

Tasmanian Women Lawyers Association

SUBMISSIONS TO LAW REFORM INSTITUTE COMMENTING ON A TASMANIAN CHARTER OF RIGHTS DISCUSSION PAPER

1. Should a Charter of Rights be enacted in Tasmania?

Tasmanian Women Lawyers (TWL) supports the enactment of a Charter of Human Rights in Tasmania. While parliament has enacted statutes to protect against certain practices such as discrimination on the basis of gender, disability or race, these laws are not comprehensive. Governments and private organisations are required to take account of these laws when making decisions and consequences may arise if rights have been violated. However, as they are not comprehensive, "rights" left unprotected are not mandatory considerations. TWL does not accept that by enacting a Charter the "floodgates" would be opened to administrative or judicial review in litigation. Such fears are demonstrated to be unjustified on the experience of other jurisdictions that have taken this step.

Any charter of rights once enacted should become fundamental to the governing of its jurisdiction; by providing a minimum standard to be expected. TWL does not accept a model maintaining parliamentary sovereignty over the Charter is the only acceptable model. A Charter of Human Rights is surely concerned with enhancing democracy. We accept that the electorate may require some education and time to observe the benefits of rights protection or in some cases failure to protect. For this reason it may be necessary to work towards a model that entrenches rights, outside parliamentary sovereignty and places the means of amendment in the hands of the electorate by referendum. This could involve an initial act, subject to review and consequent amendment, followed then by a period of time before which the Act then in force and any dissenting proposals were put to referendum. TWL accepts that from time to time a Charter may be perceived to be in need of amendment to take account of changing attitudes. However, the change would be more democratically provided for by way of referendum.

2. What rights do you think should be protected in any Tasmanian Charter of Rights?

TWL agrees the most vulnerable people in our society are the physically and mentally ill, children and indigenous communities and individuals. However, we do foresee the difficulty in naming each individual right – rather than categories of rights – where do you end? However, if not naming such things as self-determination or even such basics as housing or education has effected the realisation of specific rights, then any review of the Charter should consider their inclusion.

TWL does not support the inclusion of the rights for corporations in any Charter.

It would be preferable to provide for Civil and Political Rights as well as Economic, Social and Cultural Rights. In short if Tasmania is to go to the trouble of having this debate and hopefully enacting a Charter of Rights, that instrument should be as comprehensive as possible. We agree the Charter should be subject to a review in a short period of time following its coming into force; however, a Charter of Human Rights is not a law which should be constantly or easily amended. We note the discussion of the ACT experience and the announcement that state intends to amend their *Human Rights Act* to include social, economic and cultural rights.

If the coverage of the Charter is as wide as TWL submits it should be our organisation does not consider it necessary to expressly name certain rights held by certain groups of the community. The Charter should be drafted very tightly to ensure protection for all. As to the limitation of rights, TWL considers the most important aspect to be interpretation of that limitation. It is important to include in the Charter what is to be taken into account when considering whether it is justifiable in a particular instance to limit a human right. TWL therefore supports the inclusion of specific guidelines such as those provided for in Victoria. If this does not occur criticisms of judicial interpretation will more frequently be made - be they ill informed or not.

3. Should the Government be required make sure any laws passed comply with human rights?

TWL considers it fundamental to the operation of a Charter of Human Rights that laws passed by the legislature comply with the Rights provided for in the Charter. All laws should be subject to scrutiny on this basis and mandatory statements of compliance be provided illustrating details of compliance provided when introducing bills.

If a bill proposes to limit a right, a formal statement outlining the justification for the limitation - taking account of the guidelines - should be prepared and presented with the bill. As a further safeguard TWL would support the imposition of mandatory sunset clauses be enacted in each case of legislation that includes a limitation of rights. Recent

enactments of counter-terrorism laws demonstrate the seriousness of the violation of rights. These laws have generated considerable discussion in the community, much of it in opposition to their enactment. It is imperative to review any legislation that limits rights and consider whether the result of that limitation was indeed justifiable, but also whether the result is such that the positive outcome anticipated in limiting the right has not been overshadowed by the negative result of such limitation.

The responsibility of reviewing limiting legislation may remain with the government department responsible for its implementation, but that department should provide that review not only to the relevant minister, but also report to an independent body, specifically established to review legislation for compliance with the Charter (such a body would of course perform other duties as well). That body should report to parliament on its view of the review recommendations (or non-review should that have been the case); this would ensure compliance with the review timetable enacted, rather than relying on executive compliance with such a timetable. It is commonplace for legislation to have a review date built into the drafting. However, there are examples where this has not occurred within the timeframe legislated for. The *Youth Justice Act* is one such example and we note our earlier highlighting of children as particularly vulnerable. If Tasmania had a Charter of Human Rights such an act as the *Youth Justice Act* would have been timely reviewed under this model.

4. Should people be able to take court action to enforce their rights or obtain compensation for their breach?

TWL considers people should have a right to bring "court" action if their rights have been violated. However, such action does not necessarily have to be commenced in the Supreme Court. In line with developments in all areas of law we support the availability of mediation to attempt to resolve grievances. TWL supports the establishment of a Tribunal to review alleged violations. Mediation can be incorporated in any Tribunal process.

5. Should courts interpret the law to be consistent, as far as possible, with human rights and tell the Government if a law is inconsistent with human rights?

Where the allegation is a particular Act violates human rights protected under a Charter or the limitation imposed on a right by legislation is without justification then those alleging such violations - be that an organisation or individual- should have recourse to a court. Courts should have the power to interpret laws consistency with any Charter of Human Rights and to declare the law invalid on this basis. We submit to argue otherwise would be an argument for the interference with separation of powers, in contrast to the

government's view of this threat. This would particularly be so if the Charter required amendment by referendum. Again TWL does not consider the experience of other jurisdictions validates any fears of an inundation of litigants to be credible.

6. Are there any matters relating to the protection of human rights that you would like to bring to the attention of the Tasmanian Law Reform Institute?

TWL supports the establishment of a Human Rights Commissioner, properly resourced with administrative and professional staff, to review proposed bills and legislation and serve a role in community education. The Commissioner should be empowered to enquire and report by his or her own motion into matters concerning the protection of human rights.