Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

January 2011

Submission to the Charter of Human Rights Inquiry - Tasmania

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Acknowledgements

The Federation of Community Legal Centres (Victoria) wishes to acknowledge and thank the following:

Julie Phillips, Service Manager, Disability Discrimination Legal Service

The Federation's **Human Rights Working Group**

The Human Rights Law Resource Centre team

Andrew Homer, Senior Legal Adviser and Executive Officer of the Scrutiny of Acts and Regulations Committee

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About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for fifty community legal centres across Victoria. A full list of our members is available at http://www.communitylaw.org.au .

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

The Federation strongly commends the Tasmanian Government's inquiry into the adoption of a Human Rights Charter and is appreciative of the opportunity to contribute to the inquiry. The Federation shares the Attorney General's view that a just and inclusive society requires the protection and promotion of human rights and the fostering of a human rights culture more broadly. The adoption of a Human Rights Charter is an essential step in this process as it will provide a consistent framework within which human rights protection and education can take place in Tasmania.

The Federation fully endorses the submissions and recommendations made by our member community legal centre (**CLC**), the Human Rights Law Resource Centre (**HRLRC**). The HRLRC is recognised as a leading expert organisation on domestic and international human rights law and the operation of the Victorian *Charter of Human Rights and Responsibilities 2006* (**Victorian Charter**).

The purpose of this submission is to provide additional information to the inquiry in relation to particular consultation points set out in the Directions Paper. Our submissions are based on experiences drawn from the community legal sector in Victoria and the operation of the Victorian Charter.

Summary of Recommendations

Rights and Freedoms (Consultation points 1 and 2)

- Are the rights recommended by the Institute and listed in table 4 appropriate to Tasmania, and are they sufficient?

- What rights from the international Human Rights treaties, not listed here, would you like to see included, if any?

Recommendation 1
The Tasmanian Government should enshrine all of Australia's human rights obligations. On the question of whether the list of rights in table 4 are appropriate and sufficient, we endorse the submissions made by the HRLRC.

Recommendation 2
Both civil and political rights, and economic, social and cultural rights (**ESC rights**), should be justiciable. In the body of this submission we put forward our viewpoints on drafting appropriate limitation clauses for ESC rights and provide a summary in **Table 1**. Alternatively:

- ESC rights should be incorporated into policy formulation and law making processes with a view to making them justiciable in the future. A "Human Rights Impact Assessment" should be required for all Cabinet proposals; and all new Bills should be accompanied by a Statement of Compatibility (**SOC**).

- The Tasmanian Human Rights Commission should be empowered to receive complaints and make recommendations in relation to compliance with all ESC rights as well as civil and political rights.

Recommendation 3
In relation to the right to work: a provision similar to sections 20(3) and 8(ca) of the *Public Administration Act 2004* (Vic) could be enacted by the Tasmanian Government so that it can lead by example in its role as employer.

Recommendation 4
The expression of the right to health in table 4 of the Directions Paper is inappropriate. The Tasmanian Charter should adopt the right to health as expressed under Article 12 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

Recommendation 5
In relation to disability rights: should the Tasmanian Charter protect all rights contained under the International Covenant on Civil and Political Rights (**ICCPR**) and the ICESCR, as well as expressly refer courts to international law and judgements of foreign courts when interpreting the Charter, it would be strictly unnecessary to articulate the additional disability rights contained in table 4. Yet, we do not oppose the inclusion of such rights in the Tasmanian Charter. We think that it would be important to clarify, through a note in the Charter and/or the explanatory memorandum to the Charter, that the specification of such rights is not intended to limit the human rights enjoyed by people with disability and that other equality rights continue to apply more broadly.

Override declarations by Parliament (Consultation point 5)

- Should the Tasmanian Parliament have the right to pass an override declaration where the Parliament disagrees with a declaration of incompatibility of the Supreme Court?

Recommendation 6

The Tasmanian Charter should not include an override declaration process. Instead, the Tasmanian Charter should adapt the processes set out in sections 37 and 28 of the Victorian Charter to enhance the dialogue model of human rights protection. Statements of Compatibility should:

- be informed by the Human Rights Impact Assessment;
- include a statement of reasons as to how the limitation of rights is permitted by the general limitation clause, and should specifically address *whether there are any alternative, less restrictive means available for achieving the object of the Bill*;
- include (where relevant) the view of the Attorney General on whether an agency created under a joint State/Commonwealth scheme is a "public authority"; and
- be tabled in relation to laws or amendments made by a Parliament of another State, Territory, or the Commonwealth, where that law has been adopted as a law of Tasmania.

Role of the Court (Consultation points 8 and 9)

- The Charter requires courts and tribunals to interpret laws consistent with human rights, should that be subject to the requirement that Courts and Tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?

- Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only the Supreme Court?

Recommendation 7
The Tasmanian Charter should require *all persons*, including courts and tribunals, to interpret laws consistently with human rights.

Recommendation 8
The interpretive principle in the Tasmanian Charter should be expressed in the same way as section 32(1) of the Victorian Charter.

Recommendation 9
The Tasmanian Government should make clear, either by a note within the Tasmanian Charter or explanatory memorandum, that the interpretive principle is intended to operate in the manner proposed by the Victorian Supreme Court of Appeal in the case of *R v Momcilovic* [2010] VSCA 50 (17 March 2010).

Recommendation 10
The power to issue a declaration of inconsistent interpretation should be limited to the Supreme Court. Where questions regarding the interpretation of the Charter are referred to the Supreme Court, the Charter should clarify that there will be no additional costs implications for the parties to the proceedings, either by:

- setting up a "Charter Referral Fund"; or

- specifying that the rules relevant to costs in the original jurisdiction of the matter continue to apply.

Enforcement of Rights (Consultation points 10, 11 and 12)

- The model in this paper allows individuals to raise the rights in the Charter as part of another action in a court or tribunal or in judicial review of administrative decisions. Is this level of protection for human rights appropriate in Tasmania?

- The model allows an individual who only has a human rights action caused by incompatible provisions in an Act to take that issue to the proposed Human Rights Commission, who can then take it to the Supreme Court. Is this sufficient?

- The model allows for the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with the human rights in the Charter. Is this necessary in Tasmania and if so, is this a sufficient protection in ensuring programs and services are delivered which are consistent with human rights?

Recommendation 11
The Federation strongly endorses the recommendations made by the HRLRC on these consultation points. The Tasmanian Charter should include both non-judicial and judicial remedies.

Non-Judicial remedies should include powers of the Human Rights Commission to:

- receive, investigate and conciliate complaints regarding alleged Charter breaches;

- initiate and carry out investigations into services, and make recommendations for Charter compliance; and

- investigate alleged breaches of ESC rights in particular, should ESC rights not be made justiciable immediately.

Judicial remedies should include:

- the availability of a stand alone cause of action for Charter breaches;

- Courts should be able to exercise powers to award appropriate remedies such as making a declaration, imposing an injunction or awarding damages.

- a role for the Human Rights Commission to initiate proceedings for breach of Charter rights when an applicant is unable to do so themselves.

Community Engagement (Consultation point 13)

- A number of mechanisms are suggested in this paper to encourage engagement in human rights. Do you support these mechanisms? Are there other things that would be effective in this regard?

Recommendation 12

The Federation fully endorses the recommendations made by the HRLRC including in relation to the establishment of:

- a Joint Parliamentary Human Rights Committee;
- a Human Rights and Anti-Discrimination Commission;
- a Human Rights Leadership Group;
- an annual conversation with human rights NGOs; and
- further resourcing of human rights NGOs.

Recommendation 13

An important feature of a dialogue model of Charter rights includes the opportunity for the community to engage with and contribute to the law making process. The Tasmanian engagement model should seek to strike an appropriate balance between adhering to the demands of the parliamentary agenda, and ensuring that the community has sufficient time to consider and reply to a call for submissions. We set out a potential model in **Table 7**.

Recommendation 14

The Tasmanian Government should provide additional resources to Tasmanian community legal centres to enhance the sector's capacity to engage in human rights related case work, law reform and community legal education. The Tasmanian Government should consult with the community legal sector regarding the best use of resources and discuss the possible option of creating new positions for law reform and community development lawyers within individual community legal centres.

We set out a strategic service delivery funding model the Federation developed for its 2010 – 2011 Victorian State Budget Submission, for your reference, at **Table 8**.

Who must comply with Charter obligations? (Consultation points 15, 16 & 17)

- Should all parts of government have to comply with Charter obligations?
- Should State and Council owned companies only have to comply with Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?
- Should non-government service providers who provide services funded or controlled by Government have to comply with Charter obligations?

