SUBMISSION TO THE TASMANIAN LAW REFORM INSTITUTE

A CHARTER OF RIGHTS FOR TASMANIA?

1. Australian Lawyers for Human Rights (ALHR) is a national network of Australian lawyers active in practising and promoting awareness of human rights in Australia. ALHR's membership of over 1,200 is national, with active National and State committees.

2. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia, and works with Australian and international human rights organisations to increase awareness of human rights in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights in Australia.

3. ALHR supports the Tasmanian Government's initiative of commissioning the Tasmanian Law Reform Institute to consider whether the protection of human rights in Tasmania can be improved. In short, ALHR's view is that it can and should be and that the appropriate means of doing so is through the enactment of a statutory bill of rights.

4. ALHR has similarly supported the enactment of a bill of rights in NSW, ACT and Victoria in submissions to the inquiries conducted in those jurisdictions.

Need for additional measures to protect human rights

5. Currently, the human rights of individuals living in Tasmania are protected in a limited fashion, through an incomplete patchwork of limited Commonwealth Constitutional guarantees, Commonwealth and Tasmanian legislative enactments and common law principles and presumptions.

6. The Victorian Human Rights Consultation Committee recently observed of the position in Victoria (prior to the passage of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)[1]):

> The Committee considers that human rights protection in Victoria is far from comprehensive and that those rights that are protected are scattered and often hard to find. We agree with the large number of people making submissions who pointed out that a Charter would benefit all Victorians by writing down in one place the basic rights we all hold and expect government to observe.[2]

7. In ALHR's view, those observations apply equally to Tasmania at the present time.[3]

Suggested model for change

8. Subject to certain qualifications identified below, ALHR recommends that the Tasmanian government adopt a model for human rights protection similar to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the Victorian Charter").

9. The essential features of that legislation are as follows:

   - All legislation is required to be interpreted in a way that is compatible with the rights set out in the Charter.[4] A limited approach to statutory construction is, to some extent, already applied by Australian courts but only in a case of

[1] Human Rights Consultation Committee: Rights, Responsibilities and Respect December 2005, Chapter 1.
[2] See page 6.
[3] See also ALHR's submission to the Victorian Human Rights Consultation Committee which dealt in detail with the inadequate nature of existing human rights protections.
[4] Section 32(1)

ambiguity - under the rule that a Court will prefer a construction which is consistent with international law (including the international human rights treaties setting out the rights which are reflected in the Charter). However, from time to time doubt is cast upon that rule[5] and it has no application to a statute passed before the relevant treaty.[6] The Victorian Charter requires that, irrespective of ambiguity, legislation must be interpreted compatibly with human rights to the extent that the purpose of the legislation will allow.

- Where there is inconsistency between a human right and a statute the validity of the legislation is not affected.[7] The Supreme Court may make a declaration of inconsistency[8] but such a declaration does not affect the validity of the legislation nor does it give the aggrieved person a cause of action.[9] Rather, the relevant Minister must prepare a written statement in response to the declaration and lay it before both houses.[10] The nature of any response to a declaration of inconsistency is thus left to Parliament.

- With respect to new legislation the Minister introducing the legislation must either make a "declaration of compatibility" with human rights and lay it before both houses of parliament[11] or utilise the override provisions. Parliament may expressly declare that a provision has effect notwithstanding that it is incompatible with human rights.[12]

- A public authority is required to act in accordance with the human rights set out in the Charter, unless it could not have reasonably acted differently.[13] The

[5] See eg *Al Kateb v Godwin* (2004) 219 CLR 562 at 590 per McHugh J.
[6] *Coleman v Power* (2004) 220 CLR 1 at 28 per Gleeson CJ.
[7] Section 32(3)
[8] Section 36(2)
[9] Section 36(5)
[10] Section 37
[11] Section 28(2)
[12] Section 31(1)
[13] Section 38(1), (2)

authority is also required to give human rights proper consideration in making a decision.[14]

- The Charter limits the granting of relief for the breach of a human right to cases where proceedings are available against a public authority for unlawful conduct.[15] So, for example, if judicial review is available for an error of law by a public authority then the applicant may seek a remedy in the nature of a prerogative writ for the breach of a human right. However, damages for breach of a human right are specifically excluded.[16]

- Section 7 provides for a detailed "proportionality test". The section recognises that human rights are not absolute and are subject to exceptions. Some specific exceptions apply in relation to particular rights.[17] "Proportionality" is an overarching concept which allows human rights to be restricted by government, provided any restriction is imposed by law and can be demonstrably justified in a free and democratic society. Its enumeration in s.7 of the Victorian Charter is preferable to the general equivalent found in s.28 of the ACT *Human Rights Act 2004*. The definition draws directly on the formula found in human rights jurisprudence. Of course, as noted above, Parliament may if it chooses legislate in a manner which is inconsistent with human rights.

