

TASMANIA
LAW REFORM
INSTITUTE

A Charter of Human Rights
for Tasmania?

Update

RESEARCH PAPER NO 6

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About the Tasmania Law Reform Institute

The Tasmania Law Reform Institute is Tasmania's peak independent law reform body. The Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The work of the Institute is to conduct impartial and independent reviews or research on areas of law and legal policy in order to provide independent and impartial advice and recommendations on the area investigated, with a view to, or for the purposes of:

- i. the modernisation of the law; and/or
- ii. the elimination of defects in the law; and/or
- iii. the simplification of the law; and/or
- iv. the consolidation of any laws; and/or
- v. the repeal of laws that are obsolete or unnecessary; and/or
- vi. adopting new or more effective methods for administering the law and dispensing justice; and/or
- vii. providing improved access to justice; and/or
- viii. uniformity between laws of other states, territories and the Commonwealth; and/or
- ix. the codification of laws; and/or
- x. promoting equality before the law.

The Institute's Director is Professor Jeremy Prichard of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are: Professor Gino Dal Pont (Acting Chair, Interim Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Kristy Bourne (appointed by the Attorney-General), Craig Mackie (appointed by the Tasmanian Bar Association), Rohan Foon (appointed by the Law Society), Ann Hughes (appointed at the invitation of the Board), Kim Baumeler (appointed at the invitation of the Board) and Rosie Smith (appointed at the invitation of the Board as a member of the Tasmanian Aboriginal community).

The Board oversees the Institute's research, considering each reference before it is accepted, and approving publications before their release.

Table 1: TLRI Board membership

Position	Name	Dates
TLRI Director	Prof Jeremy Prichard*	Aug 2022 – present
	Prof Michael Stuckey (Acting)	Mar – May 2022
	Assoc Prof Brendan Gogarty (Acting)	Dec 2019 – Mar 2022
	Assoc Prof Terese Henning	Sep 2019 – Dec 2019
Dean, Faculty of Law	Prof Gino dal Pont (Interim)	May 2022 – present
	Prof Michael Stuckey	Mar 2021 – May 2022
	Prof Dianne Nicol (delegate – Head of Discipline, Law)	Jul 2020 – Mar 2021
	Prof Tim McCormack	Sep 2019 – Jun 2020
Attorney-General’s Appointee	Kristy Bourne	Apr 2021 – present
	Kerrie Crowder	Oct 2020 – Apr 2021
	Kristy Bourne	Sep 2019 – Oct 2020
Honourable the Chief Justice of Tasmania’s Appointee	The Honourable Justice Helen Wood	Sep 2019 – present
Law Society of Tasmania Appointee	Rohan Foon	Sep 2019 – present
University of Tasmania Council Appointee	Prof Jeremy Prichard	Sep 2019 – Aug 2022
Tasmanian Bar Association Appointee	Craig Mackie	Sep 2019 – present
Co-opted by the Board	Kim Baumeler	Sep 2019 – present
Co-opted by the Board	Ann Hughes	Sep 2019 – present
Co-opted by the Board as a member of the Tasmanian Aboriginal Community	Rosie Smith	Sep 2019 – present

*Acting Director Aug – Dec 2022. Absent from Board July 2020 – June 2022.

The Board is established as an advisory body to provide advice to the TLRI on: the identification of the scope, cost, completion time and expected outputs of projects; the acceptance or rejection of references; the funding of projects including the appropriateness of accepting funding from any body or person for particular references, and the publication of Final Reports. It makes decisions by consensus.

Acknowledgements

This Research Report was prepared for the Board of the TLRI by Jess Feehely, Associate Professor Brendan Gogarty, Dr Rebecca Bradfield, Adjunct Associate Professor Terese Henning and Bruce Newey, with research assistance from Gina Goh.

