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Human Rights
Commission

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TASMANIAN HUMAN RIGHTS CHARTER CONSULTATION

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Australian Human Rights Commission Submission
to the Tasmanian Department of Justice

29 November 2010

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Tasmanian Department of Justice, providing comments on the Human Rights Charter Legislative Project Directions Paper (Directions Paper).

2 Summary

2. The Commission congratulates the Tasmanian Government on making significant progress towards the legislated protection of human rights and promoting community discussion about human rights.
3. The Commission strongly believes that a Tasmanian Charter of Rights and Responsibilities (Charter of Rights), as proposed in the Directions Paper, can significantly improve human rights protection in Tasmania.
4. In June 2009 the Commission made a substantive submission to the National Human Rights Consultation (NHRC) (Attachment A). The Commission called for a federal Human Rights Act based on the model of human rights legislation operating in the UK, New Zealand, Victoria and the ACT. The submission considers in detail the key features of an effective Human Rights Act and addresses many of the consultation points raised in the Directions Paper. Accordingly, the Commission requests that its submission be read in conjunction with the submission to the NHRC.
5. In this submission the Commission has not addressed each consultation point in the Directions Paper. Rather, this submission provides general feedback and recommendations on the proposed Charter of Rights model.
6. The Commission would be willing to provide further assistance on any specific issue during the consultation.

3 Recommendations

7. The Commission makes the following key recommendations to the Tasmanian Department of Justice

Recommendation 1: The Tasmanian Government should enact a Charter of Rights based on human rights legislation operating in Victoria and the ACT.

Recommendation 2: The Charter of Rights should include protection of all economic, social and cultural rights.

Recommendation 3: The Charter of Rights should adopt, as far as possible, the wording of each right as set out in the relevant treaty.

Recommendation 4: Each bill and regulation introduced into the Parliament should be accompanied by a human rights compatibility statement.

Recommendation 5: A parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Charter of Rights.

Recommendation 6: If the pre-legislative scrutiny process is bypassed, Parliament should be required to review legislation within a specified time.

Recommendation 7: All legislation should be interpreted in a way that is consistent with the rights identified in the Charter of Rights, so far as it is possible to do so consistently with the purpose of that legislation.

Recommendation 8: The obligation to interpret laws consistently with human rights should apply to everybody interpreting and applying legislation, including courts and public authorities.

Recommendation 9: The Charter of Rights should point the courts to international law, judgements of foreign and international courts and tribunals and, the jurisprudence and views of expert treaty bodies when interpreting human rights.

Recommendation 10: The Tasmanian Supreme Court should have the power to make declarations of incompatibility and declare subordinate legislation invalid.

Recommendation 11: The definition of ‘public authority’ in the Charter of Rights should include entities whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority.

Recommendation 12: Parliament and the courts should be excluded from the definition of ‘public authority’ except when acting in an administrative capacity.

Recommendation 13: The Charter of Rights should provide an independent cause of action against public authorities for a breach of their obligations under the Charter of Rights.

Recommendation 14: The Charter of Rights should provide access to the complaint handling section of the proposed Human Rights Commission for individuals alleging a breach of the human rights set out in the Charter of Rights.

Recommendation 15: The Charter of Rights should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and damages where necessary.

Recommendation 16: The Charter of Rights should include a preamble that:

- specifically recognises the human rights of Indigenous peoples; and
- highlights that it is the responsibility of government to protect, respect and promote human rights, and the responsibility of every person in Tasmania to respect the human rights of others.

Recommendation 17: A Charter of Rights should establish an independent Tasmanian Human Rights Commission.

4 Tasmanian Charter of Rights model

8. The Commission supports the model proposed for a Charter of Rights in the Directions Paper that is based on human rights legislation operating in Victoria and the ACT because:
 - This model embeds human rights considerations into all stages – including very early stages – of public decision-making. This should help prevent human rights problems from occurring.
 - This model creates the type of accountability and transparency in decision-making which would strengthen Tasmania's democratic system of government and build upon the existing system of checks and balances.
 - This model preserves parliamentary supremacy. It would be a positive action taken by Parliament to express its view on how human rights should be protected, and to create the system it believes would achieve that purpose.
 - There is precedent for this model in New Zealand and the United Kingdom (UK), and the Tasmanian Law Reform Institute supports this model.