Recommendation 15
The Federation strongly endorses the recommendations made by the HRLRC on these consultations points including that the definition of "public authority" should comprise:

- a list of "core" public authorities; and
- a definition of "functional" public authorities, similar to that contained in the Victorian Charter.

We also suggest that the Tasmanian Parliament pay particular attention to the status of entities created under joint State/Commonwealth schemes. Options for addressing this issue may include:

- declaring joint State/Commonwealth entities as "core" public authorities under the relevant regulations at the time they are created; and/or
- specifying within the Charter or explanatory memorandum that joint State/Commonwealth entities can be considered public authorities for the purpose of the Charter, if they meet the relevant definition of "functional" public authority.

Rights and Freedoms (Consultation points 1 and 2)

Table 3 of the Directions Paper, which sets out the proposed Charter model for Tasmania, predominantly focuses on civil and political rights. Table 4 sets out additional rights (which are not included in the Victorian Charter or the ACT Human Rights Act 2004 (**ACT HRA**)) including ESC rights.

The Federation submits that all of the rights listed in tables 3 and 4 of the Directions Paper should be included in the Tasmanian Charter in the form proposed by the HRLRC. The Tasmanian Charter should include all of Australia's human rights obligations existing under international law, including both civil and political rights, and ESC rights. On the issue of whether tables 3 and 4 incorporate human rights sufficiently, the Federation endorses the position expressed by the HRLRC.

Why ESC rights are important

The Federation wishes to emphasise the importance of including ESC rights in the Tasmanian Charter. The National Human Rights Consultation Report recently noted that:

> [E]conomic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. **The most basic economic and social rights - the rights to the highest attainable standard of health, to housing and to education - matter most to Australians**, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community[1] (emphasis added).

It is widely recognised that human rights are interdependent and mutually reinforcing. For example:

- Australia's obligation to protect the right to life of a woman who is subjected to domestic violence – a civil and political right – requires government to ensure that if that woman flees the relationship, she is able to obtain adequate housing – an ESC right.

- If individuals are unable to access adequate food, clothing and housing – ESC rights – it becomes extremely difficult for such individuals to meaningfully participate in public life - a civil and political right. When someone has to focus on where they will be sleeping each night and where their next meal will come from, this leaves little or no time to learn about individual rights or engage with law makers regarding how their interests are affected by government action.

- Failure to receive an adequate education – an ESC right – can lead to a cycle of poverty which impacts on an individual's enjoyment of many other human rights. These include: the freedom to work (as a lack of education can significantly impact employment prospects); the right to adequate housing (without an adequate education and then, often, a job, an individual will be unable to afford housing); and the right to health (inadequate education, income and housing often contribute to poor health outcomes). Problematically, a person who does not have adequate housing will find it difficult to pursue education and employment opportunities in order to break the poverty cycle, as the instability arising from homelessness makes this almost impossible.

- The fact that ESC rights can be indirectly enforced through the application of certain civil and political rights in particular circumstances, further demonstrates that the distinction between rights often proves to be artificial in practice. For example, in the case of *Director of Housing v Sudi*[2] the Victorian Civil and Administrative Tribunal held that the Director of Housing acted unlawfully under section 38(1) of the Victorian Charter in seeking, without adequate justification, to evict a refugee family from social housing in breach of their right to family and the home under section 13(a) of the Victorian Charter.

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1 See the National Human Rights Committee, *Report of the National Human Rights Consultation Committee*, 344 [15.1] <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>

2 *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010).

- We submit that, given the obvious importance of ESC rights to the enjoyment of many civil and political rights, an aggrieved individual should not be required to fit a claim, that essentially involves ESC rights, through the prism of civil and political rights. In many circumstances, it will not be possible to do so, meaning that the enjoyment of ESC rights could end up applying unequally between individuals, depending on whether their particular circumstances also engage civil and political rights.

Justiciability of ESC rights

The Federation strongly supports the view that ESC rights, like civil and political rights, are capable of being justiciable, and that both categories of rights should comprise stand alone causes of action with damages as an available remedy. During the National Human Rights Consultation, one community roundtable participant noted that 'A right that can't be enforced isn't a right. It's just a good idea'.[3]

We strongly endorse the HRLRC's submissions on this point and wish to add the following comments.

A common concern with making ESC rights justiciable is that it will result in courts making decisions about the allocation of public money. Peter Hanks QC and Debbie Mortimer SC (and others) recently provided a memorandum of advice to the HRLRC addressing these concerns which is publically available.[4] Among other important points, they noted that:

- A misconceived argument exists that ESC rights predominantly entail "positive" obligations (which require governments to take action, and thus put resources towards upholding ESC rights); whereas civil and political rights predominantly entail "negative" obligations (which require governments to refrain from taking action that interferes with those rights). The authors take the view, and use persuasive examples to demonstrate, that this sharp distinction is overstated because both sets of rights entail positive and negative obligations which can entail the allocation of resources in upholding rights.[5]

- The main legal issue regarding the justiciablity of ESC rights relates to how the rights should be framed, and what remedial powers should be given to the courts in relation to ESC rights.[6] That is, *the extent to which courts could rule on the allocation of public money would depend on the particular legislative model adopted*.[7]

The authors use the South African Bill of Rights (**South African BOR**) as an example model for discussion. The South African BOR contains both civil and political rights and ESC rights. The rights contained in the South African BOR are subject to a general limitations clause (s 36) which is framed similarly to s 7(2) of the Victorian Charter. Some rights are also subject to specific limitations.

The ESC rights contained in the South African BOR – the right to housing, and the right to health care, food, water and social security - are each subject to a sub-clause which 'establishes and delimits the scope of the positive obligation imposed upon the State' in upholding ESC rights.[8] In relation to those rights, the State is required to take:

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3 Report of the National Human Rights Consultation Committee, above n 1, 19.

4 Memorandum of Advice from Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill on the justiciability of social and economic rights under a Commonwealth Human Rights Act <http://www.hrlrc.org.au/files/Advice-on-Constitutionality-and-Justiciability-of-ESC-Rights.pdf>

5 Ibid, see paragraphs [22] –[27], and paragraph [26] in particular.

6 Ibid [27].

7 The Human Rights Law Resource Centre, *A Human Rights Act for all Australians*, Submission to the National Human Rights Consultation on the protection and promotion of human rights in Australia <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/>

8 *The Republic of South Africa v Grootboom* 2001 (1) 46 [21].

reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights.[9]

South African judicial decisions regarding ESC rights demonstrate how a reasonableness test can be framed so it does not require courts to make decisions regarding the allocation of public money (even though judicial decisions may lead to government reallocating public money in light of the court's orders, just as occurs when courts make orders upholding civil and political rights). The following principles have been established through South African ESC rights cases:

- A court considering reasonableness 'will not enquire [into] whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable'.[10]

- Where reasonable measures are found not to have been taken to protect ESC rights, the precise contours and content of the alternative measures to be adopted are primarily a matter for the legislature and the executive.[11]

- The South African Bill of Rights 'contemplates…a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets'.[12]

The Canadian Supreme Court has taken a very similar approach when adjudicating economic, social and cultural aspects of civil and political rights, by reviewing policies, programs and practices for consistency with the Canadian Charter of Rights and Freedoms but deferring to government to then fashion an appropriate remedy.[13]

Drafting an appropriate limitations clause for ESC rights in Tasmania

The issue of whether the limitations clause contained in s 7(2) of the Charter would function appropriately in the context of ESC rights is a matter that requires careful consideration. We provide information below that we hope will be of assistance.

There are three contexts which must be considered when modelling an appropriate limitations clause:

- The duty to interpret legislation, as far as possible, compatibly with human rights (the **interpretive principle**), for example, s 32(1) of the Victorian Charter;

- The **procedural obligation** to give proper consideration to human rights when making decisions (for example, s 38(1) of the Victorian Charter); and

- The **substantive obligation** to act compatibly with human rights, for example, s 38(1) of the Victorian Charter.

We discuss the operation of each obligation under the Victorian Charter below.

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[9] South African BOR ss 26 and 27.

[10] *The Republic of South Africa v Grootboom* 2001 (1) 46 [41].

[11] Ibid at [41], cited by Debbie Mortimer SC et al, above n 4, at [30.2].

[12] *Minister of Health and Treatment Action Campaign* 2002 (5) SA 721 at [37] –[38], cited by Debbie Mortimer SC et al, above n 3, at [30.3].

[13] Human Rights Law Resource Centre, *A Human Rights Act for all Australians*, above n 7, [74].

