

COMMUNITY LEGAL CENTRES TASMANIA

25 November 2020

Tasmania Law Reform Institute
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via email: law.reform@utas.edu.au

To the Tasmania Law Reform Institute,
Re: Re-Examination of the Case for a Human Rights Act in Tasmania

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Re-Examination of the Case for a Human Rights Act in Tasmania*.¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

Fourteen years ago, the State Government invited the Tasmanian Law Reform Institute (TLRI) to investigate how human rights could be better protected in Tasmania. The community consultation embarked on by the TLRI was the largest undertaken in its history with 66 forums, briefings and presentations held across the State. The exhaustive consultation resulted in more than 400 submissions being received, “the largest number of original submissions received on any project undertaken by the Institute”.² Significantly, more than 90 per cent of submissions received supported the introduction of a Tasmanian Charter of Rights.³

The TLRI’s final report *A Charter of Rights for Tasmania* recommended that civil and political rights as well as economic, cultural and civil rights should be protected and that whilst “a Charter of Rights would not be a solution for all human rights problems or prevent social

¹ CLC Tas would like to acknowledge Manoj Madushanka who assisted in the preparation of this response.

² Tasmania Law Reform Institute, ‘Charter of Rights Recommended for Tasmania’, University of Tasmania Media Release, Friday 12 October 2007. As found at https://www.utas.edu.au/data/assets/pdf_file/0005/283730/Human_rightsfinalversion_media.pdf (Accessed 20 November 2020).

³ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 16.

inequality and injustice in Tasmania” it would “develop a human rights conscious culture within Tasmania”.⁴

More than a decade after the release of the TLRI’s final report, it is clear that a Charter of Rights is urgently needed with successive Governments failing to give “human rights a consistently applied central role in the conduct of government business”.⁵

Human rights in Tasmania remain “partial, disconnected and inaccessible”

In the TLRI’s final report it was observed that human rights in Tasmania “are partial, disconnected and inaccessible”.⁶ Since 2007, the failure of successive Governments to enact a Charter of Rights means that there has been no consistent recognition of human rights in government decision-making.

Over the last eight years, Community Legal Centres Tasmania has responded to Bills as well as consultation papers published by Government departments, statutory bodies and other organisations. A review of our responses at www.clctas.org.au/what/reform demonstrates that the response of Government and its instrumentalities to protecting and enhancing human rights has been mixed. Whilst, a number of significant human right protections have been enshrined in legislation, the Government has also sought to weaken human rights protections and it has been left to members of the opposition parties or Legislative Council to advocate for human right protections.

Government legislative reform that has protected human rights includes:

- The expungement of historic convictions for consensual homosexual sexual activity and related conduct;⁷
- Broadening the range of rehabilitation options available to the Judiciary when sentencing offenders to terms of imprisonment;⁸

Opposition parties or Legislative Council legislative reform that has sought to protect human rights includes:

- The repeal of the offence of begging;⁹

⁴ Ibid.

⁵ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 55.

⁶ Ibid.

⁷ Article 26 of the *International Covenant on Civil and Political Rights* provides that no person shall be discriminated against on the grounds of sexual orientation. In Tasmania see the Anti-Discrimination Commissioner, *Treatment of historic criminal records for consensual homosexual sexual activity and related conduct* (April 2015) and the *Expungement of Historical Offences Bill 2017* (Tas).

⁸ Article 10(3) of the *International Covenant on Civil and Political Rights* provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”. In Tasmania see the Sentencing Advisory Council, *Phasing out Suspended Sentences* Final Report (March 2016) and the *Sentencing Legislation Amendment Bill 2016* (Tas).

⁹ Article 3 of the *International Covenant on Civil and Political Rights* provides that “everyone has the right to life”. Also see the *Police Offences Amendment (Repeal of Begging) Bill 2019* (Tas).