Recommendation 1: The Tasmanian Government should enact a Charter of Rights based on human rights legislation operating in Victoria and the ACT.

4.1 *Economic, social and cultural rights*

9. The Directions Paper proposes to include some economic, social and cultural rights in the Charter, for example, the right to form and join trade unions and the right of children to be protected from economic and social exploitation. In addition, the Directions Paper raises for consideration the inclusion of other economic, social and cultural rights in the Charter of Rights including:
 - the right to work and a right to just conditions of work;
 - the right to have equal access to services that assist the person to acquire adequate food, clothing and housing;
 - the right to have equal access to health services to assist the person in achieving a reasonable standard of physical and mental health; and
 - the right to education, including equal access to higher education based on ability.
10. The Commission believes that a Charter of Rights should explicitly include *all* economic, social and cultural rights contained in the *International Covenant on Economic Social and Cultural Rights* (ICESCR)¹, despite the fact that human rights legislation in many other jurisdictions predominately protects civil and political rights. There are several reasons for this view:

- First, human rights are universal, interdependent and indivisible. This means that the full enjoyment of civil and political rights may be hampered if economic, social and cultural rights are not also protected.
- Secondly, some of the most pressing human rights concerns involve economic, social and cultural rights. If economic, social and cultural rights were included in a Charter of Rights, those concerns could be better addressed.
- Thirdly, the omission of economic, social and cultural rights from a Charter of Rights would reinforce a commonly-held misconception that these rights are somehow less important than civil and political rights. Including those rights in a Charter of Rights would help guide and educate decision-makers on the significance of these rights to the lives of people in Tasmania.
- Finally, the independent human rights consultation committees in the ACT, Tasmania and Western Australia all recommended that at least some economic, social and cultural rights be included in state level human rights acts.² The UK Human Rights Act includes the right to education and the UK Joint Committee on Human Rights has suggested that additional economic, social and cultural rights should be protected.

11. While the Commission would prefer the inclusion of all economic, social and cultural rights, it recommends at a minimum the inclusion of the rights listed above at paragraph 9. However, the Commission notes with concern that the proposed wording of the above economic, social and cultural rights has been altered from those rights espoused in ICESCR.³ The Commission considers that the rights contained in the Charter of Rights should adopt, as far as possible, the words of the relevant treaty to ensure consistency with international law and to enable courts to draw upon the considerable body of international and comparative human rights jurisprudence.

Recommendation 2: The Charter of Rights should include protection of all economic, social and cultural rights.

Recommendation 3: The Charter of Rights should adopt, as far as possible, the wording of each right as set out in the relevant treaty.

4.2 Role of parliament

(a) Pre-legislative scrutiny

12. The Commission considers pre-legislative scrutiny to be fundamental to preventing human rights breaches by ensuring that the human rights implications of proposed laws are openly and transparently assessed and debated, in an informed manner, before the laws are enacted.
13. Pre-legislative human rights scrutiny should require Members of Parliament to consider how legislation may affect human rights before the proposed legislation is put to a vote. The human rights implications of any proposed law should be clearly identified. They could then be debated openly in Parliament. In the event that the executive or Parliament was intending to limit the

enjoyment of any human rights, this should be explicitly identified and publicly justified and debated.

14. Pre-legislative scrutiny would also ensure that courts are better informed of legislative intent.
15. Thus, pre-legislative scrutiny processes could increase accountability and transparency – the public would be put on notice when their elected representatives were considering measures that would limit human rights.
16. Pre-legislative scrutiny would also mean that all Members of Parliament, including ministers, would have to become familiar with the potential impact of new laws and policies on human rights. It would help create an awareness of, and a culture of respect for, human rights within Parliament and across government departments.
17. In the Commission's view, a Charter of Rights should include the following pre-legislative processes:
 - every bill introduced into Parliament should be accompanied by a statement of human rights compatibility;
 - every bill should be scrutinised by a specialist parliamentary Human Rights Committee;
 - in the event that a bill bypasses those processes, the law should be automatically reviewed after a fixed period of time.