- **The interpretive principle: the relationship between s 32(1) and s 7(2) of the Victorian Charter**

We outline alternative approaches to the interpretative principle below under our discussion of consultation points 8 and 9 regarding the role of the court (see **Table 4** in particular). In summary, the current position in Victoria is that, if a legislative provision is interpreted in a manner that least infringes Charter rights, but, even so interpreted, the provision does breach a Charter right, section 7(2) is applied to determine whether the limit on that Charter right can be justified.[14] The Federation supports this model interpretive principle.

- **Procedural and substantive obligations: the relationship between s 38(1) and s 7(2) of the Victorian Charter**

The duties under s 38(1) to act compatibly with, and properly consider, human rights, are subject to specific limitation clauses under subsections 38(2) – (4). Most relevantly, s 32(2) provides:

> Subsection (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.

The issue of whether s 7(2) has a role to play in determining whether a public authority has breached the duties contained in s 38(1) is not settled in Victoria. It was the subject of an appeal from the decision of Justice Bell in *Director of Housing v Sudi* [2010] VCAT 328. A decision has yet to be handed down by the Victorian Supreme Court of Appeal and these submissions do not seek to anticipate the outcome of those proceedings.

The Federation's view is that, once it has been determined that a public authority has failed to comply with s 38(1), the conduct can only be considered lawful if it falls within subsections 38(2)–(4).

To fall within the meaning of s 38(2), it must be demonstrated that a public authority could not reasonably have acted differently or made a different decision due to the operation of a statutory provision. The court is not required to consider whether the conduct could be otherwise justified under s 7(2). Our view is based on the following considerations:

- the opening words of s 38(1) state "subject to this section", not, "subject to this Act";
- section 7(2) expressly states that human rights may only be limited "under law" and it therefore appears that Parliament did not intend that executive action limiting human rights could be justified under s 7(2); and
- the explanatory memorandum does not evince an intention that s 38(1) be subject to s 7(2).

Are the Victorian Charter limitation clauses appropriate for ESC rights?

- **The Interpretive Principle and ESC rights**

Our view is that the s 7(2) general limitation clause as framed under the Victorian Charter is an appropriate limitation on the protection of ESC rights in the context of the principle requiring human rights consistent interpretation of laws. If a statutory provision is found to unjustifiably limit ESC rights, then the court could make a declaration of incompatibility. Parliament could then amend that provision if it sees fit. If a court finds that the legislative provision can be interpreted in a manner compatible with human rights, but the decision maker failed to do so, then the court could make a declaration to that effect, and require the decision maker to apply the law in the appropriate manner.

[14] The relationship between s 32(1) and 7(2) will be the subject of High Court appeal from the decision of *R v Momcilovic* [2010] VSCA 50 (17 March 2010), to be heard in February 2011, so the law is not settled in Victoria.

- **The procedural obligation and ESC rights – the duty to give proper consideration to human rights**

Our view is that a failure to give proper consideration to all human rights, including ESC rights, should only be lawful where it is expressly permitted by law, and that the expression in section 38(2) of the Victorian Charter is an appropriate expression of this limitation. It is important that decision makers only be permitted to disregard human rights during decision making processes in circumstances where the legislature has turned its mind to issues of public importance that outweigh human rights considerations.

Importantly, this duty is related to, but distinct from, the duty to act compatibly with human rights. A court may find that there has been a failure to properly consider ESC rights in making a decision. The Court's order may require the public authority to reconsider the decision in light of human rights considerations. The question may then turn to whether the public authority's ultimate decision – made in light of human rights considerations – nevertheless represents a failure to act compatibly with human rights. In other words, it is not enough to simply consider human rights when making a decision – the decision itself must be human rights compatible.

- **The substantive obligation and ESC rights – the duty to act compatibly with human rights**

Our preferred position is that a failure to act compatibly with *civil and political rights* should only be lawful where the public authority could not have reasonably acted differently or made a different decision due to the operation of a statutory provision. We take a different view in relation to acting compatibly with ESC rights. As discussed above, judicial decisions in many areas of law, including cases concerning civil and political rights, may result in government reallocating public money in light of the court's orders. In relation to ESC rights specifically however, the National Human Rights Consultation Report noted that:

> When it comes to economic, social and cultural rights such as the rights to health, housing, employment and education, the international community has acknowledged that **respect for and protection and promotion of such rights is often more complex**. Governments always work with finite resources; parliaments weigh conflicting claims by a diverse range of constituents when deciding how resources should be allocated to the provision of services in areas such as health, education and housing[15] (emphasis added).

The ICESCR recognises that full implementation of ESC rights may not be immediately possible but requires States to take steps to the maximum of their available resources to *progressively* achieve ESC rights.[16] The South African BOR also requires the *progressive* realisation of ESC rights.

For these reasons, we think it appropriate for the duty to act compatibly with ESC rights to be subject to a specific limitation clause, drafted in a manner so that it operates similarly to the South African BOR in confining the role of the court to assessing the reasonableness of government action in taking measures to achieve the progressive realisation of ESC rights in light of available resources.

A report by Hilary Charlesworth and Andrew Byrnes (and others) of the Australian Research Council Linkage Project, considers the inclusion of ESC rights in the ACT HRA (The **ACT ESCR Research Project**).[17] The authors propose a model clause 28A setting out a positive duty to take reasonable

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[15] Report of the National Human Rights Consultation Committee, above n 1, 61. A footnote to that quote (footnote 39) states that 'it should be noted that civil and political rights can also be resource intensive – for example, the right to a fair trial'.

[16] See the International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2(1).

[17] Hilary Charlesworth, Andrew Byrnes, Renuka Thilagaratnam and Katharine Young, Australian Capital Territory, *Economic Social and Cultural Rights Research Project, Australian Research Council Linkage Project LP0989167* (September 2010) <http://acthra.anu.edu.au/PESCR/Final%20report/Final%20Report%20of%20the%20ACT%20ESCR%20Research%20Project_9%20December%202010.pdf>

measures to progressively realise ESC rights. [18] We think model clause 28A could be adapted to operate effectively as a specific limitation on the duty to act compatibly with ESC rights. The model clause could be adapted as follows:

Model clause 28A

(1) The Tasmanian Government must take reasonable measures, within its available resources, to progressively achieve the full realisation of economic, social and cultural rights.

(2) In deciding whether reasonable measures have been taken, all relevant factors must be considered, including the following:
   (a) the availability of the Government resources;
   (b) whether the measures are likely to assist in progressively achieving the full realisation of the economic, social or cultural right;
   (c) whether the measures include emergency relief for people whose needs are urgent;
   (d) whether the public was appropriately consulted and effectively informed about the measures;
   (e) that a wide range of measures may be taken to progressively achieve the full realisation of the economic, social or cultural right.

These non exhaustive criteria (a) – (e) have developed through jurisprudence regarding ESC rights under the South African BOR.[19]

Table 1 – Summary of our proposed model limitation clauses for the Tasmanian Charter

	Civil and Political Rights limitation clause	**ESC Rights limitation clause**
The Interpretive Principle **(eg, s 32(1) of the Victorian Charter)**	An equivalent provision to **s 7(2)** of the Victorian Charter	An equivalent provision to **s 7(2)** of the Victorian Charter
The procedural obligation to properly consider human rights **(eg, s 38(1) of the Victorian Charter)**	An equivalent provision to **s 38(2)** of the Victorian Charter	An equivalent provision to **s 38(2)** of the Victorian Charter
The substantive obligation to act compatibly with human rights **(eg, s 38(1) of the Victorian Charter)**	An equivalent provision to **s 38(2)** of the Victorian Charter	An equivalent provision to **model clause 28A** above

[18] In the ACT ESCR Research Project, model clauses of individual ESC rights specify which aspects of each right are immediately enforceable: see the Model Bill at 135 - 136. The approach of the authors differs from our viewpoints expressed in this paper.

[19] See the ACT ESCR Research Project, above n 17 [7.41].

- **Hypothetic example**

By way of illustration, we set out a hypothetic factual scenario and the relevant decision making steps arising from those facts, in **Table 2**, below.

Facts

A family comprised of a husband, wife and child reside in public housing. The lease is in the name of the husband only. The relationship deteriorates and the husband assaults the wife. The wife successfully seeks an intervention order against her husband, who then vacates the public housing rental. The wife seeks to have the public housing lease transferred into her name, and this is refused. Under the relevant tenancy legislation, the Director of Housing (the **Director**) *may* apply to the Tribunal for a possession order in circumstances where the relevant premises are occupied by someone who is unauthorised to occupy the premises. Technically, the wife (now the **occupant**) is an unauthorised occupant because she does not have a lease, licence or the consent of the Director to remain in the premises. The wife and child have no alternative accommodation and will face homelessness if evicted.

The Director has to decide whether to seek an application for a possession order of the premises.

