



Response to Human Rights Charter Legislative Project Directions Paper

January 2011

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ABOUT TASCROSS

The Tasmanian Council of Social Service (TasCOSS) is the peak body for the Tasmanian non-government community services industry. TasCOSS membership comprises organisations and individuals engaged and interested in the provision of services to low income, disadvantaged and vulnerable Tasmanians.

It is the role of TasCOSS to promote a fairer Tasmania through the pursuit of a progressive social justice agenda in relation to government policies that affect the industry and its clients. We also support the capacity and performance of the industry and its services to ensure that the industry can achieve positive outcomes for its clients and the broader Tasmanian community.

Through its advocacy, policy, consultation and research work TasCOSS endeavours to improve the lives of those Tasmanians who live on low incomes, are vulnerable or are disadvantaged in other ways. TasCOSS represents the interests of low income, disadvantaged and vulnerable Tasmanians to government, the parliament, relevant regulatory bodies, the public, the media and in various consultative processes.

The Tasmanian Council of Social Service (TasCOSS) welcomes the opportunity to comment on the Tasmanian Government's *Human Rights Charter Legislative Project Directions Paper* and congratulates the Government on this initiative.

TasCOSS strongly supports the introduction of legislation to protect human rights in Tasmania and recognises the potential this has both to increase community awareness of human rights and to promote a strong culture of respect for the rights of all Tasmanians. It is our view that a Tasmanian Human Rights Act will also contribute significantly to promoting social inclusion and equity and will demonstrate a positive commitment by the government of Tasmania to valuing and respecting the rights of all.

This submission focuses on the proposed model for human rights legislation detailed in the *Directions Paper*. While we do not address each 'Consultation Point', we respond to those we see as particularly significant in terms of social justice and equity. We do not have expertise in legal matters and therefore leave detailed comments on the legal arrangements of the proposed model to others more qualified in that area.

The rights to be protected

TasCOSS recommends that the rights protected under the Act include the full range of rights protected under both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), with appropriate adaptations and amendments made for the Tasmanian legal, political, social and cultural environment. This recommendation is based on our belief that human rights are indivisible and on the obligations of Australia (and its jurisdictions) as a party to both covenants.

The inclusion of the rights enshrined in the ICCPR and the ICESCR in the proposed Act would support the vision and goals of Tasmania *Together*. Indeed, the Tasmania *Together* process commits the Tasmanian Government to working towards fulfilling these civil, political, economic, social and cultural rights and it would strengthen that commitment to have these rights included in a Tasmanian Human Rights Act.

Furthermore, we recommend that the rights be expressed in the Act in a manner as close as possible to their expression in these covenants. As quoted in the *Directions Paper*, the Tasmanian Law Reform Institute noted in its final Report that,

...there are advantages in maintaining as much consistency as possible with those instruments [ICCPR & ICESCR]. For instance, general consistency would ensure that the significant body of international human rights jurisprudence remains relevant to the interpretation of the Tasmanian Charter. (TLRI, 2007, Section 4.16, p 123)

We will not comment further on the rights detailed in the *Directions Paper* in 'The Tasmanian Model' (8.1.4.1). However, we do offer some detailed comments about the 'Additional Rights' discussed at 8.6 in the *Directions Paper*.

TasCOSS welcomes the inclusion of **rights associated with standard of living**; that is, the rights to work and just conditions of work; to adequate food, clothing and

housing; to physical and mental health; and to education. These are major determinants of opportunity and their protection has the potential to make a significant contribution to increasing equity, social inclusion and the wellbeing of disadvantaged Tasmanians.

TasCOSS congratulates the Tasmanian Government for moving to include these rights in the Act and notes that their inclusion will result in Tasmanians enjoying the most comprehensive human rights protection in Australia.

We are, however, concerned about the way some of these the rights are phrased in the *Directions Paper*. Specifically, (b) and (c) state the right *to equal access to services* that, in the case of (b), ‘assist the person to acquire adequate food, clothing and housing’, and of (c), ‘to health services to assist them in achieving a reasonable standard of physical and mental health’.