During the period of this project, Terese Henning was Director of the Institute from September 2019 to December 2019. Her involvement during this phase was limited to drafting the project proposal and preparing a grant application for submission to the Law Foundation of Tasmania. Subsequently, in her capacity as UTAS Adjunct Associate Professor in Law, she was a member of the project's Expert Advisory Group until July 2022, when she commenced work as content editor on the draft paper on a voluntary basis. Brendan Gogarty was Acting TLRI Director from December 2019 to March 2022. Initial work on the reference was undertaken by Bruce Newey, with Jess Feehely appointed to continue work on drafting the paper in August 2021. She subsequently was employed by an Australian Senator and worked on this paper in a personal capacity. Dr Rebecca Bradfield has held the role of TLRI Principal Research Fellow since March 2023.

The Research Paper was prepared under the oversight of the Expert Advisory Panel and the Board of the Tasmania Law Reform Institute.

Assistance and oversight of the preparation of the Research Paper was provided by an Expert Advisory Group. The Advisory Group finished its work in January 2023. The members of the Advisory Group were: Sarah Bolt, Pia Struwe (from Nov 2021) and Melanie van Egdome (Equal Opportunity Tasmania); Dr Rebecca Bradfield (formerly UTAS) (to Nov 2021); Vincenzo Caltabiano (to Oct 2022) and Sarah Campbell (from Jan 2023) (Legal Aid Tasmania); Anja Hilkmeyer (UTAS); and Adjunct Associate Professor Terese Henning (UTAS) (to Jul 2022).

Thank you also to Professor Jeremy Gans, Associate Professor Rebecca Ananian-Welsh and David Ananian-Cooper.

The paper was edited and prepared for publication by Dr Jacqueline Fox.

Ongoing administration and management of the Inquiry has been provided by Ms Kira White.

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The community groups that referred this project to the Tasmania Law Reform Institute were:

- Australian Lawyers Alliance
- Civil Liberties Australia
- Community and Public Sector Union (State Public Services Federation Tasmania)
- Community Legal Centres Tasmania
- Equality Tasmania (formerly Tasmanian Gay and Lesbian Rights Group)
- Tasmanian Council of Social Service
- Tasmanian Human Rights Act Campaign
- Tenants Union
- Unions Tasmania

This study has been approved by the University of Tasmania Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. You will need to quote ethics reference number [H0016752].

List of acronyms and abbreviations

ACT Covid Bill	<i>COVID-19 Emergency Response Bill 2020 (ACT)</i>
ACT Human Rights Act	<i>Human Rights Act 2004 (ACT)</i>
ACT Scrutiny Committee	Standing Committee on Justice and Scrutiny
ADC	Anti-Discrimination Commissioner
AHRC	Australian Human Rights Commission
Charter and Human Rights Act/Enactment	These terms are used interchangeably in this Research Paper.
Charter jurisdictions	Australian jurisdictions that have human rights enactments – currently, the Australian Capital Territory, Victoria, and Queensland.
CHO	Chief Health Officer
Cth Scrutiny Act	<i>Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)</i>
DHHS	Department of Health and Human Services
HRLC	Human Rights Law Centre
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
JSCSL	Joint Standing Committee on Subordinate Legislation
NDLFRS	National Drivers Licence Facial Recognition System
NHHRC	National Human Rights Consultation Committee
PDAOC	Pandemic Declaration Accountability and Oversight Committee
PESRAC	Premier’s Economic and Social Recovery Advisory Council
PHRSC	Parliamentary Human Rights Scrutiny Committee (proposed)
PJCHR	Parliamentary Joint Committee on Human Rights
QHRC	Queensland Human Rights Commission
Qld Human Rights Act	<i>Human Rights Act 2019 (Qld)</i>
Reproductive Health Act	<i>Reproductive Health (Access to Terminations) Act 2013 (Tas)</i>
SARC	Scrutiny of Acts and Regulations Committee
Tasmanian Charter, Tasmanian Human Rights Act, Tasmanian human rights enactment	These terms are used interchangeably in this Report and so have the same meaning here. The TLRI 2007 Final Report used the term ‘Charter’ to cover all these terms. Because two Australian jurisdictions (the ACT and Queensland) now have Human Rights Acts, this nomenclature has been used more extensively here than in the 2007 Final Report