Table 2 – Hypothetical example of decision making process

Step 1	Identify the Charter rights potentially engaged in the circumstances	**Civil and political rights** privacy, family and the home protection of families and children security and liberty of the person	**ESC Rights** Right to adequate housing
Step 2	Identify the scope of each Charter right identified	The scope of each right must be considered in detail and should be informed by domestic and international jurisprudence.	
Step 3 **Interpretive principle**	Interpreting tenancy legislation compatibly with Charter rights (eg, s 32(1) of the Victorian Charter)	The legislation provides that the Director "may" apply to the Tribunal for a possession order where an unauthorised person occupies the premises. The Director therefore has the discretion to permit the unauthorised person to remain in the premises. A Charter rights compatible interpretation of s 344(1) may be that an application for a possession order cannot be made where such an order would unjustifiably limit the Charter rights under a s 7(2) (equivalent) analysis.	
Step 4 **Procedural obligation**	Duty to consider Charter rights in the decision making process (eg, s 38(1) of the Victorian Charter)	The Director is required to consider the occupant's human rights when deciding whether to apply for a possession order because: (a) a human rights compatible interpretation of the tenancy legislation arguably makes human rights considerations relevant; and (b) there is a stand alone duty to consider human rights when making decisions (and no statutory provision removes this obligation in the circumstances).	
Step 5 **Substantive obligation**	Duty to Act compatibly with human rights (eg, s 38(1) of the Victorian Charter)	Even if the Director properly considers the occupant's human rights when deciding whether to apply for a possession order, the decision itself has to be compatible with human rights. In other words, it is not enough to simply consider human rights when making a decision – the decision itself must be human rights compatible. If the Director finds that applying for a possession order would potentially limit the human rights noted above, the following analysis would be required to determine whether those limitations can be justified: **For the Civil and Political Rights** it would need to be considered whether, due to a statutory provision, the Director could not have reasonably acted differently or made a different decision other than apply for a possession order (eg, s 38(2) of the Victorian Charter). **For the ESC rights** it would need to be considered whether the Department of Housing has taken reasonable measures within its available resources to achieve the progressive realisation of the occupant's right to adequate housing (eg, model s 28A).	

- **Limitations analysis**

Civil and political rights: If the Director considers that a civil and political right (such as the right to privacy and the home) would be limited in the circumstances, an application for a possession order would only be lawful if the operation of another statutory provision means that the Director can not reasonably act differently. If no such statutory provision operates to that effect, then the Director should not evict the occupant in the circumstances.

ESC rights: If the Director considers that applying for a possession order would limit the occupant's right to adequate housing, the Director would be required to consider whether the eviction of the applicant (arising from the possession order) would be a reasonable measure for the progressive realisation of the occupant's right to housing. Relevant considerations might include:

- whether the occupant would qualify for public housing had she been on the waiting list herself;
- the length of time the occupant has lived at the premises;
- the urgency of the occupant's needs and those of her child; and
- whether the original refusal to have the lease transferred into her name was reasonable in light of her circumstances and other policies applicable to such an application.

Alternative model - ESC rights and the law making process

In the event that the Tasmanian Government is disinclined to make ESC rights justiciable, the Federation endorses the alternative suggestions proposed by the HRLRC including in relation to the role of the Human Rights Commissioner in receiving complaints about breaches of ESC rights and making recommendations for human rights compliance.

We make a further suggestion relating to the law making process. We submit that the Tasmanian model should make ESC rights relevant to the law making process in the same way that civil and political rights would be relevant (we elaborate on the specific process for this in our discussion of Consultation point 5 below). As noted in the ACT ESCR Research Project:

> Inclusion of ESC [rights] in the mandate of existing Parliamentary committees or proposed new Parliamentary committees has been supported by all the Australian inquiries that have endorsed enhanced protection of ECS [rights] (ACT, Tasmania, Western Australia and the National Human Rights Consultation). It was also adopted by the Commonwealth Government's 2010 Australian Human Rights Framework…[20]

We propose that:

- either the Tasmanian Charter, or Tasmanian Government Charter Guidelines, require that every policy and legislative Cabinet proposal include a thorough assessment of the human rights impact of that proposal (**Human Rights Impact Assessment**) (the Victorian Government and New Zealand Government have adopted such guidelines);[21] and

- the Tasmanian Charter require each new Bill introduced to the Tasmanian Parliament to be accompanied by a Statement of Compatibility (**SOC**) which outlines its compatibility with civil and political rights (which would also be justiciable) and ESC rights (which would not be justiciable). Statements of Compatibility should be informed by the Human Rights Impact Assessment so that each SOC is thorough, on point, and informed by international jurisprudence.

[20] The ACT ESCR Research Project, above n 17, 123 [9.21]

[21] See the Report of the National Human Rights Consultation Committee, above n 1, 164.

Placing ESC rights within the policy formulation and legislative process would have a positive impact in a number of respects. Primarily, it would provide the Tasmanian Government and public service with a clear framework from which to develop a consistent human rights based approach to law making and the delivery of social services. Taking a consistent, human rights based approach, would greatly enhance the protection and promotion of human rights and the fostering of a human rights culture more broadly.

Table 3 - A Human rights based approach to policy and law making

Step 1	Identifying the relevant objective of the policy or law.
Step 2	Identifying which human rights could be affected by a particular policy or law.
Step 3	Identifying the policy or law's impact on those human rights identified.
Step 4	If the policy or law restricts or interferes with human rights, identifying whether there is a less restrictive means reasonably available to achieve the purpose that the law or policy seeks to achieve.

Including ESC rights in the Tasmanian Charter would have many other positive benefits:

- Education and promotion of human rights, including ESC rights, can be best achieved where there is a constitutional or statutory framework to work from.
- Increased statutory emphasis on ESC rights is the best way to encourage the emergence of human rights best practice within the government and non government sectors.
- Placing ESC rights within the law and policy making process will place the Government in a better position to make ESC rights justiciable in the future, as laws, policies and social services will have time to become human rights compliant.

See our Summary Recommendations 1 & 2 (page 6)

The inclusion of all rights listed in Table 4 of the Directions Paper

- **Freedom to work and a right to just conditions of work**

The Federation understands that the Tasmanian Government referred its powers to the Commonwealth government with respect to workplace relations laws. Accordingly, the application of this right might be limited to employment laws with State application, for example, long service leave and occupational health and safety laws.

There are other ways in which the Tasmanian Government can encourage workplace cultures respectful of human rights, such as leading by example in its role as employer. By way of example, section 20(3) of the *Public Administration Act 2004* (Vic) (**PA Act**) places a statutory duty on public sector employers to conform with 'public sector employment principles'. Section 8(ca) of the PA Act defines public sector employment principles to include 'employment processes that will ensure that… human rights as set out in the Charter of Human Rights and Responsibilities are upheld'. The Tasmanian government could enact a similar provision and further elaborate that public sector employers have a statutory duty to provide 'just conditions of work'.

- **The right to health**

Article 12 of ICESCR requires States Parties to recognise 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[22]

The Directions Paper expresses the right to health as: 'the right to have equal access to health services to assist the person in achieving a reasonable standard of physical and mental health'.

The Federation supports the inclusion of the right as set out in Article 12 of the ICESCR for the following reasons:

There exists a fundamental and long standing principle of the *universality* of human rights, the importance of which has been reinforced through decades of the operation of global governance structures (that Australia has participated in), responding to and learning from a huge variety of human rights abuses globally. For this reason alone, to the extent possible, it is highly desirable for the domestic legislative articulation of human rights to benefit from these decades of global learning, which in practice means respecting the principle of the universality of human rights by adopting domestic laws that are consistent with international law.

We note that the Tasmanian Charter model set out in the Directions Paper adopts a provision similar to the Victorian Charter and the ACT HRA in expressly pointing courts to international law and the judgements of foreign courts when interpreting human rights. As recently noted by Justice Emerton of the Supreme Court of Victoria in a case involving the Victorian Charter:

> Presently, much of the content of rights that is urged upon decision-makers and the courts here in Victoria emanates from human rights decisions and commentary from overseas. This is entirely consistent with s 32(2) of the Charter, which provides for international law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered in interpreting a statutory provision, including a provision in the Charter itself. **This is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context**[23] (footnotes omitted, emphasis added).

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[22] International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 12.

[23] *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 [70].

Placing Justice Emerton's comments in the context of the right to health, should Tasmania adopt the international standard encompassed in the ICESCR, the positive and effective ways in which the Tasmanian Government seeks to ensure the health and well-being of Tasmanians is more likely to flow through to international jurisprudence and therefore have an influence in improving attainable levels of health internationally.

While it is common for the domestic legislative expression of some human rights to be modified from international standards so that they match contemporary aspirations and values of a particular society,[24] we think that the modification of the right to health as expressed in the Directions Paper is highly inappropriate for the Tasmanian context, and the model expressed under Article 12 of ICESCR should be adopted.