TasCOSS believes that by focusing on *access to services*, the rights themselves (to food, clothing, housing and health services) are not clearly stated as protected human rights. We therefore recommend that these be re-framed to be consistent with the expression of those rights in the ICESCR. This will make them clearer, more direct and less subject to ambiguity, and their enforcement will be better supported by international jurisprudence in this area.

We note that the Tasmanian Law Reform Institute, in its final Report, recommended that these rights be included in the following form:

- *The right to adequate food, clothing and housing;*
 - *The right to the highest attainable standard of physical and mental health;*
- (TLRI, 2007, Recommendation 16, p 124)

We also support the inclusion of a **right to environmental sustainability** and note that the proposal in the *Directions Paper* is based on part of Section 24 of the South African *Bill of Rights*. TasCOSS believes that this right could be strengthened and improved in the Tasmanian Act by adopting the first part of Section 24 of the South African instrument, that is:

Everyone has the right
(a) to an environment that is not harmful to their health or well-being;
(South Africa, 1996, s 24)

TasCOSS sees this as a fundamental human right and one which should be protected in a Tasmanian Human Rights Act.

We strongly recommend that the following rights:

- to work and just conditions of work;
- to adequate food, clothing and housing;
- to the highest attainable standard of physical and mental health;
- to education; and
- to environmental protection and sustainability;

be included in the Act from its inception and not left to be added later. TasCOSS sees human rights as indivisible and any incremental inclusion of rights would imply a hierarchy of importance. These social and economic rights should not be seen as optional or 'add-ons' but as an integral part of the full suite of fundamental human rights.

TasCOSS has some concerns regarding the proposed **rights for persons living with disability**. While we understand that these rights are included with the very best intentions, their inclusion is confusing, possibly misleading and, we believe, unnecessary. TasCOSS appreciates the significant and ongoing difficulties that people living with disability experience in asserting their rights in practice and in having their rights recognised and respected. This is not contested. What we question is the necessity to include these as 'additional rights' when they are, in fact, not additional but are interpretations, for people living with disability, of human rights that already appear in the Act.

We believe that singling out people living with disability as needing to have their rights interpreted in the Act in this manner implies that they are in need of 'special' treatment. Many people living with disability would disagree.

The inclusion of these as 'additional rights' also undermines the notion that the Act applies to everyone. Even more concerning is the possible implication that only these rights apply to people living with disability and that the other rights in the Act do not.

TasCOSS therefore recommends that the section titled 'Persons living with disability' not be included in the Act.

Title

A significant structural matter that we would like to comment on is the title of the proposed *Charter of Human Rights and Responsibilities*. Since it is the intention of the government for this to be an act of parliament, TasCOSS believes, in the interests of clarity, that the instrument should rightly be titled *Tasmanian Human Rights Act*. The use of the term 'charter' implies something other than an act of parliament. For instance, the *Canadian Charter of Rights and Freedoms* is part of that country's constitution, while many of us are familiar with the use of the term 'charter' in the context of a 'royal charter' by which a monarch grants a right or power, and also in the context of services, as in 'customer charters'. TasCOSS contends that if the Tasmanian human rights instrument is intended to be legislative, it should properly be titled the *Tasmanian Human Rights Act* to avoid any ambiguity regarding its status.

Note that throughout this submission we use 'the Act', rather than 'the Charter' to refer to the proposed human rights legislative instrument.

Responsibilities

We would also like to comment on the proposal to include 'responsibilities' in the title of the Act. While we agree that with rights come obligations to exercise those rights responsibly, we believe that including 'responsibilities' in the title of a human rights act effectively elevates responsibilities to the level of rights. In so doing it is implied

that human rights are contingent upon individuals acting responsibly and, we believe, this could be seen as a limitation of rights.

TasCOSS supports the inclusion of a statement about rights implying responsibilities and the imperative for individuals to exercise their rights responsibly. We do not believe that specific responsibilities should be listed.

Resources

We would like to emphasise at the outset the importance of allocating adequate resources from the State Budget for the promotion of the Act and for associated educational activities to ensure that Tasmanians understand the role of the Act and the protections it provides. This is particularly important since, firstly, there may be confusion about the application, role and functions of the Act, and secondly, in order to contribute to the process of creating a culture of human rights in Tasmania.