(b) Statement of compatibility

18. The Commission supports the proposal for a Charter of Rights to require a human rights statement of compatibility for each new bill.
19. The Member of Parliament who introduced the bill or regulation into Parliament should be required to explain whether or not it is compatible with human rights. The human rights compatibility statement should address, amongst other things, any limitations on human rights that the proposed legislation or regulation would impose. If there were such limitations, they should be justified in accordance with the reasonable limits provision in the Charter of Rights.

(c) Parliamentary Human Rights Committee

20. The Directions Paper does not expressly propose the establishment of a parliamentary Human Rights Committee that would scrutinise all bills for human rights compliance.
21. The Commission considers that a Charter of Rights should require a parliamentary committee to examine new legislation, and provide advice to Parliament on any human rights implications. This would reduce the likelihood of the introduction of laws that breach human rights standards.
22. The Committee should be permanent and dedicated to conducting human rights scrutiny. This would produce a better result than simply expanding the role of

existing legislative scrutiny committees, because it would enable the Committee to build special expertise in analysing human rights issues.

23. The pre-legislative scrutiny conducted by the Committee should be a public process, further increasing the transparency of public decision-making. The Committee's scrutiny process could also involve engagement with the public and civil society, improving the ability of people in Tasmania to become involved in democratic processes.
24. Experience in the UK and Victoria has shown that human rights committees have had an important impact on parliamentary debate. In the UK, arguably parliamentary debate on human rights issues is more informed and sophisticated as a result of the work of the Joint Committee on Human Rights.⁴ In Victoria, the pre-legislative scrutiny process has resulted in meaningful exchanges between ministers and the Scrutiny of Acts and Regulations Committee.⁵

Recommendation 4: Each bill and regulation introduced into the Parliament should be accompanied by a human rights compatibility statement.

Recommendation 5: A parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Charter of Rights.

Recommendation 6: If the pre-legislative scrutiny process is bypassed, Parliament should be required to review legislation within a specified time.

4.3 Role of the courts

(a) Interpretive role

25. The Commission supports the proposal in the Directions Paper to include an interpretive provision that requires courts to interpret legislation consistently with human rights based on the interpretative provision in ACT and Victoria.
26. The Commission submits that an interpretive provision should be subject to the requirement that courts ensure an interpretation that is also consistent with the purpose of the legislation. The pre-legislative scrutiny processes supported by the Commission would result in courts being better informed about the actual legislative intent.
27. Such an interpretive provision would ensure that courts do not cross the line between legitimate judicial interpretation and improper judicial law-making.⁶ It would preserve the separation of powers and ensure that courts do not tread onto the territory of legislators.
28. This type of provision would not limit Parliament's power to make laws, including laws that breach human rights. However, it would require Parliament to be explicit about its intention to pass a law that is inconsistent with human rights.

29. Similarly, if Parliament objected to the way legislation had been interpreted by a court, Parliament could introduce amendments clarifying the operation of the law.
30. In either case, the introduction of new laws or amendments which deliberately limit the enjoyment of human rights would engage the pre-legislative scrutiny process. Parliament would be required to justify a decision to enact legislative amendments which were inconsistent with human rights. However, parliamentary supremacy would be preserved.
31. The Directions Paper proposes that the Charter of Rights directly point the courts to international law and the judgements of foreign and international courts and tribunals when interpreting human rights as in the case in ACT and Victoria. The Commission supports this proposal which will help ensure that legislation complies with Australia's international human rights obligations. The Commission also considers that courts and tribunals should be directed to the jurisprudence and views of expert bodies with responsibility for monitoring the implementation of treaties, for example, the Human Rights Committee.
32. In the Commission's view, it is important that public authorities consider how their actions and decisions might impact on a person's human rights. Accordingly, an interpretive provision should also require public authorities to interpret legislation consistently with the rights protected by a Charter of Rights.⁷

Recommendation 7: All legislation should be interpreted in a way that is consistent with the rights identified in the Charter of Rights, so far as it is possible to do so consistently with the purpose of that legislation.