10. The drafters of the Victorian legislation chose not to annex the rights set out in the ICCPR to the Act as the UK legislators did in the *Human Rights Act* 1998. Instead they chose to "modernise" the language[18] and change it to suit in some cases the state of Victorian law as at the date of enactment. The majority of the rights are those which have appeared elsewhere and comprise the common and well

[14] Section 38(1)
[15] Section 39(1)
[16] Section 39(3)
[17] See eg s24(2).
[18] An approach taken from the *Human Rights Act 2004* (ACT).

understood civil and political rights.[19] Some additional rights are: taking part in public life, cultural rights for indigenous people and the right to found a family.

11. The "statutory bill of rights" approach in Victoria is broadly similar to that adopted in the United Kingdom, New Zealand and the Australian Capital Territory.[20]

12. That approach can be contrasted to the constitutional entrenchment of a bill of rights, which is the approach adopted in the United States, Canada and South Africa.[21] In those jurisdictions, the Courts can strike down legislation on the basis that it is inconsistent with those constitutionally entrenched rights. However, it should be noted that the *Canadian Charter* maintains the supremacy of parliament by allowing parliament to specify that a law is valid notwithstanding that it offends a relevant provision of the *Charter* (the "notwithstanding clause").[22]

The statutory model is acceptable to ALHR

13. ALHR considers that constitutional entrenchment of human rights protections along the lines of the Canadian model is of enormous benefit and an ideal to be worked progressively towards.

14. However, in the short to medium term, the statutory model provides an acceptable means of enhancing human rights protections in Tasmania. It will allow for Tasmanians to become conversant with rights issues and understand how the democratic process may continue to effectively function without any real constraint.

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[19] Equality before the law, the right to life, freedom from torture, freedom from forced work, freedom of movement, privacy and reputation, freedom of thought, conscience, religion, freedom of expression, peaceful assembly and association, protection of families and children, property rights, right to liberty and security of the person, human treatment once deprived of liberty, children in the criminal process, right to a fair hearing, rights in criminal proceedings, protection against double jeopardy and protection against retrospective criminal laws: ss. 8-27.

[20] *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 2004* (ACT).

[21] *Bill of Rights 1791* (US) (as amended); *Canadian Charter of Fundamental Rights and Freedoms* which is incorporated into the *Constitution Act 1982*; *Constitution of the Republic of South Africa 1996*;

[22] Section 33.

15. A 2006 review by Department of Constitutional Affairs set out the UK experience that the Human Rights Act 1998 (UK) has had its biggest impact on the executive and not in the courts:

> "[T]he Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating policy and by those putting it into effect."[23]

16. The review also noted that only 12 successful declarations of incompatibility had been made in the first 6 years of the operation of the *Human Rights Act 1998* (UK).[24]

17. In a sense, the statutory model envisages a form of "dialogue" between the Parliament, the Courts and the public. Parliament is given an opportunity to reply to a declaration of inconsistency by a court but the Court's finding does not alter the law. That remains a matter for Parliament. However, Parliament's actions are arguably exposed to additional scrutiny by members of the public, given that a judicial officer has declared one of Parliament's laws to violate a right considered to be fundamental.

18. Similarly, when a bill is introduced to parliament which has adverse ramifications for human rights then the requirement for a "declaration of compatibility" or a statement justifying the exceptional use of the "override provisions" will ensure that:

- legislators give full and proper consideration of human rights issues arising from a bill; and

[23] UK Department of Constitutional Affairs, *Declarations of Incompatibility made under section 4 of the Human Rights Act 1998* (as of 1 August 2006), http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf At p.35
[24] ibid

- where Parliament determines to legislate in a manner which is inconsistent with fundamental rights, it acknowledges that fact and explains to members of the public the need to legislate in that manner.

19. ALHR considers that the increased scrutiny and discussion of human rights considerations (and the requirement for public authorities to act consistently with specified human rights obligations) will operate to better protect the human rights of all Tasmanians.

