

# A charter of human rights & responsibilities for Tasmania



**Tasmanian Community Consultation  
October and November 2010**

## INTRODUCTION

I believe protecting and promoting human rights is part of the fabric of a just and inclusive community. Therefore, supporting a human rights culture is important to ensure that within a democratic society, all people are treated equally, with dignity and respect.

Both Victoria and the Australian Capital Territory have taken the step to introduce a Charter of Rights to develop further the culture of human rights in their respective jurisdictions. Following the experience of these jurisdictions, the State Government is interested to hear the views of Tasmanians on a possible Charter of Rights and Responsibilities for Tasmania.

In 2007, the Tasmanian Law Reform Institute released their research into the issue of a Charter of Rights for Tasmania where they found strong community support for a Charter. Recent consultation by the Australian Government found a similar level of support, although the Australian Government stopped short of supporting a national Charter of Rights.

The aim of a charter is to clearly list human rights, freedoms and responsibilities in the one place so that they can be easily found and understood, to provide Tasmanians with protection from infringements of those rights and freedoms by Government and its agencies and companies, and to provide effective ways for people to challenge any violation of those rights.

A charter would act as a statement of the values and principles of the community, and introduce standards to ensure that human rights are a priority for the Tasmanian Government when making laws and decisions and are adequately promoted, protected and fulfilled in Tasmania.

A charter as proposed in this discussion paper is about ensuring lasting change to the development and operation of legislation, program delivery and service delivery through systemic means as opposed to change through individual litigation and penalty mechanisms, such as awards for damages.

Practical examples of how Human Rights Charters have impacted on individual lives can be found towards the back of the directions paper.

Through this consultation, we have an opportunity to consider the findings of the State and national consultation processes, together with the experiences of Victoria and the Australian Capital Territory, and promote discussion in the community about the final shape of a potential legislated Human Rights and Responsibilities Charter.

Although the human rights record of this Government is one we can all be proud of, I believe there is always more that can be done to build a supportive and respectful society. This paper proposes a model Charter of Rights and Responsibilities to deliver that.

I encourage all to consider what their expectations of Government are in relation to the protection and promotion of human rights and provide those perspectives to the review team during the coming weeks.

I commend to you this directions paper for your information and input.



Lara Giddings MP  
**Deputy Premier**  
**Attorney-General**



## ***Protection for basic human rights***

The Directions Paper reflects the Attorney-General's request to look at a model that would spell out basic human rights in one Act of Parliament.

The proposed Act would create a Charter of Human Rights and Responsibilities for Tasmania. The processes for its use would also be in the Act.

The proposed Charter and processes would protect the human rights and freedoms of Tasmanians and help to change attitudes and perceptions about those rights and freedoms.

With rights, of course, come responsibilities, including the responsibility to respect the rights of others in our community.

The proposed Charter is similar to those operating successfully in the UK, New Zealand, the ACT and Victoria.

## ***How would the Charter work?***

The proposed Charter is about better government for the people of Tasmania.

The Charter would mean that when the Government (which includes its agencies) make decisions that affect the lives of Tasmanians, human rights must be taken into account. Government would have to comply with the Charter and have regard to human rights in its day-to-day operations.

The Charter would also apply to organisations delivering programs and services that are funded and/or controlled by the Government e.g. funded residential services for people living with a disability provided by a non-government body.

Under the proposed Charter, when new laws are developed consideration would have to be given to human rights.

When new laws are introduced into Parliament they would have to be accompanied by a

statement advising Parliament whether or not they meet the standard set by the proposed Charter. If the new laws do not meet the standard then the statement must say why the new law is necessary and how it meets a "limitation" on human rights allowed by the Charter.

The Charter would allow for reasonable restrictions or limitations to be placed on some rights, generally in order to protect other rights judged in the circumstances to be more important. For example, legislation prohibiting child pornography, while limiting an individual's freedom of expression may be seen as a reasonable limitation because of the protection it gives to children.

Courts and tribunals would be able to consider the Charter rights in deciding how a law is to be interpreted. Complaint handling bodies (e.g. the Ombudsman) would be required to consider consistency with the Charter when making a decision.

The Supreme Court would be able to make a declaration that an Act of Parliament or subordinate laws (for example, a regulations or by-law) does not meet the standard set by the Charter and as a result refer those laws back to the Parliament. The Court would be required to give the Attorney-General and the Human Right Commission a chance to comment when it is considering making a declaration of this kind.

The Supreme Court would not be able to declare a non-compliant law invalid, because it is important that the elected Parliament has the final say in whether a human right protected by the Charter can be limited in a free and democratic society.

The Office of the Anti-Discrimination Commissioner would be replaced by a Human Rights Commission. The Commission would take on the work currently done by the Office. The Commission would also help educate the



community about the Charter and report on how the Charter is working.

A Human Rights Commission It would also be able to inquire into programs and services and make recommendations for change if those programs or services are not being delivered in a way that is consistent with the Charter.

