



Human Rights in Tasmania - In on the Act

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Brenda Bailey, Senior Policy Officer

Gemma Namey, Solicitor

Edward Santow, Chief Executive Officer

Lou Schetzer, Research and Policy Officer

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on human rights

PIAC welcomes the opportunity to comment on the proposed Human Rights Charter of Rights and Responsibilities for Tasmania. PIAC conducted a range of community consultations for the National Human Rights Consultation and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take part. This included working with people experiencing homelessness, people with mental illness, Indigenous people, prisoners and former prisoners, older Australians, people with disability, and migrant women.

Much of PIAC's current and previous substantive work involves human rights. This includes work on privacy, discrimination, freedom of information, detention, government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on people's human rights and on their social and economic situation. A significant number of PIAC's casework clients have direct experience of what it means to have their human rights infringed or not respected.

PIAC has also focused specifically on human rights policy development for a number of years. Since 2003, PIAC has had a project, *Protecting Human Rights in Australia*, as a core area of its work. This has been a three-stage project.

- The development of a human rights education kit, *Protecting Human Rights in Australia: An Education Kit*, to provide members of the Australian community with basic information about human rights and about how those rights are protected, the extent of and gaps in the protection, and to illustrate the importance of human rights through case studies of instances of human rights being abused or not protected.
- The development and delivery nationally of a *Protecting Human Rights in Australia* ‘train-the-trainer’ program. PIAC conducted multiple training workshops in every state and territory of Australia, targeting community educators and other workers with the capacity to use the materials with their own communities or members. PIAC delivered workshops to over 800 trainers, community workers and educators across Australia.
- The promotion of community discussion and political engagement with human rights, with a focus on achieving comprehensive human rights protection in Australia. PIAC has provided responses to the various inquiries conducted across Australia in the last five years into human rights protection.

Response to the Directions Paper

This submission responds to the questions listed in the Directions Paper. PIAC’s responses to those questions are based on its experience (especially in representing disadvantaged clients in human rights related matters) and its extensive research. A summary of PIAC’s recommendations is contained in the Appendix to this submission.

Rights and Freedoms

1. Are the rights recommended in Table 1¹ of this document appropriate to Tasmania, and are they sufficient?

PIAC supports all of the rights listed in Table 1 for inclusion in the proposed Charter of Human Rights for Tasmania (Charter).

Human rights are interdependent, which renders them indivisible and they attach to each person by virtue of their humanity. This indivisibility is recognised at international law. The reliance of one right on the existence of another can be demonstrated by the fact that freedom of association can become meaningless if there is no right to security of person, or that the right to education is meaningless if there is no freedom of thought. All rights adopted in the Charter should receive equal protection and promotion².

¹ Tasmanian Government, *A charter of human rights and responsibilities for Tasmania*, October 2010, Table 1

² The Vienna World Conference on Human Rights in 1993 declared that the correct approach was to regard all categories of rights as indivisible, universal, interrelated, and interdependent: see Vienna Declaration, UN Con A/CONF 157/24

2. What rights from the International human rights treaties, not listed in Table 1, would you like to see included, if any?

PIAC recommends that the Tasmanian Government give legislative force to all of the rights set out in various international agreements to which Australia is a party through ratification or accession, which include the:

- Convention on the Prevention and Punishment of the Crime of Genocide³;
- International Convention on the Elimination of all Forms of Racial Discrimination⁴ (CERD);
- International Covenant on Economic, Social and Cultural Rights⁵ (ICESCR);
- International Covenant on Civil and Political Rights⁶ (ICCPR);
- Convention on the Elimination of all Forms of Discrimination Against Women⁷ (CEDAW);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸ (CAT);
- Convention on the Rights of the Child⁹ (CROC); and
- Convention on the Rights of Persons with Disabilities¹⁰ (CRPD).

Tasmania should recognise the growing emphasis placed on ‘third generation’ rights, that is, rights concerning the environment in which humans live, and the effect the environment has on people’s capacity to enjoy their human rights. Third generation rights introduce the concept of *community* or shared rights, as distinct from solely individual rights. These rights are developing in response to the growing recognition of the effect

³ Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ratified by Australia on 8 July 1949 (entered into force for Australia on 12 January 1951).

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ratified by Australia on 30 September 1975.

⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

⁶ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

⁷ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ratified by Australia 28 July 1983 (entered into force for Australia on 27 August 1983).

⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

⁹ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991).

¹⁰ Convention on the Rights of Persons with Disabilities, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008 (entered into force for Australia on 16 August 2008).

humans have on the environment, and also the effect the environment has on human rights.

Over sixty countries have recognised the human right to a healthy environment in their national constitutions.¹¹ South Africa's Constitution provides a good articulation of third generation rights by stating that everyone has the right:

- to an environment that is not harmful to their health or well being; and
- to have the environment protected, for the benefit of present and future generations.¹²

PIAC understands human rights to accrue to natural persons from the time of birth. The drafting of the Charter should reflect this and not extend beyond it. PIAC understands the right to life, protected in the ICCPR, to be a right that begins at the time of birth, and to restrain the Government from taking the life of any person in its jurisdiction. PIAC does not understand that right to prevent a woman from exercising her right to exercise control over her own body, or to prevent an informed and voluntary decision to take one's own life. The debate about a Charter should not become a debate about women's access to abortion or about euthanasia as both of these issues should be debated fully in Tasmania, leading to a clear and comprehensive policy position formulated in legislation outside of the Charter.

Recommendations - Rights and Freedoms

1. *The Tasmanian Government should adopt and implement a Charter of Human Rights based on the 'dialogue model'.*
2. *The Charter should cover all rights from international agreements to which Australia is a party.*
3. *The Charter should include third generation rights, such as those rights concerning the environment.*

Responsibilities

3. **Is there a need to specify human responsibilities in detail alongside the human rights and freedom, or is it sufficient to have an overview statement that the rights and freedoms impose responsibilities? If so, what, if any, consequences should flow from a failure to fulfil responsibilities?**

Human rights come coupled with corresponding responsibilities in the sense that the ability to exercise one's human rights is balanced against everyone else's ability to exercise their rights. These responsibilities arise from the exercising of human rights and should not be legally enforceable in themselves. They also should not be considered as establishing behaviour necessary to 'unlock' access to rights. For example, the recognition of human rights should not be preconditioned on the performance of certain

¹¹ Ayesha Dias, *Human rights, environment and development: with special emphasis on corporate accountability, Human Development Report 2000* (2000) <<http://originhdr>.

¹² *Constitution of the Republic of South Africa 1996* (South Africa) s 24.

duties, nor should it be possible to remove human rights arbitrarily.

There are clearly people in the community, including within the legislature, who believe that rights should be preconditioned particularly in relation to the rights of prisoners and alleged offenders. In an examination of the arguments for an international convention on responsibilities Ben Saul noted that the United Nations had considered this matter in 2000 and reported that responsibilities were considered as part of the process that led to the United Nations Declaration on Human Rights¹³. The analysis concludes with the finding that human rights are adequate because they do recognise duties, obligations and responsibilities and fulfilling rights and responsibilities requires 'local education about, and compliance with, the terms of the (human rights) instruments'¹⁴.

PIAC submits that the international human rights framework provides for the placing of appropriate limits on rights through, for example, the recognised need for governments to be able to punish offenders, including by limiting their freedom of movement and association.

PIAC submits that reference to responsibilities should be included in the preamble or objects provision of the Act, rather than in the substantive provisions of the Charter. The preamble could explain that the exercising of human rights requires respect for and taking care not to infringe other people's human rights.

Recommendation - Responsibilities

4. *The Charter should refer to responsibilities in the preamble or objects provision of the Act.*

Reasonable limits

4. Is having only a general limitation clause that applies to all but a small number of rights appropriate?

PIAC supports a 'reasonable limits' clause in the Charter. Limitations establish a principled framework for balancing competing rights, and for the compromises that sometimes need to be struck between human rights and other interests. PIAC supports the view that "rights are not absolute and may be limited in certain circumstances, including for the protection of the competing rights of others".¹⁵

PIAC recommends that the Charter be subject to the same limitations provision that applies in the Victorian and ACT human rights statutes. The relevant Victorian provision states:

¹³ Saul, B, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' (2001) 32 *Columbia Human Rights Law Review* 565.

¹⁴ Ibid, Saul, B. 617

¹⁵ Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 33.

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.¹⁶

Recommendation - Reasonable limits

5. *The Charter should include a 'reasonable limits clause', modelled on the Victorian and ACT human rights statutes.*

Scrutiny of Acts, Subordinate Legislation and By-Laws

5. Should the Tasmanian Parliament have the right to pass overriding declaration where the Parliament disagrees with a declaration of incompatibility by the Supreme Court?