Inclusion of economic, social and cultural rights

20. "Economic, social and cultural rights" include rights such as the right to food, health, housing and education. Australia has an obligation to guarantee those rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

21. They are typically contrasted with "civil and political rights", such as the right to life, the right to be free from arbitrary detention and the rights to freedom of expression and association. Australia has an obligation to guarantee those rights under the *International Covenant on Civil and Political Rights* (ICCPR).

22. With some exceptions,[25] the Victorian Human Rights Consultation Committee recommended that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) focus upon civil and political rights. However, the Act contemplates the possible inclusion of economic, social and cultural rights at a later date: this will be dealt with through legislatively mandated reviews 4 and 8 years after enactment.[26]

23. ALHR supports the inclusion of economic, social and cultural rights in a statutory bill of rights for Tasmania. Such an approach is consistent with the recommendations of the ACT Bill of Rights Consultative Committee, appointed

[25] See s19.
[26] Sections 44 and 45. The introduction of rights drawn from ICESCR, CEDAW and CROC and the right to self-determination are to be considered in such a review.

in April 2002 to inquire into a possible bill of rights for the ACT.[27] In recommending the inclusion of economic, social and cultural rights, the Committee observed:

> The distinction between [civil and political rights and economic, social and cultural rights is] in many ways an artificial one. If human rights are concerned with the conditions of a worthwhile human life, rights to health, to housing and to education are as integral to human dignity as the right to vote. Many of the rights in the ICESCR and ICCPR are closely entwined. For example the ICCPR protects the right to freedom of association, while the ICESCR protects the right to form trade unions… The Consultative Committee believes that the ACT *Human Rights Act* would be unbalanced if it were to protect civil and political rights alone.

24. ALHR endorses that view. Indeed many argue that economic, social and cultural rights have immediate resonance with most people who may consider civil and political rights such as the right to a fair trial as something they only need when they are involved in court proceedings.

25. While such rights were not ultimately included in the ACT legislation, they were included in the South African Constitution.

26. The South African experience demonstrates that the inclusion of such rights is workable in a practical sense. The South African Constitutional Court has emphasised the importance of restraint on the part of courts in adjudicating upon the reasonableness of measures taken to implement such rights. For example, in the context of the health budget, priorities lie with the political organs and the medical authorities.

27. ALHR recognises that there is a perception that economic, social and cultural rights are more "difficult" because of limited available resources to meet all of those rights. ALHR believes that this concern misunderstands the fact that instruments such as ICESCR are couched in terms of the "gradual realisation" of such rights. That is, ICESCR requires that States parties take steps, to the

[27] The Committee's Report, "*Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*", was presented to the Chief Minister on 21 May 2003.

maximum of its available resources, to achieve progressively the full realisation of economic social and cultural rights. This is also the approach required under the South African Constitution.

28. That approach provides greater latitude in the implementation of economic, social and cultural rights (as compared to obligations to implement civil and political rights guaranteed by the ICCPR).

29. Tasmania has an opportunity to lead the way in the protection of economic social and cultural rights in Australia. The inclusion of a progressive realisation clause for those rights will ensure that their inclusion in Tasmanian legislation does not impose an unduly onerous burden upon the government or public authorities.

Indigenous rights

30. In ALHR's view, the position of Australian Indigenous people requires a separate tailored human rights response, which recognises that those people currently suffer significant comparative disadvantage following dispossession and years of entrenched discrimination.

31. That need can be seen in the following statistics regarding the socioeconomic status of Indigenous people in Australia:

- in the 2001 Census, the average gross household income for Aboriginal and Torres Strait Islander peoples was $364 per/week, or 62% of the rate for non-Indigenous peoples ($585 per/ week);[28]
- income levels decline with increased geographic remoteness. They fall from 70% of the corresponding income for non-Indigenous persons in major cities to 60% in remote areas, and just 40% in very remote areas.[29]

[28] Australian Bureau of Statistics, *Population characteristics: Aboriginal and Torres Strait Islander Australians 2001*, ABS cat. no. 4713.0, Commonwealth of Australia, Canberra, 2003, p81.
[29] *ibid.*, p82.

16. It is also notable that the United Nations Committee on the Rights of the Child recently expressed concern at effects of that socio-economic inequality upon Aboriginal and Torres Strait Islander children, stating:

> Despite the numerous measures taken by the State party's authorities, including the Indigenous Child Care Support Programme, the Committee remains concerned about the overall situation of Indigenous Australians, especially as to their health, education, housing, employment and standard of living.[30]

32. That experience is not unique to Australia and has resulted in increasing calls for specific human rights protections for Indigenous people at an international level. Although slow to initially recognize that Indigenous people may require such protections, the United Nations Human Rights Council recently adopted the *Declaration on the Rights of Indigenous Peoples*.[31] In particular, that instrument recognizes that the right to self determination is of central importance to Indigenous people.[32]

33. Tasmania's recent reforms with respect to the 'stolen generations' is something to be emulated elsewhere in Australia.