TasCOSS believes that the Government must make a commitment to funding comprehensive educational programs for the general public, as well as more targeted educational campaigns for specific population groups who are vulnerable to human rights abuses (for instance, Indigenous Tasmanians; gay, lesbian, bisexual and transgender Tasmanians and Tasmanians living with disability).

It is also imperative that significant funding be provided to ensure access to justice under the Act. This includes adequate funding to the Human Rights Commission and additional funding to legal services (Legal Aid and/or community legal services) to ensure that all Tasmanians, including low income and disadvantaged Tasmanians, have access to the legal support necessary to use the Act to protect their rights. As stated in the TasCOSS submission to the Tasmanian Law Reform Institute (TLRI) in 2006:

Without financial support for low income Tasmanians a Charter of Rights will simply replicate existing problems within our justice system, in which access is predicated in part on an ability to pay. From TasCOSS's perspective this would undermine the entire meaning and purpose of a Charter of Rights and reinforce inequalities and inequities. (TasCOSS, 2006, p 8)

Application of the Act

The issue of who is bound by the Act is a significant one. As we argued in our submission to the TLRI in 2006, we believe in the principle that rights are indivisible in nature and that they should therefore be indivisible in application. In other words we believe that, ideally, the Act should apply to everyone, in the same way that Tasmania's *Anti-Discrimination Act 1998* applies to all. If individual human rights are to be effectively protected, then all Tasmanian individuals, organisations and legal entities should be bound by the Act.

However, we understand that the conventional approach is that such acts bind only governments and public authorities. We urge the Tasmanian Government to extend the application of its Human Rights Act further.

While TasCOSS welcomes the proposal to extend the application of the Act to 'entities delivering a service or program which is funded or controlled by a

government entity', we believe that this does not go far enough. If the intention is to bind organisations providing services on behalf of government (through outsourcing and the like), the Act must apply also to corporations that provide essential services (such as household utilities and public transport) and services of a public nature. This would obviously include both government-owned businesses and government business enterprises. Since these businesses operate in an increasingly competitive environment, it is both logical and fair to extend the application of the Act to all businesses offering services that are considered either essential or of a public nature.

In many ways, we believe it would be simpler and more equitable to bind all government operations, public authorities, community organisations and corporations operating in Tasmania to the Act.

Once again, it is essential that organisations that will be bound by the Act are adequately prepared and, where necessary, resourced to understand the practical implications of being bound by the Act, to establish a culture of compliance and to comply with the Act. This will require a phasing-in period during which those organisations affected are provided with information about their obligations under the Act through tailored human rights educational programs.

Limitations

TasCOSS supports the proposal that the Act include a general limitation clause that applies to most but not all rights, as detailed in the *Directions Paper* (p 28). A general limitation clause along the lines of that in the Victorian Charter might be most appropriate.

It will be an important function of educational programs associated with the introduction and implementation of the Act to facilitate an understanding of the reasons for and nature of any limitations of rights. It should be generally understood that a balance must be struck between protecting individual rights and collective community goals and values (such as public health and safety imperatives). It is also important that it is understood that in exercising their rights, individuals must not infringe the rights of others.

TasCOSS believes that the Act should list the specific rights that are absolute (that is, unlimited). These should align with those rights listed as absolute in the International Covenant on Civil and Political Rights (ICCPR).

The Act in practice

TasCOSS strongly believes that the Act must be able to be used as a cause for action in itself and not be limited, as is proposed, to rights being raised alongside other causes of legal action. If the Act is to be effective in protecting rights, it must provide for a free-standing cause of action for breaches of rights protected by the Act.

In addition, TasCOSS believes that individuals should have the option to enforce their rights in court. While we appreciate and support the role proposed for a Human Rights Commission and note that this avenue will enhance access for many, we believe that individuals should also have the option to pursue their rights directly

through the court system. We reiterate our call for funding for legal support to be provided to ensure that low income Tasmanians have access to the legal system in support of their human rights.