An override provision, which allows Parliament to pass legislation that expressly overrides the operation of the Charter, does not exist in the *Human Rights Act 2004 (ACT)*, the *Human Rights Act 1998 (UK)* or the *Bill of Rights Act 1992 (NZ)*. PIAC notes that such an override provision exists in the *Canadian Charter of Human Rights and Freedoms*.¹⁷ However, it is important to note that Canada's Charter is constitutionally entrenched and, as such, courts are able to strike down legislative provisions found to be incompatible with the Charter. Courts will have no such power under the Tasmanian Charter. Accordingly, there is not the same need for an override provision, under the Charter model currently being considered in Tasmania.

Section 31 of the Victorian *Charter of Human Rights and Responsibilities Act* allows the Victorian Parliament to legislate to 'override' the Charter in exceptional circumstances. Such a legislative override has the effect of exempting the provision that is the subject of the override from the operation of the Charter (including from the interpretive provision). In addition, the provision that is the subject of the override cannot be the subject of a Supreme Court Declaration of inconsistent interpretation.¹⁸ This is for a period of five years,¹⁹ after which time Parliament may renew the override for a further five years.²⁰ Under the Victorian Charter, the Victorian Parliament may legislate the override as part of the original legislation. A Member of Parliament who introduces a Bill containing an override declaration must make a statement explaining the exceptional circumstances

¹⁶ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7(2).

¹⁷ *Canadian Charter of Rights and Freedoms*, Part I, *The Constitution Act 1982 (Canada)* s 33.

¹⁸ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 31(6).

¹⁹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 31(7).

²⁰ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 31(8).

that justify the override declaration.²¹ This has the effect of preventing any dialogue or Charter interpretation from the courts. In addition, Parliament may also legislate the override in response to a declaration of inconsistent interpretation from the Supreme Court of Victoria.

PIAC submits that such an override provision is not necessary in a statutory Charter, such as the present, under which courts do not have the power to invalidate legislation. If Parliament intends to enact legislation that is not compatible with the Charter, this will be reflected in the Statement of Incompatibility tabled in Parliament with the legislation. While the Supreme Court may still issue a Declaration of Incompatibility in relation to the provision, the fact that a Statement of Incompatibility was tabled with the legislation would indicate the intention of Parliament for the provision to be incompatible with the Charter. In any case, under the Charter, Parliament would not be required to remedy the incompatibility in response to the Supreme Court Declaration. An override provision would not add anything to this process, which already reinforces the sovereignty of Parliament allowing Parliament to enact legislation that is not consistent with the Charter.

Therefore, PIAC submits that it is not necessary for the Tasmanian Parliament to have the power expressly to declare that a provision in an Act overrides the Charter, such that the Charter has no application to the provision.

PIAC notes that under the proposed Tasmanian model, an override provision would only be enacted in response to a court's Declaration of Incompatibility. The proposal is that in the event that the Supreme Court makes a Declaration of Incompatibility, within 30 sitting days thereafter, Parliament must respond either by repealing the impugned legislative provision, amending the legislative provision so that it is compatible with the Charter, or confirming the legislation by enacting an override provision. The Tasmanian Law Reform Institute also recommended that enactment of override clauses should be subject to other strict limitations:

- non-derogable rights should be excluded from the operation of override clauses;
- the power to enact override clauses should be confined to exceptional circumstances, and the Minister responsible for the legislation should outline these in a statement of incompatibility to Parliament;
- legislation containing an override clause should lapse after two years (unless Parliament reconfirms its continued operation);
- subsequent renewal of override legislation must be subject to the same limitations and procedures as the original enactment.²²

PIAC identifies that there is value in this model for an override clause, as long as the strict limitations recommended by the Tasmanian Law Reform Institute are adopted. In this way, the override facilitates and enhances the dialogue between Parliament and the Courts, rather than facilitating a bypass of the dialogue.

²¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(3).

²² Tasmania Law Reform Institute (2007), *A Charter of Rights for Tasmania*, Report No. 10, University of Tasmania, October 2007, 92-93.

6. Is it appropriate that after the Supreme Court declares subordinate legislation (e.g. regulations) and Council by-laws to be incompatible with the Charter they become invalid, unless Parliament changes the Act of Parliament to make them valid?

PIAC strongly supports the principle that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, that they become invalid, unless Parliament amends the primary legislation to make them valid. This simply reflects the principle of legality.

Such a provision would be useful, at least to avoid any doubt, even if, strictly speaking, this provision might not be necessary. That is, under the Charter's interpretative provision, any primary legislation will have to be interpreted in a manner consistent with the Charter, so far as it is possible to do so consistently with the legislation's purpose. Therefore it is arguable that any subordinate legislation which is incompatible with the Charter would have to be inconsistent and therefore beyond the ambit of the primary legislation. As such, the provision in the subordinate legislation that could not be interpreted in a manner that is compatible with the Charter, would be able to be struck down by a court under the usual rules of interpreting subordinate legislation.

Such a provision is only a modest, incremental extension of the current position at common law, as reflected in the decision of the Federal Court of Australia in *Evans v State of New South Wales*²³.

Recommendation - Scrutiny of Acts, Subordinate Legislation and By-Laws

6. *The Charter does not need to include an override provision that allows Parliament to pass legislation that expressly overrides the operation of the Human Rights Charter. Such a provision is unnecessary, as Parliament can introduce and pass legislation that is incompatible with the Charter.*
7. *The Charter should include limitations on the override clause as recommended by the Tasmanian Law Reform Institute, especially the strict limitations on when such an override clause may be enacted.*
8. *The Charter should include a definition of 'exceptional circumstances' that is consistent with the term 'public emergency' as used in Article 4 of the International Covenant on Civil and Political Rights.*
9. *The Charter should include a provision stating that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, they become invalid, unless Parliament amends the primary legislation to make them valid.*

Role of the Courts

7. **Should the Charter expressly point the courts and other branches of government to international law and the judgments of foreign and international courts and tribunals when interpreting human rights as is**

²³ *Evans v State of New South Wales* [2008] FCAFC 130.

the case in the ACT and Victoria in relation to interpretation by courts and tribunals?

The Charter should expressly allow for the consideration of international and comparative jurisprudence on human rights by courts and tribunals. On one view, such a provision might be thought unnecessary, given that this is something that Australian courts and tribunals routinely do in any event. However, in the area of human rights, which draws heavily on international and comparative law, such a provision would be useful to emphasise that Tasmanian courts and tribunals can and should allow them to consider international law, and the judgments of foreign and international courts and tribunals, relevant to human rights in interpreting the human right. The ACT Human Right Act²⁴ and the Victorian Charter²⁵ provide examples of how this matter can be included in legislation.

Parliament is required to respond to a Declaration of Incompatibility issued by the Supreme Court, and is limited in its capacity to confirm legislation that is incompatible with the Charter. Specifically, there are particular rights (i.e. non-derogable rights) that cannot be overridden, and the override declaration can only be made in exceptional circumstances. PIAC submits that the Charter should include a definition of 'exceptional circumstances' that is consistent with the term 'public emergency' as used in Article 4 of the *International Covenant on Civil and Political Rights*, which states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

8. The Charter requires courts and tribunals to interpret laws consistent with human rights, should that be subject to the requirement that courts and tribunals ensure an interpretation that best achieves the purpose of the legislation, as is the case in the ACT and Victoria?

PIAC agrees that it is the proper role of Tasmanian courts and tribunals to interpret laws consistently with the human rights protected in the Charter, subject to the expression of contrary legislative intent.

Tasmanian courts and tribunals need to play an important role in human rights protection. Ensuring that all Tasmanian laws are interpreted consistently with the human rights contained in the Charter is crucial to ensuring the protection and enforcement of human rights. The inclusion of such a requirement in the Charter codifies and reinforces the well-established common law principle that, where there is ambiguity, legislation should be interpreted consistently with human rights and so that it advances Australia's international treaty obligations²⁶ and that a court should not impute to the Parliament an

²⁴ *Human Rights Act 2004* (ACT) Part 4 S31(1)

²⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) S32(2)

²⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language²⁷.

Providing that the interpretative role of courts and tribunals be constrained by legislative intent, it preserves parliamentary supremacy and the separation of powers. It ensures that courts do not inappropriately stray from the legitimate judicial function of interpreting legislation to improper judicial law-making. Such a requirement will ensure that courts are not able to redraft legislation in a manner that undermines legislative intent.

Although it is now well accepted in the common law²⁸ and in legislation²⁹ that statutory interpretation should be purposive, inclusion of such a requirement in the Charter would ensure that this principle is maintained.

9. Is it appropriate to limit the power to make a declaration of incompatibility to the Supreme Court and only Supreme Court?

In considering which courts should be invested with the power to make a declaration of incompatibility it is important to balance the need for affordability and accessibility with the sometimes competing need to ensure that decisions have appropriate authority and are regarded seriously.

Accordingly, PIAC submits that only Tasmania's superior and most authoritative court should have the ability to make Declarations of Incompatibility. However, in order for this process to be accessible, the Charter should empower any lower court or tribunal is able to directly refer a question of law on Charter interpretation to the Supreme Court.