- Legal recognition of sex and gender diversity;¹⁰

Government legislative reform that has sought to weaken human rights protections, includes:

- Making protest unlawful when it would impede on business activity;¹¹ and
- Mandatory sentencing.¹²

Our review of the Government's legislative agenda demonstrates that the protection of human rights in Tasmania remains fragmented. We strongly concur with the TLRI's finding more than thirteen years ago that a Tasmanian Charter of Human Rights will "encourage the systematic development and observance across all arms of government of processes responsive to human rights".¹³

Indeed, this has been the outcome in the Australian Capital Territory and Victoria where human rights instruments have been operational for more than a decade. A review of the first five years of a Human Rights Act in the Australian Capital Territory for example concluded that:¹⁴

One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy. The development of new laws by the executive has been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner. These improved laws are likely to have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community.

¹⁰ Principle 1 of the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* provides that "All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights." In Tasmania see the Anti-Discrimination Commissioner, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (February 2016) and the *Justice and Related Legislation (Marriage and Gender Amendments) Bill 2019* (Tas).

¹¹ Articles 19, 21 and 22 of the *International Covenant on Civil and Political Rights* guarantee the right to freedom of expression, freedom of peaceful assembly and freedom of association. In Tasmania see the *Workplaces (Protection from Protestors) Act 2014* (Tas); *Workplaces (Protection from Protestors) Amendment Bill 2019* (Tas).

¹² Article 7 of the *International Covenant on Civil and Political Rights* notes that "No one shall be subjected to cruel, inhuman or degrading treatment or punishment" and has been interpreted as requiring proportionality in sentencing. In Tasmania see the *Justice Legislation (Mandatory Sentencing) Bill 2019* (Tas) that intends to introduce mandatory minimum sentences of imprisonment for serious sexual crimes perpetrated against children. Or the *Sentencing Amendment (Assaults on Frontline Workers) Bill 2016* that sought to impose mandatory minimum sentences of imprisonment for assaults on emergency workers.

¹³ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 55.

¹⁴ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation: A Report to the Department of Justice and Community Safety* (2009) at 6.

Or, in 2015 a review of the first ten years of the Victorian *Charter of Human Rights and Responsibilities 2006* observed:¹⁵

The introduction of the Charter has been a clear part of building a human rights culture in Victoria, particularly in the Victorian public sector. Over time, implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector, Parliament and the courts in key areas.

Nevertheless, reviews of human rights legislation in the Australian Capital Territory and Victoria have found that reforms should be introduced to further strengthen human rights protection.

Public Authorities

In 2007 the TLRI recommended that the introduction of a Charter of Rights should bind public authorities and make it unlawful for them to act in a way or make decisions that were not compliant with the Act.¹⁶ Public authorities covered by the Charter of Rights would include entities such as public hospitals, government departments and State owned businesses. The TLRI also recommended that entities that have functions of a public nature and are exercising those functions on behalf of the State or a public authority should also be included. The rationale for including these entities was noted in the Victorian case of *Metro West v Sudi*, where Justice Bell noted about a similar provision in the Victorian *Charter of Human Rights and Responsibilities*:¹⁷

The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.

The TLRI further recommended “that in prescribed reviews of the Charter, the issue of who should be bound by the Charter should be revisited and consideration given to extending its application to private bodies and individuals”.¹⁸ Given that a Charter of Rights has not been introduced in Tasmania, we believe reforms introduced in the Australian Capital Territory and Victoria should be considered as part of this TLRI review.

- Functions of a Public Nature

Like the Australian Capital Territory, the TLRI recommended that a non-exhaustive list of functions considered to be of a public nature should be included in the Charter of Rights. The TLRI went on to list the entities that it believed should be included:

- the operation of detention/correctional facilities;

¹⁵ Michael Young, *From Commitment to Culture, The 2015 Review of the Charter of Human Rights and Responsibilities 2006* (September 2015) at 22. As found at https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf (Accessed 20 November 2020).

¹⁶ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 5.

¹⁷ *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) at para. 123.

¹⁸ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 5.