Recommendation 8: The obligation to interpret laws consistently with human rights should apply to everybody interpreting and applying legislation, including courts and public authorities.

Recommendation 9: The Charter of Rights should point the courts to international law, judgements of foreign and international courts and tribunals, and the jurisprudence and views of expert treaty bodies when interpreting human rights.

(b) *Declarative role*

33. The Commission supports the proposal to grant the Tasmanian Supreme Court power to make declarations of incompatibility and to declare subordinate legislation invalid.
34. In the UK, Victoria and the ACT, courts can issue a 'declaration of incompatibility' if they are unable to interpret legislation in a way that is compatible with human rights.⁸ This declaration is brought to the attention of Parliament.
35. A declaration of incompatibility does not affect the 'validity, operation or enforcement' of the provision that is the subject of the declaration.⁹ However, in Victoria the minister responsible, and in the ACT the Attorney-General, is

required to respond to a declaration of incompatibility within six months.¹⁰ A failure to comply with this timetable does not affect the validity of the legislation.

36. Subordinate legislation is made by the Executive, not Parliament, and does not attract the same level of parliamentary scrutiny as primary legislation. For this reason, '[t]here is no threat to parliamentary sovereignty in the judiciary invalidating delegated legislation that the primary legislator has not authorised'.¹¹
37. Therefore, the Commission recommends that the Tasmanian Supreme Court be empowered to invalidate subordinate legislation which is inconsistent with the rights protected by a Charter of Rights, unless the primary Act expressly authorises the making of subordinate legislation that is inconsistent with human rights.

Recommendation 10: The Tasmanian Supreme Court should have the power to make declarations of incompatibility and declare subordinate legislation invalid.

4.4 Compliance with the obligations in the Charter

38. The Directions Paper proposes that public authorities, with the exception of courts and tribunals in the exercise of their judicial functions, should be required to comply with the obligations in the Charter of Rights.
39. The Commission considers that the definition of 'public authority' should be broad enough to encompass the myriad of entities that are not strictly public authorities yet exercise public functions, and clear enough to provide certainty as to who must comply with a Charter of Rights.¹²
40. It is particularly important that the definition of 'public authority' include private organisations when they are performing public functions on behalf of government. This is because, increasingly, services previously performed by government are being outsourced to corporations and community organisations.¹³ Outsourcing should not deprive the users of that government service from the right to be treated with respect and in accordance with human rights.
41. The definition proposed in the Directions Paper departs from the definition of 'public authority' in human rights legislation in the ACT and Victoria. In Victoria public authority is defined to include:

an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority.¹⁴
42. The definition proposed in the Directions Paper only includes organisations other than public authorities in respect of the delivery of services or programs which are 'controlled or funded' by a public authority. The Tasmanian Law Reform Institute recommended that the definition of 'public authority' include a 'function test' based on the Victorian approach.¹⁵ However, the Directions Paper proposes a definition of public authorities which omits a function test.

43. The Commission is concerned that by not incorporating a function test into the definition of public authority, entities that are not necessarily ‘controlled or funded by a public authority’, but still exercise public functions will not have to comply with human rights obligations. The Commission considers that the definition of public authorities should include a function test in line with the ACT and Victorian model.
44. The Commission notes that the Parliament and courts should generally be excluded from the definition of public authority, other than when acting in an administrative capacity. This exclusion would preserve parliamentary supremacy and protect against any interference with judicial power.

Recommendation 11: The definition of ‘public authority’ in a Charter of Rights and Responsibilities should include entities whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority.

Recommendation 12: Parliament and the courts should be excluded from the definition of ‘public authority’ except when acting in an administrative capacity.