In addition, PIAC supports the proposal in the Directions Paper for individuals or representative bodies to make a complaint to the Human Rights Commission when they believe that some primary or subordinate legislation is inconsistent with the Charter. The Directions Paper proposes that the Commission may make an application to the Supreme Court for a declaration of incompatibility where the Commission concludes that there are significant and proper grounds to do so, and subject to the *Boilermakers* principle. This mechanism will assist in making the process more accessible, particularly for disadvantaged individuals who would have difficulty in affording legal representation in proceedings before the Supreme Court.

PIAC also recommends that the Charter provide that individuals will not be personally liable for bearing the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation. Based on its extensive experience in conducting public interest litigation on behalf of socially and disadvantaged members of the community, PIAC is concerned that the usual

²⁷ *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 at [47] (French CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) citing *Coco v The Queen* (1994) 179 CLR 427 at 437 Mason CJ, Brennan, Gaudron and McHugh JJ; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131; and *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).

²⁸ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

²⁹ *Acts Interpretation Act 1931* (Tas) s 8A.

costs rule prevents disadvantaged members of the community from pursuing meritorious claims and is thus a significant barrier to access to justice.

PIAC has particular concerns regarding the costs principles and rules in public interest cases. It is submitted that proceedings referred to the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation comes within the definition of public interest litigation. These proceedings will assist in the development of the law and therefore provides significant benefit to the community. Often litigants to such proceedings will not stand to gain financially from the proceedings. However, under the usual costs rule they risk significant economic consequences if not successful.

The Victorian Law Reform Commission, in its recent *Civil Justice Review*, recommended: 'There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases ...'.³⁰

In 1995, the Australian Law Reform Commission recommended retaining the principle that costs follow the event, but noted that there should be exceptions to the general application of this rule in public interest cases, given that public interest litigation is of significant benefit to the community and that it should not be impeded by the costs allocation rules.³¹

PIAC submits that proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation are of a similar nature in that they have a significant public interest. PIAC submits that individuals should not be personally liable for bearing the costs of such proceedings, given the public interest involved.

Recommendations - Role of the Courts

10. *The Charter should expressly permit the courts and tribunals to consider international and comparative jurisprudence on human rights.*
11. *The Charter should provide that Tasmanian laws must be interpreted consistently with Charter-protected rights, subject to contrary legislative intent.*
12. *The Charter should allow only the Tasmanian Supreme Court to make Declarations of Incompatibility.*
13. *The Charter should allow any lower court or tribunal to refer a question of law on Charter interpretation to the Supreme Court.*
14. *Where an individual makes a complaint to the Human Rights Commission, the Charter should allow the Commission to refer the complaint to the Supreme Court to determine whether a Declaration of Incompatibility should be made.*

³⁰ Victorian Law Reform Commission, *Civil Justice Review*, Report No. 14 (2008) 675.

³¹ Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No. 75 (1995) [13.1], [13.19].

15. *The Charter should not allow individuals to personally bear the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation.*

Enforcement of Rights

10. The model in this paper allows individuals to raise the rights in the Charter as part of another action in a court or tribunal or in judicial review of administrative decisions, is this a level of protection for human rights that is appropriate in Tasmania?

PIAC notes that in public consultations about the protection of human rights in Australia, community members have raised concerns that if rights are breached they should be able to seek redress through a mechanism that is accessible and affordable³². For example, the Brennan Report summarised the consultation on this matter:

Barriers to access to justice—including the complexity of the legal system and the high cost of going to court—were another source of concern. ... There were strong calls for governments at all levels to honour their responsibility to respect human rights and for the court system to play a role in the enforcement of those rights.³³

PIAC recommends that individual claims be adjudicated in Tasmanian courts of all levels, against public authorities that fail to respect, protect or promote the individual's rights recognised in the Charter as enforceable. The Charter should empower courts and administrative tribunals that raise human rights issues to consider the matter, providing they arise from a cause of action within the tribunal's jurisdiction.

Care should be taken to ensure that mechanisms for seeking remedies through the courts are user friendly, inexpensive and are supported through appropriate registry services and access to legal aid and affordable legal services. Allowing courts and tribunals at different levels to consider human rights breaches will improve and individual's access to legal remedies.

11. 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, which can then take it to the Supreme Court, is this sufficient protection?

PIAC endorses the model that 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, who can then take it to the Supreme Court. PIAC submits that such a model enables greater access for disadvantaged individuals to have questions of law on Charter interpretation considered by the Supreme Court.

However, PIAC submits that additional remedies and avenues of complaint should be available to individuals who allege breaches of their human rights. PIAC proposes that

³² See, for example, Victoria, Department of Justice, *Rights, Responsibilities and Respect*, The Report of the Human Rights Consultation Committee, 2005, p115,

³³ Frank Brennan et al, *Human Rights Consultation Committee Report*, September 2009, p20.

individuals who allege breaches of their human rights should be able to make a formal complaint to the proposed Human Rights Commission. The Commission should be vested with the power to investigate the complaint, and also provide conciliation and mediation services as an option for human rights dispute resolution.

In addition, PIAC submits that the Ombudsman of Tasmania, the Energy Ombudsman of Tasmania and the Health Complaints Commissioner of Tasmania be vested with the power to consider Charter human rights complaints within their respective complaint-handling functions. PIAC submits that these alternative dispute resolution schemes offer accessible and affordable avenues for socially and disadvantaged people to resolve complaints. Where a complaint alleges that breaches of human rights under the Charter, it is appropriate that these complaint handling bodies be able to consider those matters under their respective complaint handling functions.

In order to achieve this outcome, the legislation covering the role and functions of these officials will need to be amended to specifically include Charter rights. This may require consequential amendments to the following legislation:

- *Ombudsman Act 1978* (Tas);
- *Energy Ombudsman Act 1988* (Tas); and
- *Health Complaints Act 1995* (Tas).

As outlined further below, PIAC submits that it is an essential function of the proposed Human Rights Commission that it have the power to investigate services and programs of agencies. This will provide some protection for ensuring that programs and services are delivered in a manner that is consistent with human rights; however, in and of itself it will not be sufficient protection. Such a function needs to co-exist with the recognition by the Charter of an individual right of action and enforceable remedies in Tasmanian courts. PIAC reasserts its commitment to the principle that individuals should be able to take action for a breach of a recognised right by a public authority for an appropriate remedy, including financial damages.

12. The model allows for the proposed Human Rights Commission to inquire into services and programs and to make recommendations for greater compliance with the human rights in the Charter, is this necessary in Tasmania and if so, is this sufficient protection in ensuring programs and services are delivered which are consistent with human rights?

PIAC supports an investigative and auditing function for the Human Rights Commission. Such a power is an important mechanism to ensure that human rights are protected and that enforcement of human rights does not rely too heavily on individuals. PIAC submits that the Human Rights Commission should be empowered not only to investigate services and programs but to investigate other areas of an agency's operations and service delivery in which human rights issues may arise. Although agencies will have their own human rights obligations under a Charter, it is appropriate that an external expert body such as the Human Rights Commission perform a supervisory role.

PIAC supports the ability of the Human Rights Commission to investigate an agency on its own motion or following an individual complaint, or a group complaint on behalf of a number of individuals, or by referral from the Attorney-General. Allowing the Human Rights Commission to investigate issues helps alleviate the burden on individuals in bringing complaints themselves, as is the current situation under Tasmanian anti-discrimination legislation. In PIAC's experience of representing clients in discrimination complaints at both a state and federal level, individuals are often dissuaded from pursuing complaints because of the time, effort and cost involved with bringing a complaint. Also, the current Tasmanian anti-discrimination system relies on individuals bringing complaints about discrimination, even if the complaint raises a systemic issue. It may be that a number of individual complaints are about a particular agency that reveals a systemic problem. The proposed investigative role for the Human Rights Commission, and the Charter more generally, will allow systemic issues to be properly examined.

PIAC submits that it is important that the Human Rights Commission have adequate powers to fulfil an investigative function. Such powers should include the ability to request documents, and enter premises and speak with agency staff. The Victorian Equal Opportunity and Human Rights Commission can only investigate a public authority's programs and practices, when requested by the public authority. However, other human rights bodies provide a better model for such a function. The ACT Human Rights Commission has powers to investigate an act or service on its own motion and has the power to enter and inspect correctional centres.³⁴ The Western Australian Equal Opportunity Commission also has the power to undertake a review of governmental policies and practices, including the power to obtain information and documents as part of such a review.³⁵ The power to request documents and enter premises would also be consistent with the powers and functions of the South African Human Rights Commission³⁶ and the newly formed Office of the Information Commissioner in New South Wales³⁷.

Although it is expected that agencies would cooperate with the Human Rights Commission during any investigation, it is nevertheless important that the Human Rights Commission has such powers. This is because in some cases the agency may not agree that there is a human rights compliance issue. However, given the expertise and monitoring role of the Human Rights Commission, it is appropriate that it have such power.