TasCOSS	Tasmanian Council of Social Service
Tas Covid Act	<i>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas)</i>
Tas Covid Bill	<i>COVID-19 Disease Emergency (Miscellaneous Provisions) Bill 2020 (Tas)</i>
TasCAT	Tasmanian Civil and Administrative Tribunal
THRACC	Tasmanian Human Rights Campaign Committee
TLRI	Tasmania Law Reform Institute
TLRI 2007 Final Report	Tasmania Law Reform Institute, <i>A Charter of Rights for Tasmania: Final Report (Report No 10, 2007)</i>
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
Vic Covid Act	<i>COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)</i>
Vic Covid Bill	<i>COVID-19 Omnibus (Emergency Measures) Bill 2020 (Vic)</i>
Vic Human Rights Charter	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>
Vic Pandemic Act	<i>Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic)</i>
Vic Pandemic Bill	<i>Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic)</i>

Recommendations

Recommendation 1 – Tasmanian Human Rights Enactment (p 48)

That the laws in Tasmania be reformed to provide and promote specific, better, and accessible protection for human rights through the enactment of a Tasmanian Charter of Human Rights or a Human Rights Act.

This adopts Recommendations 1 and 2 of the 2007 Final Report (see Appendix A).

Recommendation 2 — Human Rights Obligations of Public Authorities (p 53)

That all public authorities be bound by the Tasmanian Human Rights Charter or Act.

Public authorities should be required to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights, unless otherwise required by particular legislation.

This is consistent with Recommendations 7, 9, 10, 14 in the 2007 Final Report (see Appendix A).

Recommendation 3 – Public Authorities: Definition (p 53)

That the Tasmanian human rights enactment adopt a broad definition of public authority, including organisations performing public functions and organisations that opt-in to public authority obligations.

The Tasmanian human rights enactment should explicitly list the sorts of functions that are to be characterised as public functions, including the delivery of emergency, utility, public housing, education, health, disability, and transport services, and the operation of correctional and detention facilities.

This is consistent with Recommendation 8 of the 2007 Final Report (see Appendix A).

The treatment of religious bodies within a human rights enactment and anti-discrimination framework (and the interaction between the two frameworks) should be a matter for further review. As part of this review, consideration should be given to the human rights enactment providing that non-government schools and health services be subject to any Tasmanian Charter of Rights from the outset, rather than deferring decisions about their inclusion to future reviews.

This reflects the definition of public authority contained in Recommendation 8 in the 2007 Final Report (see Appendix A).

Inclusion of Courts and Tribunals

Recommendation 4 (p 58)

That a Tasmanian human rights enactment apply to the interpretation of the common law, as well as statutory law, and should include an explicit provision to the effect 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.

This is consistent with Recommendations 8 and 11 in the 2007 Final Report (see Appendix A).

Recommendation 5 (p 58)

That courts and tribunals be included in the definition of public authority when acting in an administrative capacity or in the exercise of procedure. However, this inclusion needs to be reconciled with the enforcement provisions adopted in the human rights enactment, particularly the avenues of redress.

This is consistent with Recommendations 8 and 11 in the 2007 Final Report (see Appendix A).

Recommendation 6 – Exempt Organisations (p 59)

That, if provision is made in a Tasmanian human rights enactment for exempting or excluding organisations from human rights obligations, any instrument containing such exemptions or exclusions be subject to disallowance to enable parliamentary scrutiny of whether the exemption or exclusion is justifiable.

This was not addressed in the 2007 Final Report.

Recommendation 7 – Inclusion of Economic, Social, and Cultural Rights (p 66)

That the rights protected in the Tasmanian Human Rights Act or Charter extend beyond civil and political rights.

This is consistent with Recommendations 15 and 16 of the 2007 Final Report (see Appendix A).