The Human Rights Commission would also be able to receive some complaints from the community, make recommendations for change to services or programs or ask the Supreme

Court to consider making a declaration that a law does not meet the standard set by the Charter.

### ***What rights would the proposed Charter protect?***

The following rights are similar to those in the Victorian Charter of Human Rights and Responsibilities and the ACT Human Rights Act and would most likely be included in Tasmania's proposed Charter:

#### **Table 1:**

##### **Recognition and Equality before the Law**

- A person has the right to recognition before the law
- A person has the right to effective access to justice
- A person has the right to be equal before the law

##### **Freedom from Discrimination**

- A person has the right to equal protection of the law and to equal and effective protection against discrimination
- No person may be discriminated against

##### **Protection when detained**

- A person has the right to liberty and security of the person
- A person must not be subjected to arbitrary arrest or detention
- A person who is arrested or detained has the certain civil rights, such as:
  - to be informed of their rights
  - to remain silent
  - not to be compelled to make any confession
  - to communicate with a lawyer
  - to communicate with a relative or friend
- A person has the right to humane treatment when detained
- A person has the right not to be imprisoned for a contractual debt
- A person is entitled to the protection of other rights and freedoms while in lawful detention

##### **Fair hearing**

- A person has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing
- A person has the right, if charged with a criminal offence, to be presumed innocent until proven guilty beyond reasonable doubt and the right to examine or have examined all the evidence against him or her and to adduce evidence on his or her own behalf
- A person has the right not to be tried or punished more than once for the same criminal offence
- A person has the right to compensation for wrongful conviction
- A person has the right not to be tried or punished for conduct that was not a criminal offence when it was engaged in
- A person has the right to the support needed to effectively understand and participate in legal processes

##### **Life**

- A person has the right to life from the time of birth. In particular, no person may be deprived of life

##### **Families and Children**

- Families are the fundamental group unit of society and are entitled to be protected
- A child has the right to such protection as is needed by him or her by reason of being a child



- A child has the right to be protected from economic and social exploitation
- A child has the right to special treatment, by reason of being a child, in the criminal justice process

### **General Political and Civil**

- A person has the right to self-determination
- A person has the right to privacy and reputation
- A person has the right to move freely within Tasmania in accordance with the law and to leave or enter Tasmania in accordance with the law
- A person has the right to freedom of conscience, thought, religion and belief
- A person has the right to freedom of expression
- A person has the right to freedom of association and peaceful assembly and the right to form and join trade unions
- A person has the right to participate in public life, including the right to vote

### **Property**

- A person has the right not to be deprived of his or her property except on fair and just terms determined in accordance with the law

### **Cultural**

- All peoples with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with others of that background, to enjoy his or her culture, to declare and practice his or her religion and to use his or her language
- Aboriginal people must not be denied the right, with other members of their community, to enjoy their identity and culture, and to maintain and use their language.

### **Wrongful treatment**

- A person must not be subjected to torture
- A person must not be treated or punished in a cruel, inhuman or degrading way
- A person must not be subjected to medical or scientific experimentation or treatment without his or her informed consent
- A person has the right to freedom from slavery and forced work
- People have the right to freedom from genocide

In addition, the following rights may be included, depending on the feedback received from the Tasmanian community:

### **Table 2:**

#### **An adequate standard of living**

- A person has a freedom to work and a right to just conditions of work
- A person has the right to have equal access to services that assist the person to achieve adequate food, clothing and housing
- A person has the right to have equal access to health services to assist the person to achieve a reasonable standard of physical and mental health
- A person has the right to education

#### **Environmental Sustainability**

The right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures

#### **Living with disability**

- A person living with disability has the right to respect for his or her physical and mental integrity on an equal basis with others
- A person living with disability has the right to exercise the full extent of their legal capacity in all aspects of life
- A person living with disability has the right to live independently and to be involved in the community



## ***When would the Charter start?***

The Act creating a Charter would need to pass both Houses of Parliament. It is proposed that most parts of the proposed Charter would start within 12 months of that happening.

Some parts of the proposed Charter would be delayed to allow agencies or organisations time to review or change their current practices and procedures if necessary.

The proposed Act would require that the Charter is to be regularly reviewed to ensure it is adequately protecting your rights and freedoms.

## ***Is the proposed Charter like the US Bill of Rights?***

The proposed Charter is not like the US Bill of Rights. It is based on modern laws that operate successfully in the ACT, Victoria, the United Kingdom and New Zealand. Rather than US style litigation, the proposed Charter aims to promote education and respect for people's rights no matter their background. Unlike the US model, it is proposed that the Charter will be able to be changed by Parliament to move with the times and reflect changes in community values and attitudes.

## ***Will this just lead to more litigation?***

Experience in other countries with similar human rights laws suggest that they do not lead to more litigation. The experience in the United Kingdom since the enactment of the Human Rights Act has seen very little increase in litigation in that country. In Scotland human rights arguments were raised in less than 1% of relevant cases in the three year period between 1999 and 2003.

When the Human Rights Act was introduced in the ACT, the legislation was mentioned in only 14 cases out of 1,800 or so cases heard that year.