In addition to these investigative powers, PIAC submits that the Human Rights Commission should have a function to audit or monitor the programs and services of agencies. Such an auditing function, in some cases, would replace the need for

³⁴ See *Human Rights Commission Act 2005* (ACT) s 48; *Corrections Management Act 2007* (ACT) s 56; and *Children and Young People Act 2008* (ACT) s 153.

³⁵ See *Equal Opportunity Act 1983* (WA) ss 82, 86. Two reports have been produced by the Equal Opportunity Commission under s 82 both in relation to discrimination in the area of housing *Find a Place* (2004) and *Accommodating Everyone* (2009).

³⁶ *Human Rights Commission Act 54 of 1994* (South Africa), ss 7, 9, 10.

³⁷ *Government Information (Information Commission) Act 2009* (NSW) ss 21, 25, 26.

individual complaints. For example, in PIAC's experience representing clients in disability discrimination complaints in relation to accessible public transport, if a body had a monitoring or audit function to check compliance with disability discrimination law and standards then an individual complaint would not be necessary, as non-compliance would be identified from an audit.

Also, an audit of an agency's programs and services may help to avoid breaches of the Charter. Detecting possible breaches of human rights before they occur, by proactively monitoring programs and agencies, is an important part of protecting human rights. Human rights protection is not limited to enforcement of human rights and remedies but also includes ensuring that programs and agencies are guided by respect for and protection of human rights. Moreover, in performing such a monitoring function the Human Rights Commission will be able to assist agencies to identify issues and find solutions to human rights problems.

PIAC submits that the findings and recommendations of an investigation or audit by the Human Rights Commission should be publicly available. This will ensure that the performance of agencies and Departments is subject to public scrutiny. It will also contribute to the development of a human rights culture both within agencies and the Tasmanian community more generally. When the ACT Human Rights Commission conducted an audit of correctional facilities, one of the aims was to identify systemic issues in correctional facilities in anticipation of the opening of a new prison and in doing so move to a human rights culture.³⁸

In addition, agencies should be required to formally respond to the Human Rights Commission's findings and recommendations. This response should also be made publicly available. Following an investigation or audit, the Human Rights Commission should continue to monitor the agency and ensure that any recommendations are implemented. The Human Rights Commission's findings and recommendations of an investigation or audit should be provided in a report to the Attorney-General, who is then required to table it in Parliament, similar to the requirement in s 41 of the *Human Rights Act 2004* (ACT). It is important that the investigative and auditing functions of the Human Rights Commission are adequately resourced. Further consideration is needed of how frequent agency audits are conducted having regard to the capacity of the Human Rights Commission.

Recommendations - Enforcement of Rights

- 16. The Charter should allow Tasmanian courts at all levels to consider matters within their jurisdiction that raise human rights matters.*
- 17. The Charter should allow an individual who has only a human rights action caused by incompatible provisions in the Act, to take a complaint to the Human Rights Commission, which can then refer the matter to the Supreme Court.*

³⁸ ACT Human Rights Commission, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation*, 2007, at 2-3.

18. *The Charter should allow individuals to make a complaint about breaches of their rights to the Human Rights Commission.*
19. *The Charter should provide the Human Rights Commission powers to conciliate and mediate to reach a resolution to a complaint.*
20. *The Charter should amend the Ombudsman Act 1978, Energy Ombudsman Act 1988 and Health Complaints Act 1995 to allow Charter human rights complaints in respect of their respective complaint-handling functions.*
21. *The Charter should allow individuals to take action for a breach of human rights by a public authority and seek an appropriate remedy, including financial damages.*
22. *The Charter should empower the Human Rights Commission to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. PIAC also recommends that the Human Rights Commission be granted power to conduct reviews of services and programs of agencies on reference from the Attorney-General. The Commission should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
23. *The Charter should provide the Human Rights Commission investigative powers, including the ability to request documents, enter premises and speak with agency staff.*
24. *The Charter should allow findings and recommendations of an investigation or audit by the Human Rights Commission to be made publicly available.*
25. *The Charter should require agencies to formally respond to the Human Rights Commission's findings and recommendations.*
26. *The Government should resource the Human Rights Commission to ensure it can undertake investigative and auditing functions.*

Community Engagement

13. A number of mechanisms are suggested in this paper to encourage community engagement in human rights, are there other things that would be effective in this regard?

PIAC congratulates the Tasmanian Government on its consultation efforts as part of its decision-making and implementation process. In particular, PIAC notes the inquiry conducted by the Tasmanian Law Reform Institute in 2006-2007, which attracted the greatest number of submissions received by any Tasmanian inquiry. PIAC supports the initiatives described in the Directions Paper, and also recommends that the Government:

- fund community engagement, awareness and capacity-building initiatives, focussing on the community sector, professions and sectors that represent people such as unions, local government, and the legal and business sectors;
- draft the Charter and explanatory material in clear and plain language; and
- create a task force to integrate the Charter within Government to advise and monitor the community engagement implementation plan.

The task force should be similar to that established in the United Kingdom. In the UK, a Task Force was created to help Departments and other public authorities prepare for implementation of the *Human Rights Act 1998*, increase awareness, of rights and responsibilities, help build a human rights culture and help identify, promote and support initiatives to assist training and development.³⁹

The Task Force in the United Kingdom consisted of Ministers, non-government organisations, public servants from the Home Office, the Cabinet Office, and the Lord Chancellor's Department, and other interested public sector agencies.

Recommendations - Community Engagement

27. The Government should implement the initiatives for community engagement described in the Directions Paper. In addition, PIAC recommends that:

- organisations focussing on the community sector, professions and sectors that represent people are funded to undertake community engagement, awareness and capacity building initiatives;*
- the Charter and support material are in clear and plain language; and*
- a task forced be established to integrate the Charter within Government with the purpose of advising and monitoring the implementation plan.*

Human Rights Commission

14. Do you support a single independent commission that would combine the roles of the Anti-Discrimination Commissioner and the proposed Human Rights Commission suggested in this paper?

PIAC supports the establishment of an institution to support the full implementation of the Charter. The organisation with this responsibility should be adequately funded to fulfil its role. It should be a new body and not an expansion of an existing body. A new organisation with clear objectives dedicated to human rights should be established. However, a specialist anti-discrimination unit will still be necessary, as this is a complex area that requires specialised expertise.

Recommendations - Human Rights Commission

28. A Human Rights Commission should be established and adequately funded. A specialist anti-discrimination unit be retained.

Who must comply with Charter obligations?

15. Should all parts of government have to comply with the Charter obligations?

The underlying assumption of the modern human rights movement is that human rights act as a mediating influence between individuals as rights holders, and the government,

³⁹ Jane Stratton, Robin Banks, PIAC, *Submission to Human Rights Consultation Committee, Victoria*, 17 August 2005

as the entity that has obligations to respect, protect and promote human rights. While debate continues over the extent to which non-government entities should be subject to human rights obligations, given that they wield increasing power and influence in modern society, there is overwhelming support for the plea that human rights obligations should at the very least apply to Government.⁴⁰

As the Victorian Human Rights Consultation Committee noted, one of the most important questions for the operation of the Charter is determining what is ‘the government’ and to what parts of ‘the government’ the Charter should apply.⁴¹ Human rights Charters in the UK, New Zealand, Victoria and the ACT have approached this issue by defining the instruments of government that are bound by human rights obligations within the term ‘public authorities’. PIAC recommends that the Tasmanian Charter include a definition of ‘public authority’.

PIAC supports the approach in the Victorian Charter⁴² and the amended ACT *Human Rights Act*⁴³, where there is a detailed definition of ‘public authority’. Such a definition should include the following:

- public officials;
- government departments;
- statutory authorities;
- state owned corporations;
- police;
- local Government;
- Ministers;
- Members of Parliamentary Committees when acting in an administrative capacity;
- an entity declared by regulations to be a public authority for the purposes of the Charter;
- an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority;
- any entity that chooses to be subject to the Charter obligations of public authorities.

PIAC recommends that the Charter include a power to make regulations that add organisations to the category of ‘public authority’, as this ensures that the Charter will retain a degree of flexibility to accommodate the variety of arrangements and technologies used by modern governments in the process of governing and delivery of

⁴⁰ See: Oliver, Dawn and Fedtke, Jorg (2007), *Human Rights and the Private Sphere: A Comparative Study*, Taylor & Francis Routledge, 2007; Nelson, William N. (1981), ‘Human Rights and Human Obligations’, in Pennock, J. Roland and Chapman, John W. (eds), *Human Rights*, New York University Press, 1981, at p. 281; Donnelly, Jack (1985), *The Concept of Human Rights*, Croom Helm, London, 1985, at pp. 6, 31 and 59; Alston, Philip (1997), ‘The Myopia of the Handmaidens: International Lawyers and Globalization’, 3 *European Journal of International Law* (1997) 435-448.