34. The Victorian Charter gives some specific recognition of the rights of Indigenous people. It provides in s19(2):

> Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
> (a) to enjoy their identity and culture; and
> (b) to maintain and use their language; and
> (c) to maintain their kinship ties; and
> (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

35. However, adopting the recommendations of the Consultation Committee, the Victorian Government did not include a right to self determination. The

[30] United Nations Committee on the Rights of the Child, *Concluding Observations – Australia*, Unedited version, UN Doc: CRC/C/15/Add.268.
[31] Available at http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm
[32] See articles 3, 4 and 5.

Consultation Committee recommended against the inclusion of such rights on the basis of a concern that:

> …in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences.[33]

36. This was a somewhat curious statement. As the Consultation Committee noted, the right to self determination (which is specifically recognised in article 1 of the ICCPR and article 1 of ICESCR) has been the subject of considerable international jurisprudence.[34] On the basis of that material, the right may be conceptualised as a "sliding scale" of different types of entitlements to political emancipation, ranging from a right to meaningful participation in the political process up to the right to secession (which vests only in extreme circumstances).[35] In ALHR's view, lack of certainty about the content of the right is not an issue: what the Consultation Committee failed to understand is that different peoples are entitled to different "levels" of self determination.[36]

37. To the extent there is uncertainty about what is and what is not included in the right to self determination in an Australia context, that may be avoided by adopting a relatively prescriptive approach to the content of the right (either through an exhaustive definition or by nominating examples of what is and what is not included in the right). Articles 3, 4 and 5 of the *Declaration on the Rights of Indigenous Peoples* may provide a useful guide in that regard. In essence those provisions suggest that the right to self determination for Indigenous people should include:

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[33] See page 39.
[34] Human Rights Committee, General Comment 12: The Right to Self-Determination of Peoples, Twenty-first session, 1984, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. 7, 134 [1]; Committee on the Elimination of Racial Discrimination, General Recommendation 23: Indigenous Peoples, Fifty-first session, 1997, in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. 7, 215 [4(d)].
[35] See S Joseph, et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press 2000, page 149.
[36] Ibid.

- The right to freely determine political status;
- The right to freely pursue economic, social and cultural development; and
- The right to autonomy or self-government in matters relating to internal and local affairs, as well as ways and means for financing their autonomous functions.

38. In ALHR's view consideration should also be given to including other rights specific to Indigenous people identified in the Declaration. That requires careful analysis which is beyond the scope of this short submission. ALHR is, however, happy to contribute to that process at a later stage.

A right to compensation

39. As noted above, the Victorian Charter expressly excludes damages.

40. However, it is well recognised in international human rights law that a State should make reparation to individuals whose human rights are violated (see article 2(3) of the ICCPR). This is an essential element of providing an "effective remedy" for violations of human rights (see article 2(2) of the ICCPR). Indeed, the Human Rights Committee has stated in relation to the ICCPR:

> ….the Committee considers that the Covenant generally entails appropriate compensation.[37]

41. ALHR is of the view that compensation should be available where a public authority is found to have acted in a manner which is incompatible with a human right. This is in accordance with the position under the Human Rights Act 1998 (UK) which allows a court to award damages when other remedies are inappropriate. Other remedies such as apologies and declarations should also be available.

[37] General Comment No. 31 *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004.

Reviews to revise remedies and enumerated rights in 4-8 years

42. The Victorian Charter provides for a 4 and 8 year review. That followed a recommendation of the Consultative Committee, which observed:

> The Charter can only be the beginning of a journey towards the better protection of human rights in Victoria. As such, regular reviews are necessary to assess whether the Charter is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian community.

43. ALHR endorses that comment and recommends that a Tasmanian bill of rights include a similar provision. In ALHR's view, it will contribute to greater engagement of the community and the development of a "human rights culture".

44. Further, if (contrary to ALHR's recommendation above) the Tasmanian government determines that economic social cultural rights, the right to self determination and other indigenous rights should not at the present time be included in Tasmanian legislation, the review clause should require that those matters be specifically considered in the review. The Victorian Charter imposes a requirement of that nature: s44(2).

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