Remedies

TasCOSS does not agree that the Act should preclude the awarding of damages, as proposed in the *Directions Paper* at 8.5.1. We believe that a Tasmanian Human Rights Act should allow for a full range of judicial remedies, including damages, to be available for breaches of rights under the Act. We support the following recommendation made by the Tasmanian Law Reform Institute in its final Report on a *Charter of Rights for Tasmania*:

Recommendation 19 – Enforcement

The Tasmanian Charter should state that the Supreme Court may grant such remedy or relief or make such order as it considers just and appropriate in the circumstances in relation to any act or proposed act of a public authority which it finds is or would be unlawful under the Tasmanian Charter. (TLRI, 2007, p 19)

In addition, as proposed, we agree there should also be scope for non-judicial remedies such as those that might result from a dispute resolution process outside of the court system.

Community engagement

If a Human Rights Act is to be accepted and effective in Tasmania, there must be mechanisms for ongoing community engagement. The Tasmanian community must have opportunities to participate in the continuing development of the Act, its implementation and in regular reviews. TasCOSS congratulates the government on its consultation processes on this issue so far and hopes that a consultative approach is maintained.

We have already discussed the importance of well-funded and comprehensive public education programs to support the Act, and we support the proposal that a Human Rights Commission be established with responsibility for promoting public awareness and understanding of the Act and for providing education and prevention programs. A Human Rights Commission will also, through its advocacy, investigation and other roles, develop experience with the Act that can be fed into the review process and contribute to the Act's ongoing development and improvement.

We do not support the establishment of a Human Rights Advisory Council as proposed in the *Directions Paper* (8.2.2). In our experience, advisory councils are not the most effective way to ensure broad community participation, representation or consultation. It is difficult to establish a truly representative advisory committee and, unless an advisory committee has a specific brief to consult publicly, there is a danger that it will remain a group that expresses only the individual views of its members.

We recommend instead that alternative mechanisms be established to ensure that there are opportunities for ongoing public input into the implementation and development of the Act. We are interested in further exploring the proposal for a

Human Rights Leadership Group made by the Human Rights Law Resource Centre in its submission on the proposed Charter (HRLRC, 2010, Recommendation 29, pp 64-65). A Human Rights Leadership Forum was established in Victoria to provide leadership and support for the Victorian Human Rights Charter within both government and the community. It might be instructive to explore the operations of that group and consider establishing a similar group in Tasmania to provide leadership and support for the Act and for the promotion of a culture of respect for human rights within the Tasmanian community.

We also recommend that a joint parliamentary human rights scrutiny committee be established with an obligation to call for submissions on matters before it. Such a committee would be made up of representatives from each house of parliament and could offer a view of proposed legislation and other matters which is independent of government and informed both by expert advice and submissions from interested members of the Tasmanian community. It would also function as a mechanism for public disclosure of the scrutiny process in a similar way to the Legislative Council's Government Businesses Scrutiny Committee.

In our view it is possible that a parliamentary scrutiny committee which is required to call for public submissions and which reports publicly in a timely manner could be a more effective mechanism for ongoing community engagement than an advisory council.

Some final comments

We hope that our comments are helpful and reiterate our strong support for a Tasmanian Human Rights Act.

TasCOSS appreciates the consultative approach taken by the Tasmanian Government and is committed to continuing to work positively towards the introduction of a comprehensive Human Rights Act for Tasmania that will be accepted and highly valued by Tasmanians. We believe the Act will make a major contribution to enhancing social inclusion and equity in Tasmania and to making Tasmania a fairer and an even better place to live.

References

Human Rights Law Resource Centre (HRLRC), 2010, *Towards a Tasmanian Charter of Human Rights*, December 2010.

South Africa, 1996, *Constitution of the Republic of South Africa*, Chapter 2 s 7-39: *Bill of Rights*.

Tasmanian Council of Social Service (TasCOSS), 2006, Submission to the Tasmanian Law Reform Institute's Inquiry *Do we need a Tasmanian Charter of Human Rights?*, November 2006.

Tasmanian Law Reform Institute (TLRI), 2007, *A Charter of Rights for Tasmania*, Report No. 10, October 2007.