⁴¹ *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee*, State of Victoria, Department of Justice, Melbourne, November 2005, 53.

⁴² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s4(1).

⁴³ *Human Rights Act 2004* (ACT) s40(1).

services, and the likelihood that these are constantly evolving.

PIAC also recommends that the Charter provide some guidance on the definition of ‘an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority’. It is a common feature of modern government that various non-state actors are involved with the delivery of government and public services. Such actors include not-for-profit community-based organisations, private companies, religious or faith-based bodies, and networks of government agencies and non-government organisations. The arrangements by which these non-state actors provide services are similarly diverse and include: authority delegated from government; outsourced contractual arrangements; services put out for public tender; or services that are funded through direct government grants. This transformation in the way government and public services are delivered was the subject of research undertaken by PIAC in partnership with the Whitlam Institute and the Social Justice and Social Change Research Centre of the University of Western Sydney in 2009.⁴⁴

It is these public services or functions carried out by non-state actors that are intended to be covered by the phrase ‘an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority.’

PIAC endorses the recommendation from the Tasmanian Law Reform Institute that the Charter should include guidance as to when an entity is performing a ‘function of a public nature’⁴⁵. This is the approach that was adopted in the Victorian Charter⁴⁶ and also in the amendments to the ACT *Human Rights Act*⁴⁷. The list of indicia to guide whether a function is a ‘function of a public nature’ should include whether:

- the function is conferred on the entity under a statutory provision;
- the function is connected to or generally identified with functions of government;
- the function is of a regulatory nature;
- the entity is publicly funded to perform the function;
- the entity is a State or Council owned company.

The Charter should also indicate that these indicia are not exhaustive, but are merely matters that can be taken into account in determining whether the function is a ‘function of a public nature’. In this way, the Charter retains a degree of flexibility that allows other factors also to be considered.

PIAC recommends that the Charter provide that certain specified functions are to be

⁴⁴ Public Interest Advocacy Centre, The Whitlam Institute within the University of Western Sydney, and Social Justice and Social Change Research Centre, University of Western Sydney (2009), *A question of Balance: Principles, contracts and the government-not-for-profit relationship*, July 2009.

⁴⁵ Tasmania Law Reform Institute (2007), *A Charter of Rights for Tasmania*, Report No. 10, University of Tasmania, October 2007, 79-80.

⁴⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s4(2).

⁴⁷ *Human Rights Act 2004* (ACT) s40A(1).

taken to be of a public nature. This was also recommended by the Tasmanian Law Reform Institute⁴⁸, and is included in the ACT *Human Rights Act*.⁴⁹ The functions that should be specified are:

- the operation of detention places and correctional centres;
- the provision of any of the following services:
 - gas, electricity and water supply
 - emergency services;
 - public health services;
 - public education;
 - public transport;
 - public, community or social housing.

PIAC also recommends that the Tasmanian Charter include a provision similar to section 40D in the ACT *Human Rights Act*, which allows any entity that is not a public authority to choose to be subject to the Charter obligations of public authorities. Such a provision could encourage the private and non-government sector to voluntarily subject itself to the human rights obligations under the Charter. The provision would also be useful for entities whose standing is otherwise unclear under the Charter. In addition, such a provision may be used as a mechanism to assess tenders for government contracts. Non-government entities that voluntarily choose to be subject to Charter obligations may be well positioned to be considered favourably by government for tendered services. Alternatively, certain government contracts may specifically require contractors to voluntarily choose to undertake to comply with the Charter.

As at January 2011, three organisations in the ACT have chosen to be subject to the obligations of public authorities, under section 40D of the ACT *Human Rights Act*:

- Companion House Inc (a government funded community-based organisation that provides services and support to adults and children who have sought safety in Australia from persecution, torture and war related trauma)
- Centre for Australian Ethical Research (an independent, not-for-profit research organisation, assisting investors seeking to apply environmental, social and governance criteria to their Australian and international investments)
- Women's Legal Centre (ACT and Region).

In the UK and New Zealand, the courts are bound to protect human rights, both as institutions and in the functions they perform. This has meant that the courts in these countries are required to develop the common law in a way that is compatible with human rights. Combined with the statutory requirement that the courts interpret legislation in a manner that is compatible with the human rights protected in the Charter, this has resulted in human rights standards being applied in the relationships between

⁴⁸ Tasmania Law Reform Institute (2007), *A Charter of Rights for Tasmania*, Report No. 10, University of Tasmania, October 2007, Recommendation 8 – What is a 'public authority?', 80.

⁴⁹ *Human Rights Act 2004* (ACT), s40A(3).

private entities and individuals. In this way, human rights protections have extended from the purely public sphere into the private sphere. This is sometimes referred to as the 'horizontal effect' of statutory human rights charters.

However, there is some difference of opinion as to whether the courts can be included within the definition of 'public authority' in an Australian state or territory legislative Charter. According to Australian Human Rights Centre (AHRC) at the University of New South Wales, inclusion of the courts as a 'public authority' in a state's Human Rights Charter may be problematic in Australia's federal system, which according to the High Court has one unified common law. In its submission to the Victorian Human Rights Community Consultation, the AHRC stated:

The prospects of a Charter of Human Rights having an indirect horizontal effect in Victoria are limited. Following the decision of the High Court of Australia in *Lipohar v The Queen*⁵⁰ and *Eso Australia v The Commissioner of Taxation*⁵¹, the current position ... is that there is one unified common law of Australia, which is not susceptible to direct influence by legislation in any one State⁵².

As a result, the Victorian Human Rights Consultation Committee came to the view that a state-based charter could not define the courts as a public authority beyond their administrative functions. The Committee said that including a provision which had the effect of requiring courts to apply human rights in the development of the common law would mean that there would be a real risk that the High Court would strike down part of the Charter as being inconsistent with the Australian Constitution.⁵³ For this reason, the Victorian Charter states that a 'public authority' does not include a court or tribunal except when it is acting in an administrative capacity.⁵⁴ By way of a statutory note, the Charter indicated that committal proceedings, the issuing of warrants by a court or tribunal, the practice of listing cases, or adopting practices and procedures, are examples of when a court or tribunal is acting in an administrative capacity.

The Tasmanian Law Reform Institute came to a different view, and recommended that Tasmanian courts should be included in the definition of 'public authority' and that their inclusion should not be limited to when they are acting in an administrative capacity, as is the case under the Victorian Charter. The Institute concluded that such a limitation was more extreme than was required under any constitutional constraint imposed by the principle of the unity of the common law. It formed the view that if it is decided that the Tasmanian Charter should not bind the court when interpreting the common law, it

⁵⁰ *Lipohar v The Queen* (1999) 200 CLR 485.

⁵¹ *Eso Australia v The Commissioner of Taxation* (1999) 183 CLR 10.

⁵² Australian Human Rights Centre (2005), Submission to the Victorian Human Rights Community Consultation, University of New South Wales, as quoted in *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee*, State of Victoria, Department of Justice, Melbourne, November 2005, p. 59.

⁵³ *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee*, State of Victoria, Department of Justice, Melbourne, November 2005, 59.

⁵⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s4(1)(j).

should nevertheless bind the courts in the performance of all other functions, including judicial functions not involving the interpretation of the common law.⁵⁵

Accordingly, the Institute recommended that to avoid problems associated with the doctrine of the unity of the common law, and to enable courts to be bound by a Tasmanian Charter, the Charter should contain a provision stating that all non-statutory law, including the substantive and adjectival (procedural) law, is amended by the Charter so as to conform to human rights as defined and limited in the Charter, and that any conflict with Charter rights is to be resolved in favour of the Charter. In the alternative, the Institute recommended that courts should be included in the definition of 'public authority' and be bound by the Charter except and to the extent that they are exercising their function of developing the common law.⁵⁶

While PIAC agrees that the Victorian Charter takes a highly cautious approach on this Constitutional issue, the risk that the High Court could strike down part of the Charter under the doctrine of the unity of the common law suggests that caution should be exercised in resolving this question. Accordingly, PIAC recommends that expert constitutional law advice is sought on this question to determine the extent to which Tasmanian courts should be bound by the Charter.

16. Should State and Council owned companies only have to comply with the Charter obligations if and when their competitors are subject to similar obligations or should they be treated as any other part of government?

Under the recommended definition of 'public authority' and the proposed indicia for 'functions of a public nature' referred to above, any state or council owned company would be required to comply with Charter obligations. PIAC strongly recommends that this should not be limited to state or council owned companies to the extent that their competitors are subject to similar obligations. State and council owned companies are part of the machinery of government, and as such they should be required to comply with the same human rights obligations as other government bodies and actors.

