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Dear Mr Webster,

Re: A Charter of Human Rights and Responsibilities for Tasmania

Thank you for the opportunity to make a submission regarding a Charter of Human Rights and Responsibilities for Tasmania. It has been our pleasure to reflect on our experiences in Victoria and provide comments and suggestions for the Tasmanian Department of Justice to consider when deciding how best to protect and promote human rights in Tasmania.

Should you wish to discuss any matter raised in this submission please contact the Liberty Victoria office or the President, Professor Spencer Zifcak, directly.

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SUBMISSION

A Charter of Human Rights and Responsibilities for Tasmania

INTRODUCTION

Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights. Officially known as the Victorian Council of Civil Liberties Inc, Liberty's lineage extends back to the Australian Council for Civil Liberties (ACCL). Throughout its history, Liberty Victoria has defended the right of individuals and organisations to free speech, freedom of the press, freedom of assembly and freedom from discrimination on the grounds of race, religion or political belief. We are now one of Australia's leading civil liberties organisations.

We aim to inform and influence public debate and government policy on a range of human rights and civil liberties issues. Over the years, Liberty Victoria has campaigned for the protection and promotion of human rights in Victoria and federally. Liberty played a key role, for example, in lobbying the Victorian Government to introduce the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) and called on the Federal Government to enact an Australian Human Rights Act.¹

Consistent with this position, Liberty Victoria supports the legislative protection and promotion of human rights through the enactment of a Charter of Human Rights in Tasmania. The Model for a Tasmanian Charter (Tasmanian Model) proposed in the Directions Paper is commendable, if enacted it would be the most comprehensive and progressive human rights act in Australia.

In this submission, therefore, Liberty Victoria makes some further comments and suggestions for the Tasmanian Department of Justice (DOJ) to consider when deciding how best to protect and promote human rights in Tasmania. As a Victorian based organisation, our submission is informed by the provisions in and operation of the Victorian Charter.

Prior to commencing with the substance of this submission, Liberty would also like to commend the submissions from the Human Rights Law Resource Centre (HRLRC) and the Institute of Legal Studies of the Australian Catholic University (ILS) to the Tasmanian DOJ. Liberty also supports draft human rights legislation in the form proposed in the New Matilda Human Rights Bill.²

¹ Liberty Victoria's submissions are available online at: www.libertyvictoria.org.au.

² New Matilda Human Rights Bill 2009. A copy of this proposed bill may be downloaded at <http://www.humanrightsact.com.au/2008/about-the-campaign/>.

RIGHTS AND FREEDOMS

The human rights proposed for protection in the Tasmanian Model are adequate but insufficient. Liberty believes that the Tasmanian Government should embrace the protection not just of civil and political rights but also the protection of economic, social and cultural rights (ESCR). The Tasmanian Charter should include reference to all the principal human rights enshrined in the:

- *International Covenant on Civil and Political Rights (ICCPR)*³
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴

Australia is a party to both treaties and legal obligations to respect, protect and promote the human rights included extends to all Australian governments.⁵

At first glance the Tasmanian Model reflects the articulation of rights in the Victorian Charter, the *Human Rights Act 2004 (ACT)* (ACT Human Rights Act) and international human rights treaties. However, as recognised by the HRLRC in its submission there are some deficiencies in the articulation of the following rights:

- the right to equality and non-discrimination
- the right to liberty and security of the person
- the right to humane treatment when deprived of liberty
- the right to a fair hearing
- minimum guarantees when charged with a criminal offence
- protection from retrospective laws
- freedom of thought, conscience and religion
- freedom of movement
- the right to take part in public life and
- cultural rights.⁶

Liberty Victoria supports the recommendation of the HRLRC that the Tasmanian Model 'should be reconsidered and amended to more consistently reflect the rights as

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976).

⁵ Article 50 of the ICCPR states – 'The provisions of the present covenant shall extend to all parts of federal States without any limitation or exception.'

⁶ Human Rights Law Resource Centre (HRLRC), *Submission: Towards a Tasmanian Charter of Rights* (2010) 19-22.

articulated in the ACT Human Rights Act, Victoria Charter and ICCPR'.⁷

Liberty Victoria does not support the categorisation of human rights into the ten categories of rights as done in the Tasmanian Model. The ten categories of rights proposed are not useful and there is the risk that the understanding and interpretation of certain human rights could be constrained by reference to such categories. Instead of categorising rights, an approach similar to the Victorian Charter should be adopted and a heading for each human right listed in a Tasmanian Charter should be provided.

Additional Rights

The 'Additional Rights' proposed in the Tasmanian Model includes some ESCR, as well as some disability and environmental rights. As stated earlier, Liberty Victoria supports the inclusion of economic, social and cultural rights, alongside civil and political rights. This is because of the fundamental principle that human rights are, in the end, indivisible.