Specifically, the specific rights outlined in the 2007 Final Report (Recommendation 16, see Appendix A) should be adopted in a Tasmanian human rights enactment.

If all of the economic, social, and cultural rights that the TLRI 2007 Final Report recommended be included in a Tasmanian human rights enactment are not initially included, then the economic, social, and cultural rights currently protected in other jurisdictions with human rights enactments (cultural rights of Aboriginal and Torres Strait Islander people, the right to education, the health rights, and the right to work) should be included.

These rights were included in the 2007 Final Report Recommendations 16 and 17 (see Appendix A).

Further, if economic, social, and cultural rights are not initially included in a Tasmanian human rights enactment, then it should explicitly require the first review to consider the inclusion of additional human rights, including all the rights recommended for inclusion in the TLRI 2007 Final Report.

This is a new aspect in the recommendation about the scope of rights contained in the 2007 Final Report (see Recommendation 16 and 17 in Appendix A).

Recommendation 20 of the 2007 Final Report contains the TLRI's recommendations for the review process of the Human Rights enactment (see Appendix A).

Recommendation 8 – Statements of Compatibility (p 68)

That statements of compatibility accompany all Bills and amendments to Bills introduced into Parliament.

This is in accordance with Recommendation 10 of the 2007 Final Report (see Appendix A).

In addition, any amendments to Bills made during Parliamentary debate should also be accompanied by further statements of human rights compatibility.

This is an addition to the recommendations contained in the 2007 Final Report about the Role of Parliament (Recommendation 10, see Appendix A).

Further, where amendments are introduced and passed in the House of Assembly, the amendments should be referred to the Parliamentary Human Rights Scrutiny Committee for review prior to the amended Bill being introduced in the Legislative Council.

This is an addition to the recommendations contained in the 2007 Final Report about the Role of Parliament (Recommendation 10, see Appendix A).

Recommendation 9 – Human Rights Unit (p 69)

That a Human Rights Unit be established to prepare statements of compatibility in consultation with responsible agencies.

Such dialogue will foster human rights discourse across government, while maintaining quality control over these statements.

This is consistent with Recommendation 22 of the 2007 Final Report (see Appendix A).

Further, guidelines should be developed for identifying and assessing human rights implications of proposed legislation to assist responsible agencies and departments in developing human rights compatible policies and proposals for legislation.

This is consistent with Recommendation 22 of the 2007 Final Report (see Appendix A).

Recommendation 10 – Subordinate Legislation (p 70)

That subordinate legislation be accompanied by statements of human rights compatibility and subject to the usual disallowance procedures, where non-compliance with human rights is identified.

This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

Recommendation 11 – Parliamentary Human Rights Scrutiny Committee (p 71)

That a dedicated Parliamentary Human Rights Scrutiny Committee ('PHRSC') be established and given responsibility for scrutiny of all Bills for compatibility with human rights.

The PHRSC should be constituted across party lines and consist of members of both House of Parliament.

This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

The Tasmanian human rights enactment should provide a guaranteed minimum time period for the PHRSC to consider each new Bill before it can be debated in Parliament. This time may be

extended, if the statement of compatibility indicates that the Bill is potentially incompatible with human rights. Additional time may also be sought by the PHRSC if, despite no statement of incompatibility, it is satisfied that the Bill may be incompatible with rights and will reasonably require a longer assessment period.

This is an addition to the recommendations in the 2007 Final Report in relation to the PHRSC (Recommendation 10, see Appendix A).

Recommendation 12 – Override Clauses (p 73)

That, in recognition of the primacy of Parliament, Parliament be able to respond to a court’s declaration of incompatibility by enacting an override clause to confirm the legislation.

This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

The override clauses should be confined to exceptional circumstances.

This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

The override clauses should be subject to a two-year sunset clause.

Parliament should be able to reinstitute override clauses prior to expiration of the two-year period.

These recommendations are consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

Recommendation 13 – Declarations of Incompatibility (p 75)

That the Minister administering the legislation be required to respond to a declaration of incompatibility with human rights made by the Supreme Court of Tasmania.