PIAC recognises that there may be concerns that this imposes a competitive disadvantage on state and council owned companies which are competing with non-state and private entities. However, PIAC notes that a comprehensive definition and guidance for the terms 'public authority' and 'functions of a public nature' would ensure that all actors, state and non-state, would face the same obligations to comply with human rights where they are performing functions of a public nature on behalf of the state. PIAC submits that whenever a non-state actor is performing functions of a public nature on behalf of the state, that entity should also be required to comply with the Charter. As such, that entity will not have any competitive advantage over a state or council owned company in relation to the performance of those functions.

⁵⁵ Tasmania Law Reform Institute (2007), *A Charter of Rights for Tasmania*, Report No. 10, University of Tasmania, October 2007, p. 78-79.

⁵⁶ *Ibid*, Recommendation 8 – What is a 'public authority'?, 80.

17. Should non-government service providers that provide services funded or controlled by Government have to comply with the Charter obligations?

Under the recommended definition of ‘public authority’ and the indicia for ‘functions of a public nature’ referred to above (see Question 15), the issue of government funding or government control of a non-government service provider are among the criteria used to assess whether that service is performing a ‘function of a public nature on behalf of the state’, and as such, is bound by the Charter. PIAC recommends that the indicia used to assess whether the entity is performing a function of a public nature should be neither exhaustive nor determinative. This means that the fact that one or more of the factors set out are present in relation to a function, does not necessarily result in the function being of a public nature. PIAC submits that this approach ensures that there is inbuilt flexibility in the criteria for determining whether an entity is performing a function of a public nature. This will accommodate the myriad strategies, technologies and processes used by modern government for the delivery of public services.

PIAC therefore recommends that it is inappropriate to confine the reach of the Charter into the non-government sector only to those non-government service providers who provide services funded or controlled by government. Firstly, the fact that a service is funded and/or controlled by government, should not definitively determine whether the provision of the service is equivalent to performing a function of a public nature. It is necessary to observe a range of factors in relation to the overall character of the function being performed to assess whether the function is a function of a public nature. For this reason, PIAC recommends including detailed guidance to assist in determining whether a function is a function of a public nature, as well as giving specific examples of where the function is to be taken to be a function of a public nature.

Secondly, to confine the guidance to the issues of whether the service is funded or controlled by government undermines the purpose of the provision, namely to assess whether the entity performs the functions of a public authority. The test of government funding or government control emphasises the institutional character of the entity and its relationship to government, as opposed to the nature of the function it is performing. The purpose of including in the definition of ‘public authority’ an entity whose functions include functions of a public nature is to focus not so much on the relationship of the entity with government, but on the ‘publicness’ of the functions and activities that it performs. The determination of the ‘publicness’ of the activities may be informed by aspects of the entity’s relationship to government; however, those aspects should not be the only aspects to consider in resolving that question. Confining the aspects to be considered to the existence of government funding and control, would result in a number of activities and functions being excluded from the definition of ‘public authority’, including any privatised public transport, privatised utility services, and some welfare and charitable services that have a readily identifiable ‘public service’ aspect to their character.

To confine the guidance to the question whether the service is funded or controlled by government would have the effect of enshrining a narrow, institutional approach to the meaning of public authority. The UK Joint Committee on Human Rights has been highly critical of such an approach by the UK courts, because it has the potential to create a

situation where some vulnerable persons may be denied the full benefits of statutory human rights protection on the basis of the institutional character of the entity from which such persons obtain services, and the relationship of that entity to government.⁵⁷ Moreover, users of welfare services, which are provided by purely private or charitable bodies that do not receive government funding or are not subject to government control, would not receive protection from the Charter. However, users of the exact same services provided by local government or state government departments would enjoy those human rights protections. Such a result would be anomalous, and has the effect of denying human rights protections to many people most in need of such protection.

Recommendations - Who must comply with Charter obligations?

29. *The Charter should include a detailed definition of 'public authority' that includes:*
- *public officials*
 - *government departments;*
 - *statutory authorities;*
 - *state owned corporations;*
 - *police;*
 - *local Government;*
 - *Ministers;*
 - *Members of Parliamentary Committees when acting in an administrative capacity;*
 - *an entity declared by regulations to be a public authority for the purposes of the Charter;*
 - *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority;*
 - *any entity which chooses to be subject to the Charter obligations of public authorities.*
30. *The Charter should include a power to make regulations that add organisations to the category of public authority.*
31. *The Charter should provide guidance on the definition of 'an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority' by including non-exhaustive indicia. The list of indicia should include whether:*
- *the function is conferred on the entity under a statutory provision;*
 - *the function is connected to or generally identified with functions of government;*
 - *the function is of a regulatory nature;*
 - *the entity is publicly funded to perform the function; and*
 - *the entity is a State or Council owned company.*

⁵⁷ House of Lords House of Commons Joint Committee on Human Rights (2007), *The Meaning of Public Authority under the Human Rights Act*, Ninth Report of Session 2006-07, HL Paper 77 HC 410, London, 28 March 2007, 37.

32. *The Charter should provide for certain specified functions to be taken to be of a public nature. The functions that should be specified are:*
- *the operation of detention places and correctional centres;*
 - *the provision of any of the following services:*
 - *gas, electricity and water supply*
 - *emergency services;*
 - *public health services;*
 - *public education;*
 - *public transport;*
 - *public, community or social housing.*
33. *The Government should seek expert constitutional law advice to determine the extent to which Tasmanian courts should be bound by the Charter.*
34. *State and council owned companies should always be required to comply with the same human rights obligations as other government bodies and actors.*
35. *The Charter obligations for non-government service providers should not be confined to those non-government service providers who provide services funded or controlled by government.*

Rights in detail

18. Do you agree with the detail outlined for each of the ten categories of rights in this paper? If not, what detail do you suggest should be incorporated for each?

As currently drafted in the Directions Paper, the detail of the rights is not always sufficient. PIAC submits that the Tasmanian Government should give legislative force to all of the rights set out in the international agreements to which Australia is a party through ratification or accession. As a result, PIAC submits that when drafting the Tasmanian Charter, reference should be had to the words in these international instruments.

More generally, PIAC supports the principles-based drafting, as outlined in the ten categories, as the best way to incorporate rights in the Tasmanian Charter. Principles allow for greater flexibility and are capable of application to all government agencies. Also, principles allow for a greater degree of 'future-proofing' so that the Charter can adapt to new issues as they arise without the need for regular amendments to the Charter to accommodate new circumstances.

PIAC notes that the detail provided in the discrimination provision of the proposed Charter is drawn from section 16 of the *Anti-Discrimination Act 1998* (Tas). The requirement that legislation be compatible with the human rights in the Charter means that the grounds of discrimination contained in Tasmanian anti-discrimination legislation must be consistent with the rights articulated in the Charter. Therefore, if the Charter is to expand human rights protection in the area of discrimination, then it is important that the

Anti-Discrimination Act 1998 (Tas) be amended, otherwise it may be found to be incompatible with the Charter.

Section 24 of the *Anti-Discrimination Act 1998 (Tas)* provides that a person may discriminate against another person if it is reasonably necessary to comply with a Tasmanian law. PIAC notes that there is a risk that s24 may be incompatible with the Charter as the effect of s24 is to make it subservient to other Tasmanian legislation. In contrast, the Charter would operate so that all Tasmanian legislation must be interpreted so that it is consistent with human rights.

Recommendations - Rights in detail

36. *The Charter should include all the rights set out in the international agreements to which Australia is a party through ratification or accession.*
37. *The Charter should expand human rights protection in the area of discrimination, and s16 of the Anti-Discrimination Act 1998 (Tas) should be amended to ensure it is compatible with the Charter.*
38. *The Government should give further consideration to the compatibility with the Charter of s24 of the Anti-Discrimination Act 1998 (Tas), which provides that a person may discriminate against another person if it is reasonably necessary to comply with a Tasmanian law.*

Additional Rights

19. Should a right to adequate standard of living and environmental sustainability be included in a Tasmanian Charter?

PIAC supports the inclusion of these rights in the Charter. However, as outlined above PIAC submits that the additional rights should not be confined to these two areas. Rather, the Tasmanian Charter should include all economic, social and cultural rights contained in the ICESCR.

Although no Australian State or Territory Charter currently contains such rights, there is precedent for the inclusion of such human rights in a Charter or similar instrument. The South African Bill of Rights, which is entrenched in the South African Constitution, contains similar rights, including for the environment, housing, health, food and water and education.⁵⁸ The UK Human Rights Act includes the right to education. It seems that the ACT is moving towards including such rights: a report, commissioned by the ACT Government, recently tabled in the ACT Legislative Assembly, recommended the inclusion of economic, social and cultural rights in the *Human Rights Act 2004 (ACT)*; the report included a Model Bill.⁵⁹ Moreover, the human rights consultation committees in Tasmania, the ACT, and Western Australian all recommended the inclusion of at least some economic, social and cultural rights in their acts.⁶⁰

⁵⁸ *Constitution of the Republic of South Africa 1996* (South Africa) ss 24, 26, 27, 29.

⁵⁹ *Australian Capital Territory Economic, Social and Cultural Rights Research Project*, Report, September 2010, <<http://acthra.anu.edu.au/>> at 13 December 2010.

