



Tasmanian Council of Social Service Inc.

Submission to the TLRI on A *Charter of Rights for Tasmania Update*

November 2020



INTEGRITY
COMPASSION
INFLUENCE

About TasCOSS

TasCOSS' vision is one Tasmania, free of poverty and inequality, where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry, and to change the systems, attitudes and behaviours that create poverty, inequality and exclusion. Our membership includes individuals and organisations active in the provision of community services to low-income Tasmanians living in vulnerable and disadvantaged circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to provide input into the review of the need for a Charter of Rights for Tasmania, hereafter called a Human Rights Act.

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. As such, we strongly support the introduction of legislation to protect human rights as a fundamental underpinning of good government and a good life in Tasmania.

TasCOSS submissions and advocacy are strongly informed by the expertise of our members and the lived experiences of the Tasmanians we represent. This submission focuses on questions where we feel we have relevant knowledge or expertise.

Key Issues

Australia is now the only Western democracy without some kind of national Human Rights Act or bill of rights enshrining in law the rights to which we are all entitled.¹ In the absence of a national charter or bill of rights, and because international human rights treaties are not effectively enforceable, some Australian states and territories have introduced their own instruments to enshrine human rights protections for their citizens. Despite decades of discussion, Tasmania remains without a Human Rights Act.

TasCOSS sees no substantial change to the TLRI's 2007 observation that Human Rights protections in Tasmania are “partial, disconnected and inaccessible”.² Even where they exist, current protections focus largely on non-discrimination. This means that individuals’ rights are gauged in relation to others, that is, that treatment is not differential. Non-discrimination does not ensure that human rights will be respected or delivered.

COVID-19 has shown how vulnerable we can all become and the extent to which government decision-making impacts on the basic needs and rights of us all. In Tasmania, the decision to close businesses and restrict people’s movements highlighted the importance of access to fundamental rights such as food and housing as well as access to health and education. The fact that many groups missed out on various economic supports also highlighted the need for protections that cover all people regardless of their age, sex, gender, disability, race, residency or citizenship.

That some groups fell through the gaps in government support was acknowledged by measures such as supermarkets offering priority shopping times for the elderly and other vulnerable groups during the height of the crisis, and food relief organisations boosting their outputs to give meals to stranded

¹ AHRC, 2020. [Ten common questions about a Human Rights Act for Australia.](#)

² Tasmanian Law Reform Institute (TLRI), 2007. [A Charter of Rights for Tasmania.](#) p. 55

international students. While such instances of goodwill are welcome, they are also ad hoc. The fact they were necessary demonstrates our current human rights framework is not sufficient to ensure that the human rights of everyone in Tasmania are acknowledged, enacted and championed.

A well-constructed Human Rights Act would be a positive step for Tasmania for three reasons:

- 1) it would help to fill gaps in Tasmania's patchy human rights framework;
- 2) it would help shift discussion of rights from a focus on non-discrimination to a more ambitious discussion of rights as positive and universal; and
- 3) it would ensure Tasmania's protection of human rights is consistent with comparable nations and the international treaty obligations to which our country has signed on.

Since the TLRI's initial report there have been some advances in the protection of rights in Tasmania, as well as some backwards steps. The following case studies draw attention to recent human rights related matters and changes to policy and legislation that TasCOSS considers particularly relevant for the review.

Case studies

Positive developments since the 2007 review

The first four case studies represent recent examples of extending rights protections or positive developments in that direction. While it is pleasing to see progress in these areas, it is sporadic and we have no framework in which protections come together. None of these examples counter the larger-scale fragmentation and inaccessibility of the protection and application of rights.

- **Legal recognition of sex and gender**

In April 2019 Tasmania passed the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* which made a number of amendments to the *Births Deaths and Marriages Act*. As summed up by the Tasmanian Law Reform Institute (TLRI) the changes:

were intended to make it easier for Tasmanians to gain official documentation that reflects their gender identity. The stated aim of those changes was to reduce the discrimination and trauma experienced by intersex and gender diverse Tasmanians whose identification documents do not correctly record their gender identity.³

One of the most significant changes the laws introduced was the removal of the requirement to have surgery before registering a change of gender. This and other changes brought in with the Act accords with key human rights principles in relation to sexual orientation, gender identity, gender expression

³ TLRI, [Legal Recognition of Sex and Gender; Final Report](#), p. 18

and sex characteristics as set out in various international human rights instruments including the *Yogyakarta Principles plus 10*.⁴

- **Voluntary Assisted Dying**

Tasmanian MLC Mike Gaffney recently introduced the *End-Of-Life Choices (Voluntary Assisted Dying) Bill 2020* into the Legislative Council in Tasmania. This bill follows three previous attempts to pass private members bills on Voluntary Assisted Dying (VAD) in Tasmania, with the most recent being defeated in the House in 2017.