- provision of essential services, (gas, electricity, water);
- provision of emergency services;
- provision of government-controlled health care or medical services;
- provision of government educational services;
- provision of public transport and;
- provision of public housing.

Victoria on the other hand did not include a list of entities in its Charter, and the lack of clarity has proven to be a source of frustration as a number of organisations argued in submissions to the 2015 *Review of the Charter of Human Rights and Responsibilities*. In particular, concerns were raised that the lack of clarity has made it more difficult for individuals to raise human rights breaches because they do not know if the entity is bound by the Charter and that some public authorities have been shielded from complying with their human rights obligations.¹⁹ As a result, the Victorian review recommended the provision of a non-exhaustive list of functions of a public nature as has been enacted in the Australian Capital Territory and previously recommended by the TLRI in its proposed Tasmanian Charter of Rights.²⁰

- **Public authority ‘opt-in’**

Despite the TLRI recommending that the Charter of Human Rights should initially only bind public authorities, a further reform that should be adopted is providing entities -including businesses and not-for-profit organisations- with the opportunity to ‘opt-in’ to public authority obligations under the Charter of Rights. This is a reform that was introduced in the Australian Capital Territory in 2009 with the insertion of section 40D of the *Human Rights Act 2004* (ACT) which provides entities with the option of requesting that the Attorney-General declare it a public authority:

40D Other entities may choose to be subject to obligations of public authorities

- (1) *An entity that is not a public authority under section 40 may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.*
- (2) *On request under subsection (1), the Minister must make the declaration.*
- (3) *The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.*
- (4) *A declaration under this section is a notifiable instrument.*

We strongly believe that providing a mechanism for entities to proactively and publicly declare their support for human rights will act as a reminder that human rights are not restricted to Government and its instrumentalities as well as assisting in building a human rights culture in both the public and private sectors. We would also note that this reform was

¹⁹ Michael Young, *From Commitment to Culture, The 2015 Review of the Charter of Human Rights and Responsibilities 2006* (September 2015).

https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf (Accessed 20 November 2020).

²⁰ Michael Young, *From Commitment to Culture, The 2015 Review of the Charter of Human Rights and Responsibilities 2006* (September 2015) at 62. As found at

https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf (Accessed 20 November 2020).

recommended in 2015 by the Victorian review of the *Charter of Human Rights and Responsibilities 2006*.²¹

International law and judgments from other jurisdictions

Section 32(2) of the Victorian *Charter of Rights and Responsibilities 2006* currently provides that international law and judgements may be considered when courts or tribunals are interpreting compatibility with human rights:²²

Division 3— Interpretation of laws

32 Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of— (a) an Act or provision of an Act that is incompatible with a human right; or (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

However, the failure to expressly provide that courts and tribunals must consider relevant decisions and laws from other jurisdictions has led to conflicting approaches and as a result uncertainty. In the case of *WBM v Chief Commissioner of Police*²³ for example, the Victorian Supreme Court was required to consider the meaning of ‘arbitrary’ interference in the context of the right to privacy.²⁴ The facts of the case were that WBM pleaded guilty to possession and production of child pornography offences in April 2003 and was sentenced to 12-months imprisonment, suspended for two years. The order was not breached and ceased in April 2005. In 2004, one year after WBM had been sentenced, the *Sex Offenders Registration Act 2004* (Vic) came into effect and in August 2007 WBM was advised that his name would be placed on the Victorian Sex Offenders Register. WBM argued among other things that the registration was an arbitrary interference with his privacy.

In finding that WBM could be placed on the sex offender register, Kaye J was reluctant to follow relevant international jurisprudence on the basis that the United Nations Human Rights Committee’s views did not accord with the plain meaning of arbitrary and because it was a non-judicial body comprising members from countries with different systems of democracy to Australia. Kaye J subsequently held that ‘arbitrary’ should be given its ordinary grammatical meaning and that a decision would only meet this description when it is “capricious and not based on any identifiable criterion or criteria”.²⁵ This interpretation can be contrasted with the United Nations Human Rights Committee which has interpreted ‘arbitrary’ in relation to Article 17(1) of the *International Covenant on Civil and Political*

²¹ Ibid at 65.