First, framing the right in terms of "equal access to services" is open to two, in our view, unsatisfactory interpretations:

- One interpretation may be that the right does not strictly require those services to be of a high standard; it merely requires that people have *equal access* to the services *that are available* (even if those health services are of an average standard). Once an individual accesses those health services, they would have the right to *expect assistance* to achieve a reasonable standard of health (which might not be possible if the health services are ill equipped to provide adequate assistance).

- Another interpretation may be that the health services have to be:

    - equally accessible to everyone; *and*

    - of a standard that can assist the person to achieve a *reasonable* standard of health.

We submit that this second interpretation merely requires health services to be bordering on sufficient as opposed to excellent and well equipped to deal with relevant medical needs. This is because the services only have to be sufficient enough to assist a person to attain a "reasonable" standard of health – which implies that the service could arguably be said to uphold the right to health even where some aspects of a person's health remain compromised due to the inadequacies of a particular health service.

Secondly, framing the right in terms of attaining a "reasonable" standard of health is highly problematic in the context of health related issues. While "reasonableness" is often described as an objective test, it inherently involves elements of subjectivity because it requires the decision maker (or judicial adjudicator) to place more or less weight on particular factors. We submit that the exercise of this kind of broad discretion is inappropriate in the context of determining the adequacy of someone's attainable level of health. It should go without saying that the attainment of the highest possible level of health is pivotal to every aspect of a person's life, including the ability to gain employment, care for family and to enjoy almost every other human right.

Considering the fundamental importance of health to an individual, the aim of lawmakers, policy makers and decision makers, should always be that individuals be able to enjoy the highest possible standard of health within available resources, as opposed to a "reasonable" – which could mean compromised - level of health, within available resources. Put another way, should the right be framed in terms of "reasonableness", this could result in an outcome where the government has the resources and capacity to uphold a person's right to attain the highest standard of health, but be-

[24] Report of the National Human Rights Consultation Committee, above n 1, 75.

cause the obligation only requires upholding the right to attain a "reasonable" standard of health, it is that lower level of health that the provider aims to uphold.

Should the right to health be justiciable immediately or in the future in Tasmania, then an appropriate limitation clause could be drafted so that the "reasonableness" of the entire circumstances can be considered at a more appropriate point (as discussed above under Consultation Points 1 and 2 in relation to the justiciabiliy of ESC rights more generally).

Finally, in our respectful submission, we think that framing the right to health in terms of the right to attain a "reasonable" standard of health sends a negative message to the people of Tasmania regarding the Government's commitment to providing excellent health care services.

- **The three specific rights relating to people with disability**

Should the Tasmanian Charter protect all rights contained under the ICCPR and the ICESCR, as well as expressly refer courts to international law and judgements of foreign courts when interpreting the Charter, it would be strictly unnecessary to articulate the additional disability rights contained in table 4 of the Directions Paper. Yet, we do not oppose the inclusion of such rights in the Tasmanian Charter. We think that it would be important to clarify, through a note in the Charter and/or the explanatory memorandum to the Charter, that the specification of such rights is not intended to limit the human rights enjoyed by people with disability and that other equality rights continue to apply more broadly.

See our Summary Recommendations 3-5 (page 6)

Override declarations by Parliament (Consultation point 5)

Section 31 of the Victorian Charter provides that Parliament may expressly declare through legislation that a particular Act or provision of an Act has effect despite being incompatible with one or more of the Charter rights. This can occur at the time of introducing a Bill into parliament (see section 31(3)), and where the Supreme Court has made a declaration of incompatibility (see section 31(1)).

Drawbacks of an override declaration process

Under the Victorian Charter, if Parliament makes an override declaration in relation to a particular law, this removes the duty under section 32(1) to interpret that law, as far as possible, consistently with human rights (see section 31(6) and the note to section 31 of the Victorian Charter). The Federation submits that it is particularly important to maintain that duty in relation to laws that entail significant inconsistencies with human rights and therefore does not recommend the inclusion of an override declaration process in the Tasmanian Charter.

Statements of Compatibility

One function of the override process under the Victoria Charter is to ensure that Parliament only over-rides human rights in "exceptional circumstances". In our view, it is extremely important for policy makers and Parliament to consider in detail, whether the objectives of a particular Bill justify limiting human rights. Yet we consider that a SOC process similar to that contained in section 28 the Victorian Charter could be adapted to further encourage a human rights approach to law making. We make the following suggestions regarding the SOC process:

- A human rights based approach (as set out at **Table 3** above) should be taken at the early stages of policy formulation so that one aim of the legislation is to be human rights compliant. Either the Tasmanian Charter or Charter Guidelines should require a thorough human rights analysis to occur far in advance of the Bill being drafted, for example, by requiring Cabinet proposals to be accompanied by a Human Rights Impact Assessment . This process should inform statements of compatibility, so that each SOC is thorough, on point and informed by international jurisprudence.

- The Tasmanian model could be enhanced by requiring statements of compatibility to include a statement of reasons as to how any limitation of rights is permitted by the limitations clause in the Charter. The Tasmanian Charter should explicitly specify that, one of the issues that must be addressed is *whether there is a reasonably available, less restrictive means of achieving the objectives of the Bill.* We think that this measure would encourage the relevant Minister and law makers to carry out a more thorough human rights analysis in advance of the Bill being drafted.

- Where relevant, we recommend that a SOC be required to provide the view of the Attorney General as to whether a particular agency established pursuant to a State/Commonwealth joint scheme, is a "public authority" for the purpose of the Charter.

- The Tasmanian Parliament may have previously passed a law that adopts a law of another State or of the Commonwealth, and any amendment to that law, as a law of Tasmania. The Tasmanian Charter should require a SOC to be tabled by the Responsible Minister or Attorney General in relation to such laws and any amendments made to those laws, and the Joint Parliamentary Human Rights Committee should be required to provide a report regarding those laws on Charter compatibility.

- At the Supreme Court *declaration of inconsistent interpretation stage*: The process contained in section 37 of the Victorian Charter is the more appropriate model for enhancing dialogue between Parliaments and the Courts.

See our Summary Recommendation 6 (page 7)

Role of the Court (Consultation points 8 and 9)

Consultation Point 8
This consultation point requires consideration of three significant matters:

- whether the interpretive principle should apply just to courts and tribunals, or to all persons;
- how the interpretive principle should be expressed in the Tasmanian Charter; and
- how the legislature should seek to clarify its intended operation of the interpretive principle (in either a note within the Charter or in the explanatory memorandum).

- **Application of the interpretive principle to all persons**

The Federation strongly endorses the submission of the HRLRC that the Tasmanian Charter should require all persons, as well as courts and tribunals, to interpret statutory provisions consistently with human rights.

- **The expression of the interpretive principle in the Tasmanian Charter**

We submit that the Tasmanian Charter should adopt the expression included in the Victorian Charter:

> 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.

Cases in the ACT, Victoria and the United Kingdom demonstrate that courts have taken different views, on the basis of various factors (including the gleaned intention of particular parliaments), on how similarly framed interpretive principles should be applied in practice.[25] For this reason, in order to reduce potential uncertainties and ambiguities, it is important that the Tasmanian Government clarify which approach is intended to be taken under the Tasmanian Charter.

- **The Intended operation of the interpretive principle**

We have had the advantage of reading the submissions of both the HRLRC and Dr Julie Debeljak of the Castan Centre for Human Rights on this issue. The HRLRC supports the approach taken by the Victorian Court of Appeal in the case of *R v Momcilovic* [2010] VSCA 50 (17 March 2010) (the **Momcilovic approach**); whereas the Dr Debeljak prefers the approach taken by the House of Lords in the case of *Ghaidan v Godin- Mendoza* [2004] UKHL 10 (the **Ghaidan approach**).

Table 4 below summarises the Momcilovic approach and the Ghaidan approach.

The Federation certainly recognises, and is grateful of, the expertise of both the HRLRC and Dr Julie Debeljak of the Castan Centre. On this particular issue however, on balance, we submit that the Tasmanian Government should adopt the Momcilovic approach. In either the explanatory memorandum or in a note in the Charter, it should be clearly expressed that the interpretive principle is intended to be applied consistently with the Momcilovic approach.

We note that the Momcilovic decision has been appealed to the High Court, to be heard in February 2011. It is likely that the High Court will consider the constitutionality of both the Ghaidan approach and the Momcilovic approach. This submission does not seek to anticipate the outcome of those issues in detail.

[25] Compare for example, *R v Momcilovic* [2010] VSCA 50 (17 March 2010); *Ghaidan v Godin- Mendoza* [2004] UKHL 10; and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).