A number of fundamental human rights are potentially affected by regulations on voluntary assisted dying, including the right to life, to privacy and bodily autonomy, and to freedom from cruel, inhuman or degrading treatment. On balance, it would appear that such legislation could extend protections of human rights and respect for individual choice in Tasmania. The existence of a Human Rights Act could enhance this by requiring legislators to be explicit about the compatibility of any legislation with fundamental rights and assisting in deliberations of how co-existing rights are balanced in implementation. It could help shift the discussion to a more holistic one which is strongly grounded in the rights of individuals.

- **A pilot intermediary /communication assistant scheme for Tasmania**

In March 2020 the Tasmanian Government announced a Pilot Intermediary Scheme to assist children and adults with communication needs to participate in the criminal justice system.⁵ The Bill provides for witness intermediaries to support prosecution and defence lawyers to ensure that vulnerable witnesses are asked questions they can understand, have access to materials they need to express themselves in answering questions and have the time and space they need to communicate their best evidence.

The Scheme is a response to recommendations of the Royal Commission into Child Sexual Abuse and is aimed at ensuring equal access to justice. It therefore helps bring Tasmania's laws into step with international human rights obligations, particularly the right to a fair hearing, the right of children to special treatment in the criminal justice process and rights of people with disability to equality before the law.⁶

- **Guardianship and Administration Act 1995 (Tas)**

In 2018 TasCOSS made a submission to the TLRI's review of Tasmania's *Guardianship and Administration Act*.⁷ Our submission argued that, to give meaningful effect to our obligations under the need to align the Act with Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities*⁸,

⁴ [The Yogyakarta Principles plus 10](#), 2017

⁵ Elise Archer, 2020. Media release: [Enhancing access to justice for survivors of child abuse](#)

⁶ TLRI, [Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?](#), p.xi

⁷ TLRI, 2018. [Review of Guardianship and Administration Act](#). Also, [TasCOSS submission to the review](#)

⁸ Australia is a State Party to the Convention, having ratified it on 17 July 2008. See:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en&clang=en.

in particular Article 12, and measures the Tasmanian Government would need to take to give meaningful effect to any legislative changes.⁹

To align with the UN Convention, the Tasmanian Act would need to provide for a shift from the practice of substitute decision-making to one that is based on supported decision-making. While referring to our obligations under UN conventions to which Australia is a signatory gives some weight to calls for legislative reform, the existence of a binding Human Rights Act that encapsulates international human rights principles would smooth the path for such legislative changes – and, indeed, mean that legislation is enacted that complies with these principles.

Negative developments since the 2007 review

The remaining case studies presented are examples of where gaps remain, protections have deteriorated, or rights have been curtailed in the period since the previous review.

- **Anti-Protest Laws**

In 2014 the Tasmanian government introduced the *Workplaces (Protection from Protestors) Act 2014*. As TasCOSS argued in its submission on the draft legislation, the bill contained provisions that would allow for the curtailment of rights to freedom of expression, freedom of association and peaceful assembly, and the right to participate in public life. Despite being challenged successfully in the High Court, the amended Act still contains provisions which impinge on the right to protest.¹⁰

A similar case in Victoria in which protesters at a business were charged with “trespass and besetting” was successfully challenged under their Charter as a breach of guaranteed rights.¹¹ A well-functioning and enforceable Human Rights Act, under which legislation is reviewed for compatibility with human rights, might have meant Tasmania’s workplace protection laws were drafted in such a way that they did not impinge on fundamental rights. It might also have prevented the costs to the State associated with the High Court Challenge and subsequent amendments to the bill, which could see further challenges.

- **Conversion practices**

Queensland, the ACT and Victoria have all recently banned or declared an intention to ban conversion practices. Conversion practices refer to attempts to change a person’s sexuality or gender for reasons often but not always based on religious belief or ideology. A recent report for the UN Human Rights Commissioner called for a global ban on these practices and decried them as an “egregious violation of

⁹ [TasCOSS submission](#), p.3

¹⁰ See the bill here: <https://www.parliament.tas.gov.au/bills/pdf/54_of_2019.pdf>

¹¹ [Victoria Police v Anderson & Ors](#) (2012) Magistrates’ Court of Victoria (23 July 2012)

rights to bodily autonomy, health, and free expression of one's sexual orientation and gender identity. When conducted forcibly, they also represent a breach to the prohibition of torture and ill-treatment."¹²

The Australian jurisdictions that have or are considering banning conversion practices also have a Human Rights Act, and no ban on these practices exists in jurisdictions without a Human Rights Act. The TLRI currently has a reference to investigate conversion practices in Tasmania. A recommendation by the TLRI to ban conversion practices in this State as a result of its investigation would be strengthened by the existence of a human rights act which includes the right to self-determination and expression of one's sexuality and gender identity. This would bring Tasmania in line with our international obligations, and comparable jurisdictions.