²² Also see section 31 of the *Human Rights Act 2004* (ACT).

²³ [2010] VSC 219.

²⁴ Section 13(a) of the *Charter of Human Rights and Responsibilities 2006* (Vic).

²⁵ [2010] VSC 219 at para. [57].

Rights as meaning “reasonable in the particular circumstances”.²⁶ Whilst other Victorian Supreme Court decisions have been prepared to consider international law and the judgments of foreign and international courts and tribunals²⁷ the uncertainty could be removed through expressly providing that courts and tribunals must consider relevant decisions and laws from other jurisdictions.

Floodgates and Judicial Activism Arguments Unfounded

Finally, it is worth noting that the arguments raised by some that a Charter of Rights would “open the floodgates to frivolous court actions”²⁸ has proven unfounded. For example, a review in the Australian Capital Territory found that the Human Rights Act was mentioned in approximately 6.6 per cent of Tribunal decisions, 9.2 per cent of Supreme Court decisions and 7.6 per cent of Court of Appeal decisions.²⁹

As well, the Chief Justice of the ACT Supreme Court Helen Murrell has observed about the Human Rights Act:³⁰

[T]he HRA has had little direct impact on the outcome of cases. The enactment of the HRA was a powerful symbolic statement, and it was predicted that the Supreme Court would play an important role in increasing human rights compliance in the ACT. But despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome.

Similarly, analysis carried out by the Human Rights Law Centre in Victoria found that between 2007-2011 the *Charter of Human Rights and Responsibilities 2006* was “considered in 1.48 per cent of all Victorian reported judgments and substantively considered in 0.58 per cent of all cases”.³¹ Unsurprisingly, this led them to conclude that “there has been no ‘flood of litigation’ or discernible increase in the number, length or complexity of cases being brought before Victorian courts and tribunals as a result of the Victorian Charter”.³²

²⁶ General Comment 16 (32), Doc CCPR/C/21/Rev 1 (19 May 1989) para. 4.

²⁷ See, for example, the case of *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 at para. 70 in which her Honour Emerton J held that the consideration of international law and the judgments of foreign and international courts and tribunals “is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context”.

²⁸ Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No. 10: October 2007) at 51.

²⁹ ACT Human Rights and Discrimination Commissioner, *Look who's talking – A snapshot of ten years of dialogue under the Human Rights Act 2004* at 5. As found at <https://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf> (Accessed 20 November 2020).

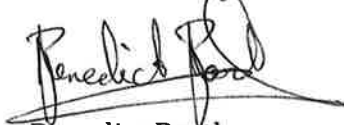
³⁰ ACT Supreme Court Chief Justice Helen Murrell, “The judiciary and human rights”, paper presented at *Ten Years of the ACT Human Rights Act: Continuing the Dialogue Conference*, Australian National University, 1 July 2014. As found at <http://www.hrc.act.gov.au/content.php/content.view/id/385> (Accessed 20 November 2020).

³¹ Human Rights Law Centre submission to the Inquiry and Review of the Charter of Human Rights and Responsibilities Act 2006 at 33. As found at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/263_Human_Rights_Law_Centre.pdf (Accessed 20 November 2020).

³² *Ibid* at 4.

In summary, we strongly support the 2007 findings of the TLRI that a Charter of Rights will “develop a human rights conscious culture within Tasmania” in which human rights are considered in a systematic way by both the community and our decision-makers in Parliament. However, we believe that reviews carried out in the Australian Capital Territory and Victoria after the first decade of their respective Acts, highlight some minor changes that should be included which will further strengthen a future Charter of Rights for Tasmania.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Bartl', with a long horizontal flourish extending to the right.

Benedict Bartl
Policy Officer
Community Legal Centres Tasmania