⁶⁰ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), 169-170; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*:

PIAC submits that it is appropriate that Tasmania include economic, social and cultural rights in its Charter. Human rights are universal, interdependent, interrelated and indivisible. Economic, social and cultural rights, in many ways, are necessary precursors to the exercise of many of the civil and political rights contained in the Charter. These rights cover issues that have profound impacts on the daily lives of Tasmanians. The ability to access work; services to assist with food, clothing and housing; health services; and housing impact on a person's dignity and ability to fully participate in society on an equal basis with others. In PIAC's experience working with disadvantaged and marginalised communities, including people experiencing homelessness, problems in service delivery in areas such as housing can be significant. Also, children with disabilities who are attending schools, often face problems accessing adequate teaching support to meet their needs.

Moreover, the Tasmanian Government has more direct responsibility in relation to these matters than the Commonwealth. This is because care service delivery has always been the particular domain of the States, something reflected in the division of powers in the Commonwealth Constitution.

PIAC supports the inclusion of a right to environmental sustainability, notwithstanding that such a right is not currently guaranteed in any international human rights treaty to which Australia is a party.⁶¹ The Tasmanian natural environment is unique and an important part of Tasmania's heritage. It is important that present and future Tasmanian generations are able to enjoy the benefit of the state's natural environment. It is appropriate that the right to environmental sustainability be included in the Charter.

There is growing recognition at an international level and in other countries of the importance of protecting human rights and the environment. In 1994, environment and human rights experts released the United Nations Draft Principles on Human Rights and the Environment, a non-binding international text, which outlines environment-related human rights.⁶² The right to a clean environment is explicitly included in domestic and regional human rights instruments. The South African Bill of Rights does include a right to a clean environment; it incorporates principles of ecologically sustainable development.⁶³ The African Charter on Human and Peoples' Rights also includes a right to a 'satisfactory environment' favourable to development.⁶⁴ Other countries have included a right to a healthy environment domestically, for example in France, Chile, Cost Rica and the Philippines.

Report of the ACT Bill of Rights Consultative Committee (2003), 100. 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), 76-77.

⁶¹ However, two international human rights treaties to which Australia is a party, mentions the environment indirectly in relation to the right to health. Article 24 of the CROC, refers to aspects of environmental protection relating to the child's right to health. Article 12(2)(b) of the ICESCR refers to environmental and industrial hygiene in relation to the right to health.

⁶² Available at <http://www1.umn.edu/humanrts/instree/1994-dec.htm>.

⁶³ *South African Bill of Rights* s 24.

⁶⁴ *African Charter on Human and Peoples' Rights* s 24.

There is also an increasing realisation that human rights and environmental protection are interrelated and that civil, political, economic, social and cultural rights can be infringed as a result of environmental degradation. Although not explicitly recognised in international human rights treaties, environmental rights are indirectly or implicitly protected through other rights, such as the right to life,⁶⁵ the right to health,⁶⁶ the right to culture, the right to privacy,⁶⁷ the right to water and the right to adequate housing. For example, without the right to a clean and healthy environment and the right to water, the right to life cannot be realised. These human rights, which are protected in the ICCPR and ICESCR, to which Australia is a party, highlight the inherent interconnectedness of human rights and environmental rights. As the 2008 Earthjustice *Environmental Rights Report on Human Rights and the Environment* noted:

‘increasing recognition that environmental harms adversely affect various individual and community rights such as the rights to life, health, water, food, work, culture, development, and information and participation, and that a human rights-based approach to environmental protection (eg., right to a clean and healthy environment, right to water, right to nature protection, and other basic procedural and democratic rights) can provide an effective framework for addressing these issues.’⁶⁸

If international experience is a guide, it is likely that notwithstanding a specific environmental right, that environmental human rights issues may arise in the context of other rights included in the Tasmanian Charter. However, PIAC submits that it is appropriate also to include environment-related rights expressly in the Charter. Environmental human rights cannot be adequately protected by incidental reference to other human rights. Specific inclusion in the Charter will provide clarity as to the extent of the right and ensure greater specificity as to the content of such a right. Under the proposed dialogue model, articulating environmental rights in the Charter will provide guidance to public authorities in their decision-making. It will also ensure that new Bills are scrutinised by reference to environmental sustainability. This will provide significant protection as environmental issues will need to be considered more broadly in all matters, not simply in the usual areas of planning and development.

⁶⁵ For example, in *Oneryildiz v Turkey* (Chamber Judgement delivered 30 November 2004), the European Court of Human Rights found that the government in question had violated the applicant’s right to life by failing to prevent deaths caused by a methane explosion at a municipal waste dump.

⁶⁶ For example, the UN Committee on Economic, Social and Cultural Rights has asserted that the right to life encompasses a wide range of socio-economic factors that promote conditions that can lead to a health life, including a health environment (General Comment 14).

⁶⁷ For example, in *Lopez Ostra v Spain* (1994) 20 EHRR 277, the European Court of Human Rights held that environmental pollution emitted by a waste treatment plant constituted a breach of the right to a private and family life (Art 8 ECHR).

⁶⁸ Earthjustice, ‘*Environmental Rights Report 2008: Human Rights and the Environment*’ (2008), 6, <http://www.earthjustice.org/features/human-rights-and-the-environment> at 14 December 2010.

Given the specialised and scientific nature of environmental matters, consideration may need to be given to whether the proposed Human Rights Commission will have sufficient expertise to deal with environment-related rights complaints. PIAC is not familiar with the Tasmanian environment protection system, but suggests it may be possible to empower an existing environment agency, such as the Environment Protection Authority to hear Charter human rights complaints.

20. Should a right to adequate standard of living and environmental sustainability be included now or should their inclusion be delayed until they are also included in other Australian States or Territories?

PIAC submits that there is no reason for Tasmania to delay the inclusion of these rights in its Charter until other States and Territories have made such inclusions. Delaying the introduction of such rights in the Tasmanian Charter would limit the extent of the protection of human rights in Tasmania to civil and political rights. As previously stated, human rights are interdependent and indivisible, and economic, social and cultural rights and environmental rights should not be regarded as less important than civil and political rights.

Legislating to include these rights in the Tasmanian Charter now would be a good opportunity for Tasmania to show leadership to other Australian jurisdictions by expanding the scope of human rights protection. It would allow Tasmania to reflect best practice in human rights law and policy. Although no Australian State or Territory has yet legislated to include these rights, other countries have included such rights in their human rights instruments, so in this respect Tasmania would not be going it alone. Moreover, the issue of protecting economic, social and cultural rights and environmental rights is not new and has been considered in a number of inquiries, most recently in the ACT.⁶⁹

21. Is the detail provided for these two categories adequate for Tasmania?

PIAC submits that the detail for these two categories of rights is not adequate. The separate rights included in the right to an adequate standard of living, namely, the right to work, the right to equal access to services in relation to food, clothing and housing, the right to health services and the right to education, should be separate rights under the Tasmanian Charter. These are all separate rights in the ICESCR⁷⁰ and should be included as such in the Tasmanian Charter to ensure consistency with international law. The wording for these rights should be drawn from the ICESCR.

In PIAC's view, the detail provided in the right to environmental sustainability is not adequate. While the right to environmental sustainability is not currently guaranteed in any international human rights treaty, the South African Bill of Rights does include an environmental right. The Tasmanian Charter should be modelled on s24 of the South African Bill of Rights, as recommended by the Tasmanian Law Reform Institute. Section 24 states:

⁶⁹ See above n 45.

⁷⁰ ICESCR articles 6 (right to work), 11 (right to adequate standard of living), 12 (right to health), 13 (right to education).

24. Environment

Everyone has the right

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - i. prevent pollution and ecological degradation;
 - ii. promote conservation; and
 - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 appropriately refers to well-recognised international environmental principles, namely intergenerational equity and ecologically-sustainable development. It also explicitly protects the environment against pollution and ecological degradation. In contrast, as drafted in the Directions Paper the right to environmental sustainability inappropriately refers to the use and development of resources. PIAC is concerned that, as currently drafted, the right does not strike the appropriate balance between environmental protection and sustainable development and that the environment is not adequately protected.

22. Are the rights listed in the paper for persons living with disability necessary and if so, are there any others you would like to include?

PIAC submits that such rights are necessary in the Tasmanian Charter as people living with disability often face numerous human rights issues. PIAC has extensive experience advocating for and representing people with disabilities, including people with mental illness. In PIAC's experience, people with disabilities face difficulties in accessing services, including mental health services; accessing public transport; and more generally, participating fully and on an equal basis to others.

Including specific rights for people with disabilities will go some way to improving the protection of their human rights. The inclusion of specific rights for people with disabilities will also assist in mainstreaming disability issues in government policy and programs. This is important as the rights of people with disabilities need to be considered across government, not just in the area of health or disability services.