Table 4 – Alternative approaches to the interpretative principle

	Momcilovic Approach	**Ghaidan Approach**
Step 1	Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic). This essentially requires an exploration of all *possible* interpretations of the relevant provision, and adopting an interpretation which least infringes Charter rights. What is *possible* is determined by the existing framework of interpretive rules (see *Momcilovic* at [**103**]).	Ascertain the meaning of the relevant provision by applying ordinary principles of statutory interpretation. Section 32(1) has no part to play in ascertaining the meaning of the statute.
Step 2	Consider whether, so interpreted, the relevant legislative provision breaches a Charter right.	Consider whether, so interpreted, the legislative provision limits or engages a Charter right.
Step 3	If the provision so interpreted breaches Charter rights, s 7(2) is applied to determine whether the limit on the right is justified.	If the provision does limit or engage a Charter right, is the limit justifiable under s 7(2) or under a specific limit within a right?
Step 4	[None]	If the provision imposes an unjustified limit on rights: it must be considered whether the provision can be "saved" through a s 32(1) interpretation. Accordingly, s 32(1) only operates to require the decision maker to alter the meaning of a law in order to achieve Charter compatibility. This is the first point at which the interpreter of the law applies s 32(1).
Step 5	[None]	The judge must then decide whether the altered rights-compatible interpretation of the law is "possible" in light of, and "consistent" with, the purpose of the statute. (see *Ghaidan* at [30-34], [67 -69], [109-110] and [121]).
Conclusion	A remedy is available only where the breach of the Charter right cannot be justified under s 7(2). If s 7(2) is not satisfied, the Court can issue a declaration of inconsistent interpretation.	If the s 32(1) rights interpretation is "possible" and "consistent" with the statute's purpose, this is a complete remedy to the human rights issue. If the s 32(1) rights compatible interpretation is not possible in light of the statute's purpose, the court can make a declaration of inconsistent interpretation under s 36(2).

Arguments in favour of the Ghaidan approach

The Ghaidan approach is described as having an important "remedial" reach in that it allows a court to alter the meaning of a law, in a manner consistent with the purpose of the statute, in order to make that law Charter compliant. Members of the House of Lords have recognised that this process can involve "difficult" and complex considerations, of 'how far, and in what circumstances section 3 [of the UK Human Rights Act] requires a court to depart from the intention of the enacting Parliament'.[26]

Yet, despite the potential complexities of this approach, the House of Lords has placed great emphasis on the intention of the UK Parliament 'to "bring rights home" from the European Court of Human Rights to be determined in the courts of the United Kingdom'.[27] In Ghaidan, members of the House of Lords agreed that the UK Parliament considered that '[r]ights could only be effectively brought home if section 3(1) was the prime remedial measure', and that section 4, encompassing the process for the Court to issue a declaration of inconsistent interpretation, should be 'a measure of last resort'.[28]

In considering whether to adopt the Ghaidan approach, the Tasmanian Government needs to consider whether human rights would be best protected by requiring Courts to undertake an often complex balancing act between altering the meaning of a law that - according to normal rules of interpretation, is not Charter compliant - in a manner that is consistent with both Charter rights and with the "fundamental"[29] purpose of the statute.

Arguments in favour of the Momcilovic approach – our favoured approach

- The existing framework of interpretative rules under Australian common law includes a presumption against interference with rights.[30] The Tasmanian equivalent to section 32(1) would operate best by embracing and affirming this presumption in emphatic terms, making it an expression of the collective will of the Parliament.[31] Put simply, the Momcilovic approach extends, clarifies and affirms interpretative rules that currently exist at common law.

- The Ghaidan approach has given rise to uncertainties regarding the precise principles to be applied. Members of the House of Lords variously described the task as requiring a human rights compliant interpretation that:

    - Does not go beyond the "fundamental feature" or the "underlying thrust" of the legislation (Lord Nicholls at [33]).
    - Goes "with the grain" of the legislation (Lord Rodger at [121]).
    - Is consistent with the "scheme of the legislation" or its "essential principles" (Lord Rodger at [121]).
    - Should not go beyond the "scope" or "scheme" of the legislation (Lord Rodger at [121]).

In highlighting these differences in language, the ACT Supreme Court recently commented that:

> The difficulties of determining what legislative purpose to use in applying a purposive interpretation provision…pale into insignificance beside the difficulties of working out the real meaning of the constraint referred to in so many different ways by the Law Lords, given that whatever the nature of the constraint, it does not relate to the text of the legislation and it does not include recourse to the intention of the legislature. It is all very well to disparage a practice of interpreting legislation by reference to the words actually cho-

[26] See *Ghaidan v Godin- Mendoza* [2004] UKHL 10 [30].
[27] Ibid [42].
[28] Ibid [46].
[29] Ibid, see paragraphs [112] –[113].
[30] See *R v Momcilovic* [2010] VSCA 50 (17 March 2010) [103] citing Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth.*
[31] Ibid, see the view expressed by the Victorian Court of Appeal at [104].

> sen by the Parliament as providing "an entertaining parlour game for lawyers" (Lord Rodger at [123]), but the apparent alternative, to "interpret" by reference not to the words and not to the legislative intention but to some presumably free-standing characteristic of the legislation such as its fundamental features, underlying thrust or "grain", has an almost surreal quality to it.[32]

- Section 32(1) requires *all* persons to interpret legislation consistently with the Victorian Charter, as do the equivalent provisions in the UK Human Rights Act and the New Zealand Bill of Rights.[33] We strongly recommend that the interpretive principle in the Tasmanian Charter be drafted to operate in the same way. Persons required to abide by the interpretive principle would include public sector, private sector, and non profit sector decision makers. As pointed out by the Victorian Supreme Court of Appeal in *Momcilovic*:

> Certainty of interpretation is vitally important. The expansive power which s 3(1) HRA has been held to confer would seem to create real problems of uncertainty for anyone called upon to interpret a provision of a UK statute which arguably infringed a human right. In view of the approach of the House of Lords, that person might reasonably ask 'If the words do not mean what they say, what do they mean?'[34]

In our view, the Ghaidan approach would make it extremely difficult, if not impossible, for everyday, non-judicial decision makers, to comply with the interpretive principle.

- On balance, for the reasons set out above, we think that the Momcilovic approach would be more appropriate to the Tasmanian context.

See our Summary Recommendations 7- 9 (page 8)

[32] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [75].

[33] See Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities,* (Thompson Lawbook Co 2008) 217 [4720].

[34] *R v Momcilovic* [2010] VSCA 50 (17 March 2010) [97]

Consultation Point 9

The Federation agrees that the power to issue a declaration of inconsistent interpretation should be limited to the Supreme Court.

We refer to paragraph 8.4.4.1 of the Directions Paper. We suggest that where provision is made for a tribunal or court to refer questions regarding the interpretation of the Charter to the Supreme Court, the Tasmanian Charter should clarify the costs implications for the parties. By way of example, parties may be involved in a dispute in a no costs jurisdiction (that is, where it is usual practice for the court or tribunal to order that each party cover its own costs). We suggest that the Tasmanian government consider the following models for instances where matters are referred to the Supreme Court:

- The Tasmanian Government could set up a Charter Referral Fund which could be used to cover additional costs associated with having a matter referred to the Supreme Court from a no costs jurisdiction; alternatively

- The Charter could specify that where a matter is referred to the Supreme Court, the rules relating to costs in the original jurisdiction continue to apply.

See our Summary Recommendation 10 (page 8)

Enforcement of Rights (Consultation points 10, 11 & 12)

The Federation strongly endorses the submissions of the HRLRC on these consultation points. The Tasmanian Charter should provide for "effective remedies", which should include both judicial and non judicial remedies.

Non-Judicial Remedies

- Individuals should be able to lodge a complaint with the Human Rights Commission which could investigate the matter and facilitate alternative dispute resolution between the parties.
- The Human Rights Commission should be empowered to initiate and carry out investigations into services and make recommendations for greater Charter compliance.
- If ESC rights are not made justiciable immediately, the Federation supports the recommendations put forward by the HRLRC regarding the role of the Human Rights Commission in investigating alleged breaches of ESC rights.
- The Human Rights Commission and public authorities should be required to publish in annual reports, details of complaints received, the Commissioner's recommendations and actions taken.

Judicial Remedies

- Breach of Charter rights should comprise a stand alone cause of action (with the exception of an action for a declaration of incompatibility).
- Courts should be able to exercise powers to award appropriate remedies such as making a declaration, imposing an injunction or awarding damages.
- If an individual has lodged a complaint with the Human Rights Commission, the Commissioner should be empowered to initiate proceedings on that individual's behalf. However, this should be in addition to the right of the individual to initiate proceedings on their own behalf.