Generally, the proposed Charter will not provide an additional right to legal action just for a breach of the Charter and there can be no damages awarded by a court just for a breach of the Charter.

## ***How would we better off with a Charter?***

The proposed Charter aims to ensure that the Tasmanian Government makes new laws fairly and gets the balance right between new powers and protecting the rights of Tasmanians. The proposed Charter can improve our public services and the behaviour of government agencies. New policies and laws will be required to take into account human rights and people who work for the Government must observe human rights in their day-to-day work

## ***How can I Comment?***

The Full Directions Paper may be accessed on the Department of Justice website at: <http://www.justice.tas.gov.au> or contact the Project Manager on 6233 6315.

Comments must be received by the close of business on the **29<sup>th</sup> of November 2010** and sent to:

Dale Webster  
Project Manager  
Department of Justice,  
GPO Box 825, Hobart TAS 7001  
or e-mail to: [dale.webster@justice.tas.gov.au](mailto:dale.webster@justice.tas.gov.au)

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## **NOTES:**



**You can comment on any issue related to the proposed Charter. The Directions Paper asks for comments on these areas:**

<b>Rights and Freedoms</b>	
	<ol style="list-style-type: none"> <li>1. Are the rights recommended in table I of this document appropriate to Tasmania, and are they sufficient?</li> <li>2. What rights from the International human rights treaties, not listed here, would you like to see included, if any?</li> </ol>
<b>Responsibilities</b>	
	<ol style="list-style-type: none"> <li>3. Is there a need to specify human responsibilities in detail along side the human rights and freedom, or is it sufficient to have an overview statement that the rights and freedoms impose responsibilities? If so, what, if any, consequences should flow from a failure to fulfil responsibilities?</li> </ol>
<b>Reasonable limits</b>	
	<ol style="list-style-type: none"> <li>4. Is having only a general limitation clause that applies to all but a small number of rights appropriate?</li> </ol>
<b>Scrutiny of Acts, Subordinate Legislation and By-Laws</b>	
	<ol style="list-style-type: none"> <li>5. Should the Tasmanian Parliament have the right to pass overriding declaration where the Parliament disagrees with a declaration of incompatibility by the Supreme Court?</li> <li>6. Is it appropriate that after the Supreme Court declares subordinate legislation (e.g. regulations) and Council by-laws to be incompatible with the Charter they become invalid, unless Parliament changes the Act of Parliament to make them valid?</li> </ol>
<b>Role of the Courts</b>	
	<ol style="list-style-type: none"> <li>7. Should the Charter expressly point the courts and other branches of government to international law and the judgments of foreign and international courts and tribunals when interpreting human rights as is the case in the ACT and Victoria in relation to interpretation by courts and tribunals?</li> <li>8. The charter requires courts and tribunals to interpret laws consistent with human rights, should that be subject to the requirement that courts and tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?</li> <li>9. Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only Supreme Court?</li> </ol>
<b>Enforcement of Rights</b>	
	<ol style="list-style-type: none"> <li>10. The model in this paper allows individuals to raise the rights in the Charter as part of another action in a court or tribunal or in judicial review of administrative decisions, is this a level of protection for human rights that is appropriate in Tasmania?</li> <li>11. The model allows for an individual who only has a human rights action caused by incompatible provisions in an Act to take that issue to the proposed Human Rights Commission, which can then take it to the Supreme Court, is this sufficient protection?</li> <li>12. The model allows for the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with the human rights in the Charter, is this necessary in Tasmania and so is this sufficient protection in ensuring programs and services are delivered which are consistent with human rights?</li> </ol>
<b>Community Engagement</b>	
	<ol style="list-style-type: none"> <li>13. A number of mechanisms are suggested in this paper to encourage community engagement in human rights, are there other things that would be effective in this regard?</li> </ol>
<b>Human Rights Commission</b>	
	<ol style="list-style-type: none"> <li>14. Do you support a single independent commission that would combine the roles of the Anti-Discrimination Commissioner and the proposed Human Rights Commission suggested in this paper?</li> </ol>



Who must comply with Charter obligations?	
	<p>15. Should all parts of government have to comply with the Charter obligations?</p> <p>16. Should State and Council owned companies only have to comply with the Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?</p> <p>17. Should non-government service providers that provide services funded or controlled by Government have to comply with the Charter obligations?</p>
Rights in detail	
	<p>18. Do you agree with the detail outlined for each of the ten categories of rights in this paper? If not, what detail do you suggest should be incorporated for each?</p>
Additional Rights	
	<p>19. Should a right to adequate standard of living and environmental sustainability be included in a Tasmanian Charter?</p> <p>20. Should a right to adequate standard of living and environmental sustainability be included now or should their inclusion be delayed until they are also included in other Australian States or Territories?</p> <p>21. Is the detail provided for these two categories adequate for Tasmania?</p> <p>22. Are the rights listed in the paper for persons living with a disability necessary and if so are there any others you would include?</p>

**NOTES:**