- **Prisons and prisoners**

Because prisoners have been deprived of their liberty, and are under the custodianship of the State, they are particularly vulnerable to human rights violations. The Custodial Inspector recently found that "the Tasmanian Prison Service (TPS) is overstretched at almost every point due to the continual increase in prisoner numbers and existing infrastructure constraints" and notes that such pressure on the system impacts on prisoners' mental health and their access to education, employment, rehabilitation and suitable preparations for their release.¹³ Many released prisoners also face ongoing stigma and discrimination based on their criminal record.

While prisons and prisoners are subject to various forms of oversight and regulation, a Human Rights Act as recommended by the TLRI in 2007 would represent a powerful additional mechanism to ensure the State fulfils its obligation to protect and promote the rights of prisoners.¹⁴ This focus on upholding the human dignity and rights of prisoners may also have the secondary effect of reducing recidivism and improving public safety.¹⁵ An act which applies to everyone, including those being sanctioned by the justice system, would be a powerful statement of the importance and universality of human rights and the dignity of all people.

- **Major Projects Legislation**

Tasmania recently passed the *Land Use Planning and Approvals Amendment (Major Projects) Bill 2020*. This bill was controversial, with concerns raised around the transparency and independence of the new process and the ability of the decision-making structures envisioned by the bill to take community sentiment into account, given restrictions around public participation in the decision-making process.¹⁶

¹² OHCHR, 2020. [Summary of Report on Conversion Therapy](#).

¹³ Office of the Custodial Inspector, Tasmania. 2020. [Media Release: Rehabilitation & Reintegration Inspection Report – Inspection of Adult Custodial Services in Tasmania, 2018](#)

¹⁴ See for example [Human Rights Principles for ACT Correction Centres](#), ACT Department of Justice and Community Safety. 2019

¹⁵ UNODC, 2018. [Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders](#)

¹⁶ [One analysis of public submissions](#) found that 98% were explicitly opposed to the bill.

By removing planning decisions from the local council planning process, limiting community input, and removing the right to appeal, the Bill flies in the face not only of good governance principles of transparency, inclusion, accountability, participation, responsiveness and consensus orientation,¹⁷ but also the human and democratic right to exercise a voice. It is also in potential conflict with the human right of Aboriginal Tasmanians to maintain their spiritual, material and economic relationship with land and of all Tasmanians to equality before the law.

Human rights considerations should be integral to the process and outcomes of planning decisions.¹⁸ A Tasmanian Human Rights Act which places these rights at the heart of the assessment and determination of decisions made by government authorities would both build confidence in the transparency and fairness of the planning process, and achieve better social outcomes from planning decisions.¹⁹

Conclusion

TasCOSS welcomes the review into the need for human rights legislation in Tasmania. Consistent with our previous submissions on this issue we believe there remains a clear need for such legislation. A well-functioning act has the potential to fill the gaps in our current patchy framework, align our domestic legislation with our international obligations, and provide a catalyst for the promotion of a strong culture of respect for human rights in this State.

¹⁷ See [Good Governance Guide for Local Government in Tasmania](#), DPC Tasmania

¹⁸ See EHRC, 2019. [Planning and the environment, human rights for ombudsman schemes](#)

¹⁹ See for example UN Habitat, 2020. [Human Rights, Rule of Law and the New Urban Agenda](#), p. 22-29

Appendix – Rights recommended by the 2007 TLRI Review

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

- The right to life;
- The protection of the family and children;
- The right to liberty and security of the person;
- The right to humane treatment when detained;
- The right to a fair hearing;
- The right of children to special treatment in the criminal justice process;
- The right to compensation for wrongful conviction;
- The right not to be tried or punished for conduct that was not a criminal offence when it was engaged in (freedom from retrospective criminal punishment);
- The right not to be imprisoned for a contractual debt;
- The right to privacy and reputation;
- Freedom of movement;
- Freedom of conscience, thought, religion and belief;
- Freedom of expression;
- Freedom of association and peaceful assembly and the right to form and join trade unions;
- The right to vote and to participate in public life;
- The right to self-determination;
- The right to recognition as a person before the law;
- The right to equality before the law and to equal protection of the law;
- Freedom from discrimination;
- The right of ethnic, religious and linguistic minorities to enjoy their own culture;
- The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land;
- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment;
- Freedom from slavery and forced work;
- The right to work and just conditions of work;
- The right of children not to be exploited economically or socially;
- The right to adequate food, clothing and housing;
- The right to the highest attainable standard of physical and mental health;
- The right to education;
- The right not to be deprived of property except on just terms;
- The right to a safe environment and to the protection of the environment from pollution and ecological degradation;
- Freedom from genocide