See our Recommendation 11 (page 9)

Community Engagement (Consultation point 13)

Endorsement of the models proposed by the HRLRC

The Federation strongly endorses the models proposed by the HRLRC regarding the facilitation of the Tasmanian Human Rights Charter and community engagement. We summarise some key points below and make additional suggestions.

Joint Parliamentary Human Rights Committee

- The Federation agrees with the functions of a Parliamentary Committee as proposed by the HRLRC.
- We would like to emphasise the importance of statements of compatibility setting out whether there is a reasonably available, less restrictive means of achieving the objectives of the Bill.
- The Committee should assist government responses to Declarations of Incompatibility made by the Supreme Court, and other international court and tribunal decisions that concern Tasmania.
- The Committee should be empowered to table another report regarding amendments made to the Bill following the second reading debate or passage through the upper house.

Human Rights Commission

- The Federation agrees with the proposed functions of a statutory commission set out at paragraph 7.5 of the Directions Paper.
- An independent statutory commission should combine the functions of anti-discrimination and human rights work.
- Broadly, the Commission would have the role of researching, monitoring, promoting and advising on human rights protection and promotion.
- The functions of the Commission should operate in addition to an aggrieved person being able to assert their rights through an independent cause of action.

Human Rights Leadership Group

- The purpose of the leadership group would be to provide support for the cultivation of a human rights culture in Tasmania.
- As noted by the HRLRC, the Victorian Human Rights Leadership Group has received very positive feedback from participants.
- The Federation submits that this model should be adopted in place of the Human Rights Advisory Council.

Annual Conversation with Human Rights NGOs

- The Federation strongly endorses the HRLRC's proposed model for consultation with the NGOs.
- We suggest that the categories of "human rights organisations" be considered broadly to include the community legal sector and organisations that assist social justice concerns such as homelessness, domestic violence, youth issues, disability advocacy, seniors' assistance, and environmental issues.

Funding of the Community Legal Sector

- The Federation strongly encourages the Tasmanian Government to consult with the community legal sector to develop and fund initiatives aimed at enhancing the sector's role in law reform work and community education.
- We set out our suggested funding model for consultation at **Table 8**.

See our Recommendation 12 (page 10)

Community Consultation during the Legislative Process

We wish to make further comment on the community engagement proposal put forward in the Directions Paper at 7.4.2, relating to processes for inviting community input during the legislative process.

- **The Victorian legislative process**

The Victorian Scrutiny of Acts and Regulations Committee (**SARC**) has responsibility for reviewing all Bills and statutory rules for compliance with the Victorian Charter and to provide a report to Parliament regarding its findings.[35]

In **Table 5** below, we set out a summary of the legislative process of the lower house in Victoria. Under the Parliamentary agenda, SARC usually has less than two weeks in which to report on each Bill for compatibility with the Victorian Charter prior to the second reading debate of each Bill.

If an individual or community organisation wishes to make a submission to SARC, it must do so in enough time for SARC to consider its submission and to (potentially) incorporate submission points into its report. This essentially means that community organisations have less than one week to make submissions in order for SARC to have sufficient time to consider those submissions and incorporate information it considers relevant. From our experience, and that of our members, the short, two week adjournment period makes it very difficult to prepare submissions on issues that are often very complex.

Another weakness in the Victorian process is that, where amendments to a Bill are made following the second reading debate, the Responsible Minister is not required to table an additional SOC in relation to those amendments prior to the Third reading of the Bill. The National Human Rights Consultation Report made a recommendation that a SOC be made at the time a Bill is introduced into the Commonwealth Parliament and prior to the third reading.[36] We propose a similar process for the Tasmanian Charter.

- **Enhancing community dialogue in Tasmania during the law making process**

We recommend that the community consultation process on Charter issues in Tasmania seek to strike a more appropriate balance between keeping up with the demands of a parliamentary agenda, and allowing sufficient time for community input. Our proposed model below in **Table 7** endeavours to reflect this balance.

Methods for achieving this could potentially be enacted through particular provision in the Tasmanian Charter; or by enactment of, or amendment to, other Parliamentary and Committee processes.

We set out three tables below:

Table 5 - The legislative process in the lower house of Victoria.

Table 6 - Our understanding of the Tasmanian legislative process in the House of Assembly.

Table 7 - The Consultation Model we propose for the Tasmanian Charter with respect to the legislative process.

[35] See section 30 of the Victorian Charter.

[36] Report of the National Human Rights Consultation Committee, above n 1, Recommendation 26.

Table 5 - Summary of the Victorian legislative and SARC process

First Reading Stage	Long title is read out; Members vote on the Bill being introduced & on first reading. The contents of the Bill remain confidential at this stage – however: The Minister and Executive can choose to issue an Exposure Draft to the public at any time.
Second Reading Stage	The Minister makes a Second Reading Speech. The SOC is tabled.[37] The Bill is no longer confidential and is published on Parliament's website. Unless the Minister has released an exposure draft, this is the first opportunity for the public and SARC to consider the Bill.
Adjournment Period Usually 2 weeks	Parliamentary debate on the relevant Bill is adjourned for a period of at least two weeks (unless other measures are taken to push the Bill through Parliament urgently), but this time can be extended.[38] **During the two week adjournment period:**
	Members of Parliament have the opportunity to consider the Bill.
	SARC conducts an inquiry into whether the Bill is compatible with Human Rights.[39]
	Any individual or community organisation can make a submission to: - SARC (which publishes submissions received by it on its website); - their local member or other relevant Member of Parliament; or - the Minister responsible for the Bill.
	SARC prepares a report on all Bills identifying any incompatibilities with the Victorian Charter. It can (but is not required to) refer to submissions received.
Second Reading Debate	The SARC report is tabled in Parliament (with the "Alert Digest"). If SARC requires more time to prepare its report, it can do so at a later time in accordance with its statutory powers.[40] The Legislative Assembly undertakes a debate regarding the Bill.
Consideration in detail	This process usually takes place where members move amendments to the Bill or where the opposition wants to debate the Bill's clauses in detail. This process allows members to debate and vote on each clause of the Bill. If all members agree, consideration in detail can be skipped.
Third Reading	Members may debate the Bill at this stage, but it is unusual. The Responsible Minister is *not* required to present a SOC regarding any amendments made to the Bill. If the members pass the Bill at this stage, it is moved to the upper house.

[37] See section 28 of the Victorian Charter.

[38] For information on the Victorian law making process, see Fact Sheet C1*: How a Bill becomes Law* <http://www.parliament.vic.gov.au/publications/fact-sheets>

[39] See section 30 of the Victorian Charter and Section 17(a)(viii) of the *Parliamentary Committees Act 2003* (Vic).

[40] See Section 17(b)(c) of the *Parliamentary Committees Act 2003* (Vic). If tabled at a later time, the SARC report would not be available to inform debate regarding the Bill and it is therefore unusual for SARC to fail to meet the two week deadline.

Table 6 - Our Understanding of the Tasmanian Legislative Process[41]

First Reading	Prior to the First Reading, the responsible Minister may release a discussion paper regarding a proposed Bill, and invite public feedback. During the First Reading, a Bill is tabled in Parliament, and the long title of the Bill is read out. Unlike the Victorian process, the Bill is a public document from the first reading stage.
Adjournment Period	There is a minimum adjournment period of 2 days in the House of Assembly and 3 days in the Legislative Council. This period can be extended by a motion. During this time, a member of the community could make a written submission to the Responsible Minister, their local member or other relevant Member of Parliament, regarding the Bill.
Second Reading Speech and Debate	The responsible Minister makes a speech regarding the purpose of the Bill. The second reading debate follows immediately after the speech, with no further adjournment period. After the second reading speech, when the Bill has been agreed to "in principle", the Bill can move to the next stage.
Select Committee (if referred)	During the second reading debate, a Bill can be referred to a select committee for review, to which the public can make written submissions regarding the Bill. Unless a Bill is referred to a Select Committee, there is no other formal process where the public are invited to make submissions regarding a Bill.
Committee of the Whole	It is normal course that when a Bill has passed the second reading stage, it then moves to the "committee of the whole" (which includes every member of the House) to examine and amend the Bill clause by clause. The committee makes a report on the Bill (**Committee Report**). The House of Assembly Standing and Sessional Orders and Rules do not appear to permit the Committee of the Whole to receive public submissions.[42]
Third Reading	The Presiding Officer receives a certified copy of the Bill. The Committee Report can be discussed, and once it has been accepted, a formal motion is made that the Bill be read a third time. If it passes this stage, the Bill moves to Legislative Council which undertakes a similar process.