In addition to the rights included in the Directions Paper, PIAC submits that the following rights should also be included:

- accessibility (CRPD article 9);
- freedom from exploitation, violence and abuse (CRPD article 16); and
- freedom of expression and opinion, and access to information (CRPD article 21).

Including the rights listed above would not extend the scope of the Charter beyond what is proposed in the Directions Paper. The rights listed above are already included in the ten proposed categories. However, including rights that relate specifically to persons living with disability acknowledges the particular circumstances of people with disability. Given that people with disability are often marginalised, disadvantaged and vulnerable to abuse of their human rights, it is appropriate that their human rights be given particular protection in the Tasmanian Charter.

PIAC submits that the drafting of the rights contained in the Tasmanian Charter should be by reference to the various international instruments to which Australia is a party. As a result, PIAC submits that reference should be had to the CRPD when drafting the rights in the Charter. Although in some respects the CRPD can be regarded as a human rights instrument that simply incorporates existing rights found in other human rights instruments, it does so with specific reference to persons with disabilities. The Convention was drafted with the full consultation and participation of people with disabilities. The CRPD is significant as it elevates the protection of people with disabilities human rights. PIAC has advocated for priority to be given to the CRPD by all Australian governments and that full compliance with the CRPD and that a goal of the National Disability Strategy.⁷¹

Recommendations - Additional Rights

39. *The Charter should include all economic, social and cultural rights as contained in the ICESCR.*
40. *The Charter should include the right to environmental sustainability be modelled on s24 of the South African Bill of Rights.*
41. *The Charter should include the additional rights rather than a staged introduction of legislation. However, a staged approach to implementation and timing of when legislation may come into force should be considered.*
42. *The Charter should include, in addition to the rights included in the Directions Paper for people with disability, the following rights:*
 - *accessibility (article 9 CRPD);*
 - *freedom from exploitation, violence and abuse (article 16 CRPD); and*
 - *freedom of expression and opinion, and access to information (article 21 CRPD).*

⁷¹ Banks R, PIAC, *People with disability – from recipients to full and active participants: response to the National Disability Strategy Discussion Paper*, 1 December 2008.

Appendix

Recommendations

Recommendations - Rights and Freedoms

1. *The Tasmanian Government should adopt and implement a Charter of Human Rights based on the 'dialogue model'.*
2. *The Charter should cover all rights from international agreements to which Australia is a party.*
3. *The Charter should include third generation rights, such as those rights concerning the environment.*

Recommendation - Responsibilities

4. *The Charter should refer to responsibilities in the preamble or objects provision of the Act.*

Recommendation - Reasonable limits

5. *The Charter should include a 'reasonable limits clause', modelled on the Victorian and ACT human rights statutes.*

Recommendation - Scrutiny of Acts, Subordinate Legislation and By-Laws

6. *The Charter does not need to include an override provision that allows Parliament to pass legislation that expressly overrides the operation of the Human Rights Charter. Such a provision is unnecessary, as Parliament can introduce and pass legislation that is incompatible with the Charter.*
7. *The Charter should include limitations on the override clause as recommended by the Tasmanian Law Reform Institute, especially the strict limitations on when such an override clause may be enacted.*
8. *The Charter should include a definition of 'exceptional circumstances' that is consistent with the term 'public emergency' as used in Article 4 of the International Covenant on Civil and Political Rights.*
9. *The Charter should include a provision stating that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, they become invalid, unless Parliament amends the primary legislation to make them valid.*

Recommendations - Role of the Courts

10. *The Charter should expressly permit the courts and tribunals to consider international and comparative jurisprudence on human rights.*
11. *The Charter should provide that Tasmanian laws must be interpreted consistently with Charter-protected rights, subject to contrary legislative intent.*
12. *The Charter should allow only the Tasmanian Supreme Court to make Declarations of Incompatibility.*

13. *The Charter should allow any lower court or tribunal to refer a question of law on Charter interpretation to the Supreme Court.*
14. *Where an individual makes a complaint to the Human Rights Commission, the Charter should allow the Commission to refer the complaint to the Supreme Court to determine whether a Declaration of Incompatibility should be made.*
15. *The Charter should not allow individuals to personally bear the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation.*

Recommendations - Enforcement of Rights

16. *The Charter should allow Tasmanian courts at all levels to consider matters within their jurisdiction that raise human rights matters.*
17. *The Charter should allow an individual who has only a human rights action caused by incompatible provisions in the Act, to take a complaint to the Human Rights Commission, which can then refer the matter to the Supreme Court.*
18. *The Charter should allow individuals to make a complaint about breaches of their rights to the Human Rights Commission.*
19. *The Charter should provide the Human Rights Commission powers to conciliate and mediate to reach a resolution to a complaint.*
20. *The Charter should amend the Ombudsman Act 1978, Energy Ombudsman Act 1988 and Health Complaints Act 1995 to allow Charter human rights complaints in respect of their respective complaint-handling functions.*
21. *The Charter should allow individuals to take action for a breach of human rights by a public authority and seek an appropriate remedy, including financial damages.*
22. *The Charter should empower the Human Rights Commission to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. PIAC also recommends that the Human Rights Commission be granted power to conduct reviews of services and programs of agencies on reference from the Attorney-General. The Commission should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
23. *The Charter should provide the Human Rights Commission investigative powers, including the ability to request documents, enter premises and speak with agency staff.*
24. *The Charter should allow findings and recommendations of an investigation or audit by the Human Rights Commission to be made publicly available.*
25. *The Charter should require agencies to formally respond to the Human Rights Commission's findings and recommendations.*
26. *The Government should resource the Human Rights Commission to ensure it can undertake investigative and auditing functions.*

Recommendations - Community Engagement

27. *The Government should implement the initiatives for community engagement described in the Directions Paper. In addition, PIAC recommends that:*

- *organisations focussing on the community sector, professions and sectors that represent people are funded to undertake community engagement, awareness and capacity building initiatives;*
- *the Charter and support material are in clear and plain language; and*
- *a task force be established to integrate the Charter within Government with the purpose of advising and monitoring the implementation plan.*

Recommendations - Human Rights Commission

28. A Human Rights Commission should be established and adequately funded. A specialist anti-discrimination unit be retained.

Recommendations - Who must comply with Charter obligations?

29. The Charter should include a detailed definition of 'public authority' that includes:

- *public officials*
- *government departments;*
- *statutory authorities;*
- *state owned corporations;*
- *police;*
- *local Government;*
- *Ministers;*
- *Members of Parliamentary Committees when acting in an administrative capacity;*
- *an entity declared by regulations to be a public authority for the purposes of the Charter;*
- *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority;*
- *any entity which chooses to be subject to the Charter obligations of public authorities.*

30. The Charter should include a power to make regulations that add organisations to the category of public authority.

31. The Charter should provide guidance on the definition of 'an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority' by including non-exhaustive indicia. The list of indicia should include whether:

- *the function is conferred on the entity under a statutory provision;*
- *the function is connected to or generally identified with functions of government;*
- *the function is of a regulatory nature;*
- *the entity is publicly funded to perform the function; and*
- *the entity is a State or Council owned company.*

32. The Charter should provide for certain specified functions to be taken to be of a public nature. The functions that should be specified are:

- *the operation of detention places and correctional centres;*
 - *the provision of any of the following services:*
 - *gas, electricity and water supply*
 - *emergency services;*
 - *public health services;*
 - *public education;*
 - *public transport;*
 - *public, community or social housing.*
33. *The Government should seek expert constitutional law advice to determine the extent to which Tasmanian courts should be bound by the Charter.*
34. *State and council owned companies should always be required to comply with the same human rights obligations as other government bodies and actors.*
35. *The Charter obligations for non-government service providers should not be confined to those non-government service providers who provide services funded or controlled by government.*

Recommendations - Rights in detail

36. *The Charter should include all the rights set out in the international agreements to which Australia is a party through ratification or accession.*
37. *The Charter should expand human rights protection in the area of discrimination, and s16 of the Anti-Discrimination Act 1998 (Tas) should be amended to ensure it is compatible with the Charter.*
38. *The Government should give further consideration to the compatibility with the Charter of s24 of the Anti-Discrimination Act 1998 (Tas), which provides that a person may discriminate against another person if it is reasonably necessary to comply with a Tasmanian law.*

Recommendations - Additional Rights

39. *The Charter should include all economic, social and cultural rights as contained in the ICESCR.*
40. *The Charter should include the right to environmental sustainability be modelled on s24 of the South African Bill of Rights.*
41. *The Charter should include the additional rights rather than a staged introduction of legislation. However, a staged approach to implementation and timing of when legislation may come into force should be considered.*
42. *The Charter should include, in addition to the rights included in the Directions Paper for people with disability, the following rights:*
 - *accessibility (article 9 CRPD);*
 - *freedom from exploitation, violence and abuse (article 16 CRPD); and*
 - *freedom of expression and opinion, and access to information (article 21 CRPD).*