4.5 Enforceability of rights

45. There is no independent cause of action in the proposed Charter of Rights model. The model proposes to allow individuals to raise the rights set out in the Charter of Rights:
 - as part of another action in a court or tribunal; or
 - as part of the judicial review of administrative decisions.
46. In addition, the model allows for an individual who only has a human rights action caused by incompatible provisions in an Act to take that issue to the proposed Human Rights Commission. It is proposed that the Human Rights Commission would then be able to seek a declaration of incompatibility in the Supreme Court.
47. While the Commission supports the proposed power of the Human Rights Commission to be able to take complaints to the Tasmanian Supreme Court, it considers that the proposed model will not provide sufficient protection of human rights in Tasmania.
48. The Commission submits that a Charter of Rights should provide an independent cause of action where a claim is made that a public authority committed a breach of human rights. Victims of human rights breaches should not have to rely on a separate cause of action in order to seek a remedy. The Commission considers such an approach will unduly restrict the availability of remedies to those who complain of human rights breaches.
49. The Commission understands the concern that a Charter of Rights may lead to increased litigation.

50. However, an accessible alternative dispute resolution (ADR) process would reduce the impact of a Charter of Rights on the judicial system.
51. Litigation need not be the only – or indeed, the first – port of call for people who want to make a complaint alleging a breach of human rights.
52. The current anti-discrimination jurisdiction recognises the potential of ADR to resolve disputes between complainants and public authorities in a quick, cost-efficient and effective manner.¹⁶
53. Following this model, a Charter of Rights could require a person to attempt to resolve a human rights complaint through the investigation and conciliation processes provided by the proposed Human Rights Commission.
54. Any ADR process under a Charter of Rights should be properly funded, accessible and affordable.
55. Where a complaint cannot be resolved through conciliation, complainants should be entitled to pursue their claim in the courts.

Recommendation 13: The Charter of Rights should provide an independent cause of action against public authorities for a breach of their obligations under the Charter of Rights.

Recommendation 14: The Charter of Rights should provide access to the complaint handling section of the proposed Human Rights Commission for individuals alleging a breach by a public authority of the human rights set out in the Charter of Rights.

4.6 Enforceable remedies

56. The Commission is concerned at the proposal in the Directions Paper for a Charter to explicitly exclude damages from any remedy or relief arising solely from an action based on the Charter.
57. The Commission understands this proposal to mean damages in relation to an action where human rights are raised as part of a separate cause of action, since there is no provision for an independent cause of action.
58. A public authority should be held accountable if it breaches the human rights of an individual. A Charter of Rights could provide that accountability by giving a person access to enforceable remedies when a public authority breaches his or her human rights under the Act.
59. A Charter of Rights should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and the payment of damages.
60. The right to claim monetary damages for a breach of human rights would send an important message to public authorities and people in Tasmania that Tasmania takes breaches of human rights by, or on behalf of its government, seriously.

61. Thus, a Charter should empower a court to make an order for damages where appropriate. Furthermore, exclusion of damages would arguably be contrary to Australia's obligations under article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR).¹⁷
62. The human rights treaties either explicitly or implicitly require Australia to ensure that a person has access to effective remedies, including judicial remedies, if their rights are breached.¹⁸
63. According to the UN Human Rights Committee, an 'effective remedy' requires reparation to the person whose rights have been violated. Reparations can 'involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices'.¹⁹
64. In the case of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has noted that although administrative remedies can sometimes be enough, 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary'.²⁰
65. Damages are currently available for breaches of human rights protected by federal discrimination laws.²¹
66. Damages are available for a violation of the UK Human Rights Act but only if this award is necessary to afford just satisfaction to the complainant.²²
67. While the *New Zealand Bill of Rights Act 1990* (NZ) does not make specific provision for remedies, the New Zealand Court of Appeal has held that compensation is available for breach of the human rights protected under that Act.²³

Recommendation 15: The Charter of Rights should permit a court to make such orders as it considers appropriate if a public authority has breached human rights, including orders requiring action, injunctions and payment of damages where necessary.