[41] We accessed <http://www.parliament.tas.gov.au/tpl/Backg/LawsMade.htm>

[42] See Part 30 of The House of Assembly Standing and Sessional Orders and Rules < http://www.parliament.tas.gov.au/ha/SO&Sessionals.pdf>

Table 7 - The Consultation Model we propose for the Tasmanian Parliament

First Reading	The Bill is tabled in Parliament and is not confidential; the SOC is tabled in Parliament.
Adjournment Period	**For each Bill introduced into Parliament, either:** • a 4 week (minimum) adjournment period takes place (see below); or • where the Government considers that it is in the public interest to push the Bill through Parliament quickly, the Human Rights Committee must report on the final enactment in consultation with the community and that report must be tabled in parliament. The minimum **4 week** adjournment period involves the following deadlines:
Second Reading Speech and Debate	A **2 week** deadline is set for public submissions to the Human Rights Committee - to be made available on Parliament's website as they are received.
	Following the deadline for public submissions, the Human Rights Committee has either: • **one week** to table its report; or • has until the first day of the next sitting week to table its report, whichever is later.
	Following the tabling of the Committee's report, the second reading debate should be set for no earlier than: • **one week** from the date of the tabling of the Report; or • at the commencement of the next sitting week, whichever is sooner. This would provide Members of Parliament with an opportunity to consider the Human Rights Committee's report in detail, and would also allow members of the community to make further written submissions to the responsible Minister or their local member in light of the Human Rights Committee's report.
	The second reading speech would be given, and debate would then occur, with Members of Parliament having the advantage of having a Committee report informed by community consultation and further community feedback. This would enhance and inform parliamentary debate regarding the limitation of Charter rights.
Second Statement of compatibility	Where amendments are made to the Bill arising from the second reading debate, the responsible Minister/member of Parliament must submit a SOC regarding those amendments. Alternatively, where an amendment raises a Charter issue, the responsible Minister or Member of Parliament must raise the matter in Parliament, and the Committee must provide a further report on that issue either prior to or following the passage of the Bill.
Further Reports of the Joint Committee	The Committee should be empowered to prepare: (a) a report regarding Charter compatibility of any amendments to the Bill, to be presented to the Upper house; (b) a report regarding Upper house amendments, which would be presented to the lower house; and (c) a report regarding Charter compatibility on the final Bill as passed by both houses.

Community legal sector resourcing and engagement

- **Community legal sector clients**

The Commonwealth Government's Review of the Commonwealth Community Legal Services Program (**Commonwealth Review**) noted that the community legal sector assists the most disadvantaged individuals in dealing with a significant variety of legal issues. The Commonwealth Review noted that collated data demonstrated that 58% of community legal sector clients received some form of income support, 82% of clients earned less than $26,000 per annum, and almost 9% of clients had some form of disability.[43]

- **Legal concerns frequently dealt with by CLCs**

Many of our clients' concerns relate to the provision of government services, such as housing and disability services. Our search of the Community Legal Service Information System (**CLSIS**) data revealed that in Tasmania, the following issues featured in the top 20 problem types registered CLCs assisted with during the 2009/2010 financial year:

- Disability discrimination (354 matters);
- Government pensions and benefits (605 matters);
- Civil legal system or process (231 matters);
- Child contact or contact orders (530 matters);
- Family or domestic violence orders (123 matters); and
- Civil violence and restraining orders (197 matters);

- **The importance of access to justice and community education to our clients**

As noted by the National Human Rights Consultation Report:

> 'Access to justice' is not simply about the ability to enforce rights in courts: it also refers to the ability to obtain **legal advice** and **non-legal advocacy** and support to **participate effectively in law reform processes**. The Committee heard that **access to justice is important in the promotion, protection and fulfilment of human rights**... (footnotes omitted, emphasis added).[44]

In relation to human rights education, the National Human Rights Consultation Report noted that:

> The Committee heard strong criticism of the extent of human rights education available in the Australian community. 'We don't know what our rights are' and 'We don't know where to find out about human rights' were common refrains when the Committee visited locations around Australia.[45]

- **The role of CLCs in undertaking human rights related legal assistance and education**

Because many of our clients' concerns relate to the provision of government services, the community legal sector is particularly well placed to undertake a diversified approach to human rights related work by:

- acting for individual clients with respect to legal concerns;
- engaging in community development and education; and
- engaging with government and parliament regarding the human rights impact of laws.

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[43] Review of the Commonwealth Community Legal Services Program March 2008, 6. <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>

[44] Report of the National Human Rights Consultation Committee, above n 1, 198.

[45] Ibid 134.

Unfortunately, community legal centres often lack the time and resources to carry out a diversified approach to service delivery. We understand that there are seven CLCs in Tasmania, the core funding of which is predominantly provided by the Commonwealth Government Attorney General's department, with some CLCs receiving a smaller amount of State funding or grants. We encourage the Tasmanian Government to provide further funding to Tasmanian CLCs so that the sector can more readily undertake human rights related work.

- **Funding model**

We think it would be worthwhile for the Tasmanian Government to consult with the CLC sector on increasing funding to enhance access to justice to better realise human rights. **Table 8** is our suggested funding model for consultation.

The Federation made a detailed Victorian State Budget 2010/2011 submission regarding the minimum annual funding required for a CLC to most effectively implement a *strategic service delivery model* - $516,536.[46] The breakdown of this figure is reflected in **Table 8** below:

Table 8 – Strategic Service Delivery funding model

Position	Salary	On costs	Total Salary Costs	Operating Expenses	Interpreter	Total Position cost
Co-ordinator	69,673	9,615	79,287	31,715		111,002
Principle Solicitor	66,680	9,202	75,882	30,353	8,000	114,235
Admin worker	53,460	7,377	60,838	24,335		85,173
Solicitor	62,179	8,518	70,760	28,304	8,000	107,063
Community Worker	62,179	8,581	70,760	28,304		**99,063**
Total						**516,536**

This funding model is designed to enhance the capacity of CLCs to undertake a diversified approach in assisting clients and prospective clients. We highlight the role of *community worker* because feedback often received from the Victorian community legal sector is that centres would like to engage in more law reform and community legal education work, but find it difficult to do so because of the overwhelming demand for individual client services. The employment of workers who do not engage in case work, but rather, conduct law reform and community legal education, addresses this issue.

See our Summary Recommendations 13 & 14 (page 10)

[46] The Federation's 2010 – 2011 State Budget Submission is available at <http://www.communitylaw.org.au/cb_pages/federation_reports.php#Accesstojusticeandfunding>

Who must comply with Charter obligations? (Consultation points 15, 16 & 17)

The Federation strongly endorses the submissions of the HRLRC on these Consultation points. Rather than defining "public authority" in terms of bodies that are "controlled" or "funded" by government (as suggested by in the Directions Paper at paragraph 8.3.1), the definition of public authority should include:

- an express list of "core" public authorities; and
- a definition of "functional" public authorities: those entities which carry out functions of a public nature on behalf of the State or a core public authority.

We also suggest that the Tasmanian Parliament pay particular attention to the position of entities created under joint State/Commonwealth schemes.[47] Options for addressing this issue might include:

- declaring joint State/Commonwealth entities as "core" public authorities under the relevant regulations, at the time they are created; and/or
- specifying within the Charter or explanatory memorandum that joint State/Commonwealth entities can be considered public authorities for the purpose of the Charter, if they meet the relevant definition of "functional" public authority.

The Federation wishes to emphasise that, based on experiences of our member centres, it is clear that many clients engage with social services that may be delivered on behalf of government, but not necessarily by government. Those private or non profit entities that deliver such services may not be "funded" by government, and the commercial relationships between government and private entities could add complexity to this question. Community legal sector clients in Victoria often engage with a variety of service providers, including the following:

- utility providers for electricity, gas, and water etc;
- Industry Ombudsmands responsible for investigating complaints and requests for assistance in relation to dealings with utility providers;
- Department of Transport regarding fines and infringements;
- Department of Housing and public housing providers;
- public health care providers;
- if incarcerated, private health care providers;
- employment assistance organisations;
- disability assistance service providers; and
- emergency assistance organisations for people fleeing domestic violence or other risks to personal safety.

The Federation strongly submits that defining "public authority" on the basis of "control" and "funding" could give rise to complexities due to the differing financial and commercial relationships that may exist between core government, and private and non profit organisations delivering public services. The definition proposed by the HRLRC should be adopted.

See our Summary Recommendation 15 (page 11)

[47] For examples of instances where issues have been identified in the Victorian context, see SARC's report on the *National Gas (Victoria) Bill 2008* (Alert Digest No.6 of 2008; and the *Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009* (Alert Digest No. 6 of 2009).