The protection and promotion of human rights enshrined in the ICCPR and ICESCR would benefit all Tasmanians, particularly the most vulnerable. Liberty also supports the inclusion of a right to environmental sustainability in recognition of the fact that such a right is fundamental to the achievement of inter-generational justice.

Having said this, Liberty recognises that economic and social rights have a special character. That is, their protection necessarily involves the expenditure of public money. Consequently, a special interpretative provision should be included to ensure that the attainment of economic and social rights does not unreasonably impact on the allocation of public funds by the Tasmanian Government. The New Matilda Human Rights Bill 2009 presented to the Australian Government included economic and social rights,⁸ and consequently a special interpretative provision stating:

In relation to ss.37-41, it is acknowledged that these human rights are subject to progressive realisation and that their realisation may be limited by the financial resources available to government. Accordingly, in any proceeding under this Act that raises the application and operation of these human rights, a court must consider all the relevant circumstances of the particular case including –

⁷ Ibid, Recommendation 4, 22.

⁸ New Matilda Human Rights Bill 2009, sections 38-42, above n 2.

- (a) *the nature of the benefit or detriment likely to accrue or be suffered by any person concerned; and*
- (b) *the financial circumstances and estimated amount of expenditure required to be made by a public authority to act in a manner compatible with human rights*

before determining that the provisions of any law or that the acts or conduct of a public authority are incompatible with the Act.⁹

A similar interpretative provision should be adopted by the Tasmanian Government.

RESPONSIBILITIES

In Liberty Victoria's view a detailed list of human responsibilities is not a necessary element for an effective Human Rights Act. Liberty agrees with the Tasmanian Law Reform Institute that 'recognition of rights implicitly involves recognition of responsibilities'¹⁰ and thus there is no need to list responsibilities alongside rights and freedoms.

Quite apart from this, Liberty notes that responsibilities, particularly as between citizen and citizen, are of their nature unenforceable. Their inclusion in legislation, therefore, is unlikely to yield any benefit but may produce considerable difficulty, as for example, in legislating for a legally enforceable duty placed upon citizens to protect the human rights of others.

Liberty Victoria recommends, therefore, that the Tasmanian Government adopt the preamble approach to promoting the concept of human responsibilities as taken by the Victorian Government and the ACT Government. The preamble in the Victorian Charter, for example, states that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others'.¹¹ Liberty also refers DOJ to the excellent preamble to the draft New Matilda Human Rights Bill.¹²

⁹ New Matilda Human Rights Bill 2009, above n 2, section 43. The section is referring to: the rights of people with disabilities, the right to education, the right to work, right to an adequate standard of living and the right to the highest standard of physical and mental health.

¹⁰ Department of Justice (Tasmania), *A Charter of Human Rights and Responsibilities for Tasmania* (2010) 27.

¹¹ *Charter of Human Rights and Responsibilities 2006* (Vic) Preamble.

¹² New Matilda Human Rights Bill 2009, above n 2.

REASONABLE LIMITS

Liberty Victoria believes that limitations on human rights are only permissible if they are reasonable and can be demonstrably justified in a free and democratic society. The general limitations clause in the Victorian Charter, section 7(2), is operating well in Victoria and the Tasmanian Government should include such a clause with similar terms in a Tasmanian Charter. Notably, the Tasmanian Model does include such a section.¹³

There are a number of human rights under international law that should not be limited in any way, at any time. The Tasmanian Model provides that the following human rights and freedoms are not to be limited:

- the right to freedom from torture and cruel, inhuman or degrading treatment or punishment
- freedom from discrimination
- the right not to be held in slavery
- freedom from genocide
- freedom from retrospective criminal punishment and
- the right to be recognised as a person before the law.

Liberty proposes that the following rights should also be classified as rights that cannot be limited by the Tasmanian Government:

- the right to life
- the right to a fair trial
- the right to freedom of thought, conscience, religion and belief and
- the prohibition on imprisonment for failure to fulfil a contractual obligation.

In addition to stating that the aforementioned rights cannot be limited, the Tasmanian Charter should identify the human rights that cannot be derogated from. Liberty refers the DOJ to the HRLRC's submission, Part 6 – Reasonable Limitations on Human Rights, for a thorough consideration of a limitations clause, absolute rights and 'derogable' rights.¹⁴

Specific limitations

¹³ Department of Justice (Tasmania), above n 10, Tasmanian Model - 8.1.5, 8.1.5.1.

¹⁴ HRLRC, above n 6, 29-35.

In terms of including specific limitations on certain rights, Liberty Victoria would like to highlight the importance of careful and considered legislative drafting of specific limitations. Without careful and considered drafting the wording of specific limitations may be without any practical effect and result in uncertainty and confusion. The ILS identifies section 15 of the Victorian Charter as an example of a specific limitation without practical effect in the context of other provisions in the Victorian Charter.¹⁵

Savings provision

Liberty Victoria does not recommend the inclusion of any savings provision, similar to section 48 of the Victorian Charter, which would prohibit a Tasmanian Charter from operating with respect to any particular issue or area. Section 48 of the Victorian Charter excludes any law relating to abortion or child destruction from scrutiny in accordance with the Victorian Charter. As a consequence of section 48 the human rights implications of the *Abortion Law Reform Act 2008* (Vic) were not considered to the detriment of the exercise of freedom of conscience.