4.7 Inclusion of preamble that specifically recognises the human rights of Indigenous peoples

68. While it may have limited legal significance, the preamble to a Charter of Rights could send a strong symbolic message to the Australian community about the importance of human rights.
69. A preamble to a Charter of Rights could articulate, in plain and simple language, the importance of human rights for an inclusive, cohesive and democratic society. It could set out the fundamental principles and values that underpin the Act. Furthermore it could affirm that all people in Tasmania are entitled to enjoy human rights, without discrimination.
70. A preamble should also specifically recognise the unique status of Indigenous peoples as first peoples and acknowledge their human rights.²⁴

71. By recognising Indigenous peoples in the preamble to a Charter of Rights, the Tasmanian Government would demonstrate a clear commitment to protecting their human rights. This is appropriate given the significant and sustained breaches of human rights that Indigenous peoples face.
72. A preamble should also highlight that it is the responsibility of government to protect, respect and promote human rights, and the responsibility of every person in Australia to respect the human rights of others.²⁵

Recommendation 16: The Charter of Rights should include a preamble that:

- specifically recognises the human rights of Indigenous peoples; and
- highlights that it is the responsibility of government to protect, respect and promote human rights, and the responsibility of every person in Tasmania to respect the human rights of others.

4.8 Disability rights

73. As noted above, human rights are universal, interdependent and indivisible. The Commission welcomes the proposed inclusion of some of the rights recognised in the Convention on the Rights of Persons with Disabilities (CRPD).²⁶ However, it is noted that only a small number of the rights derived from this Convention are proposed for inclusion.
74. This may be on the basis that people with disability are covered by the rights contained in the ICCPR and the ICESCR. While this is accurate as a matter of law, a Charter of Rights is likely to be far more useful in providing practical guidance on implementation of human rights for people with disability if it directs attention to the material contained in the CRPD, including extrinsic material.
75. A similar point can be made regarding each of the other thematic Conventions. At a minimum it is suggested that people implementing and interpreting the Charter of Rights have their attention directed to the thematic Conventions rather than only to the ICCPR and ICESCR.

5 Establishment of an independent Human Rights Commission

76. The Commission supports the establishment of an independent Human Rights Commission that would incorporate the work of the current Anti-Discrimination Commission.
77. The right to freedom from discrimination is one of the most fundamental of human rights. Human rights are non-divisible. Consideration of some rights such as the right to be free from discrimination often requires consideration of other fundamental human rights.
78. A single Human Rights Commission would be able to consider the effectiveness of protection from discrimination as well as the effectiveness of protection from other breaches of human rights.

79. The Commission supports giving a Tasmanian Human Rights Commission a broad range of functions including:

- monitoring human rights protections under the Charter of Rights;
- advising government on compliance with the Charter of Rights;
- intervention role as amicus curiae or intervener in court proceedings;
- promoting awareness and understanding of the operation of the Charter of Rights (both within the broader community and court system);
- encouraging government agencies and authorities to adopt policies and programs which are compatible with the Charter of Rights;
- preparing an annual report on the operation of the Charter of Rights to be tabled by the Attorney-General in Parliament;
- examining enactments to see if they comply with the Charter of Rights;
- reviewing practices of public authorities, including Government Departments, for Charter of Rights compatibility;
- making submissions to the Parliamentary Standing Committee on Human Rights about the human rights implications of new bills;
- promoting understanding and acceptance of, and compliance with, the Charter of Rights. This may include undertaking research and developing education programs to promote the objectives of the Charter.

Recommendation 17: The Charter of Rights should establish an independent Tasmanian Human Rights Commission.

¹ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966. At http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (viewed 16 November 2010).

² Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), at http://www.department.dotag.wa.gov.au/H/human_rights_report_2007.aspx?uid=0053-1186-4534-3685 (viewed 7 June 2009), pp 76 - 77; Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), at http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf (viewed 16 November 2010), pp 169 - 170; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), p 100, at <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 16 November 2010).

³ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966. At http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (viewed 16 November 2010)

⁴ M Hunt, *The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia* (Speech delivered at the Australian Human Rights Commission, Sydney, 17 February 2009). At http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html (viewed 16 November 2010).

⁵ Victorian Equal Opportunities and Human Rights Commission, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (2009), p 30. At <http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp> (viewed 7 June 2009), p 71.

⁶ Chief Justice Spigelman argues that the words 'consistently with their purpose' in the Victorian Charter and the ACT Human Rights Act are words of limitation which do not permit the courts in Victoria and the ACT to apply the interpretive obligation as expansively as had occurred in the UK. See The Hon Chief Justice J Spigelman AC, *The Application of Quasi-Constitutional Laws* (Speech delivered at the 2008 McPherson Lecture Series, Brisbane, 11 March 2008), p 9. At [http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/\\$file/spigelman110308.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$file/spigelman110308.pdf) (viewed 4 June 2009), , p 32; The Hon M McHugh AC QC, *A Human Rights Act, the courts and the Constitution* (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009). At http://humanrights.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc (viewed 4 June 2009), p 26.

⁷ See *Kracke v Mental Health Review Board* [2009] VCAT 646, para 206 where Justice Bell said '[t]he subject of s 32(1) is everybody. It applies to the courts, tribunals, government officials and public authorities'.

⁸ *Human Rights Act 1998* (UK), ss 4, 36; *Human Rights Act 2004* (ACT), s 32. In Victoria, this is known as a 'declaration of inconsistent interpretation': *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36.

⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5); *Human Rights Act 2004* (ACT), s 32(3).

¹⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37; *Human Rights Act 2004* (ACT), s 33(3).

¹¹ J Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169, p 175. See also D Meagher, 'Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework' (2005) 10 *Deakin Law Review* 686.

¹² For definitions of 'public authority' in other jurisdictions, see *Human Rights Act 2004* (ACT), s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4; *Human Rights Act 1998* (UK), s 6.

¹³ These services include those in the areas of welfare services, health care, and management of prisons and other detention facilities.

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(2); a similar definition is found in the *Human Rights Act 2004* (ACT), s 40(1)(g).

¹⁵ Tasmanian Law Reform Institute, note 2, p 72.

¹⁶ For information on the complaints process, see Australian Human Rights Commission, *Federal Discrimination Law Online*, ch 6. At <http://www.humanrights.gov.au/legal/FDL/index.html> (viewed 16 November 2010).

¹⁷ *International Covenant on Civil and Political Rights* (ICCPR), 1966, art 2(3). At http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (viewed 22 November 2010)

¹⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 6. At http://www.unhchr.ch/html/menu3/b/d_icerd.htm (viewed 16 November 2010); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, art 14. At <http://www2.ohchr.org/english/law/cat.htm> (viewed 6 November 2010); *Convention on the Elimination of All Forms of Discrimination against Women*, 1979, art 2(c). At <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm> (viewed 29 May 2009); *International Covenant on Civil and Political Rights*, 1966, art 2(3). At http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (viewed 22 May 2009); *International Covenant on Economic, Social and Cultural Rights*, 1966, art 2(1). At http://www.unhchr.ch/html/menu3/b/a_cescr.htm (viewed 16 November 2010); *Convention on the Rights of the Child*, 1989, art 4. At <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (viewed 16 November 2010); *Convention on the Rights of Persons with Disabilities*, 2006, art 4. At <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (viewed 16 November 2010). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), para 5. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (viewed 16 November 2010).

¹⁹ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16. At <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (viewed 16 November 2010).

²⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, UN Doc E/C.12/1998/24, CESCR (1998), para 9. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument) (viewed 16 November 2010). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3*, note xvii, para 5.

²¹ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46P(4)(d). See also Australian Human Rights Commission, *Federal Discrimination Law Online*, note 16, ch 7.

²² *Human Rights Act 1998* (UK), s 8(3).

²³ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

²⁴ See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.

²⁵ See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.

²⁶ *Convention on the Rights of Persons with Disabilities* (Disability Convention), 2006. At <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (viewed 17 November 2010).