The Tasmanian Model includes a subsection qualifying the right to life similar to section 9(2) of the ACT Human Rights Act and does not refer to a savings provision.¹⁶ The controversy about abortion laws and a Charter should therefore be avoided.

SUBORDINATE LEGISLATION

Subordinate legislation is the responsibility of Executive Government. Thus, empowering the courts to invalidate subordinate legislation does not interfere with the relationship between the courts and Parliament but rather encourages a dialogue. Liberty supports the suggestion that when subordinate legislation is declared incompatible with a Tasmanian Charter by the Supreme Court, Parliament should be required to expressly validate the provision by amending the primary legislation. This would ensure that all human rights limitations are scrutinised by the Parliament properly.

Liberty Victoria agrees with the HRLRC that the section applicable to the interpretation of subordinate legislation, section 32(3), of the Victorian Charter lacks

¹⁵ Institute of Legal Studies (ILS) – Australian Catholic University, *Submission – Human Rights Legislative Project Directions Paper* (2011).

¹⁶ Department of Justice (Tasmania), above n 10, Tasmanian Model – 8.1.4.1.

clarity.¹⁷ Further, Liberty agrees with the HRLRC's recommendation that:

For the sake of clarity, the Tasmanian Charter should clearly and expressly state that subordinate instruments are invalid if they are incompatible with human rights, unless the empowering Act provides for the making of incompatible instruments.¹⁸

INTERPRETATIVE ROLE OF THE COURTS

Liberty Victoria is in agreement with the Tasmanian Law Reform Institute that a provision directing courts to consider comparative and international human rights instruments and law when interpreting human rights should be included in a Tasmanian Charter.¹⁹ The Tasmanian Model does not include such a provision. Liberty recommends a provision similar to section 32(2) of the Victorian Charter be included in a Tasmanian Charter.

The wording of the statutory interpretation provision in the Tasmanian Model is appropriate in Liberty Victoria's view. It is similar to section 32(1) of the Victorian Charter. For a detailed discussion of the 'Interpretation of Laws Consistently with Human Rights' including how this provision is operating in Victoria, Liberty recommends the HRLRC submission.²⁰

HUMAN RIGHTS COMMISSION AND CHIEF COMMISSIONER

Liberty Victoria supports the establishment of a Human Rights Commission (HRC) with a Chief Commissioner.²¹ The functions envisaged for the Commission are comprehensive,²² and would encourage the protection and promotion of human rights in Tasmania. The Tasmanian Model includes a number of judicial and non-judicial protective mechanisms involving a Human Rights Commission. The Tasmanian Model allows for:

- Individuals or representative bodies to make complaints to the HRC when:
 - 'they believe that a statutory provision, provision in subordinate legislation or a law is inconsistent with the Charter.'²³

¹⁷ HRLRC, above n 6, 39-40.

¹⁸ Ibid, Recommendation 14, 40.

¹⁹ Department of Justice (Tasmania), above n 10, 31.

²⁰ HRLRC, above n 6, 46-7.

²¹ Department of Justice (Tasmania), above n 10, Tasmanian Model – 8.2.1.1.

²² Ibid, Tasmanian Model – 8.2.1.2.

²³ Ibid, Tasmanian Model – 8.4.4.2.

- ‘they believe that a decision, service or program is inconsistent with the Human Rights Charter.’²⁴
- The HRC to undertake own motion compliance inquiries if the HRC believes that an inconsistency with the Charter may be of a significant or systemic nature.²⁵
- The HRC after completing an assessment of a complaint or own motion compliance inquiry to apply to the Supreme Court for a declaration of incompatibility when there are significant and proper grounds to do so.²⁶

In relation to the HRC’s ability to apply to the Supreme Court, Liberty is of the view that further detail is required. The ILS identifies two areas that could be problematic without further clarification. First, there is the potential that the scheme may require the courts to exercise non-judicial powers.²⁷ Second, problems may arise in regards to the Commission’s review at first instance.²⁸ It is important that the role of the HRC and other protective mechanisms are clear to ensure the effective and efficient protection of human rights.

CONCLUSION

Liberty would like to conclude by reiterating our support for the Tasmanian Model. Should you wish to discuss any matter raised in this submission please contact the Liberty Victoria office or the President, Professor Spencer Zifcak, directly.

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²⁴ Ibid, Tasmanian Model – 8.4.5.

²⁵ Ibid, Tasmanian Model – 8.4.4.4, 8.4.6.

²⁶ Ibid, Tasmanian Model – 8.4.4.5.

²⁷ ILS, above n 15.

²⁸ Ibid.