This is consistent with Recommendation 10 in the 2007 Final Report (see Appendix A).

Consistent with the dialogue model of human rights, Parliament and the public should be notified of a declaration as soon as possible.

The written report to Parliament responding to the declaration should be tabled within six months of notice being given. However, Parliament should be able to grant one extension of no more than two months, if satisfied that additional time is required.

This recommendation builds on Recommendation 12 in the 2007 Final Report (see Appendix A).

Impugned legislation should cease to operate to the extent of its incompatibility with human rights, if the government fails to respond to a declaration of incompatibility within the designated time period after notice of the declaration has been received, or no more than eight months after, if an extension to the time period is granted.

This recommendation builds on Recommendation 12 in the 2007 Final Report (see Appendix A).

Recommendation 14 – Invalidation of Subordinate Legislation (p 75)

That the Supreme Court of Tasmania have the power to invalidate subordinate legislation that is the subject of a declaration of incompatibility.

This is consistent with Recommendation 12 of the 2007 Final Report (see Appendix A).

Recommendation 15 – Cause of Action for Breaches of Human Rights (p 75)

That a direct cause of action should be available to a person who is, or would be, the victim of unlawful action where a public authority has acted, or proposes to act, in a way that is made unlawful by the human rights enactment.

This is consistent with Recommendation 19 of the 2007 Final Report (see Appendix A).

Proceedings against a public authority should be able to be brought in either the Tasmanian Civil and Administrative Tribunal ('TasCAT') or the Supreme Court of Tasmania.

This recommendation builds on Recommendation 19 of the 2007 Final Report, which referred only to actions in the Supreme Court of Tasmania (see Appendix A).

Implementation of this recommendation should be supported by statutory procedural provisions covering the relationship between different institutions, the Human Rights Commission, TasCAT, and the Courts, and also dealing with jurisdictional matters, such as where proceedings are to be commenced, and rights of appeal. These provisions should be constructed in a way that ensures parties' accessibility.

This recommendation builds on Recommendation 19 of the 2007 Final Report (see Appendix A).

Recommendation 16 – Remedies (p 78)

That the Supreme Court of Tasmania and Tasmanian Civil and Administrative Tribunal ('TasCAT') be able to grant any remedy or relief or make such order that is appropriate for breaches of human rights, including damages.

This recommendation is consistent with Recommendation 19 of the 2007 Final Report (see Appendix A).

Recommendation 17 – Human Rights Commissioner (p 80)

That an independent office of Tasmanian Human Rights Commissioner be established under a Tasmanian human rights enactment.

This recommendation is consistent with Recommendation 23 of the 2007 Final Report (see Appendix A).

The functions and powers of a Tasmanian Human Rights Commissioner should include advising government and Cabinet on the preparation of legislation.

Further, explicit arrangements should be put in place to provide for early review of all laws identified as potentially affecting human rights.

This recommendation is consistent with Recommendation 23 of the 2007 Final Report (see Appendix A).

Recommendation 18 – Notification to Human Rights Commissioner (p 81)

That parties to Supreme Court proceedings should be required to notify the Attorney-General and the Tasmanian Human Rights Commission where proceedings raise human rights issues.

In proceedings held in the Magistrates Court or Tasmanian Civil and Administrative Tribunal ('TasCAT'), the magistrates or Tribunal members (as applicable) should also have discretion to require parties to notify the Attorney-General and the Tasmanian Human Rights Commission, when matters raise human rights issues where intervention would be in the interests of justice.

Proceedings should not be adjourned while notice is given, and there should be a rebuttable presumption that the costs of the intervention will be borne by the Commission.

The Commission should be adequately resourced to intervene in any relevant matter.

These recommendations build on Recommendation 23 of the 2007 Final Report relating to the powers and functions of the Human Rights Commissioner (see Appendix A).

Recommendation 19 – Dispute Resolution (p 81)

That the Tasmanian human rights enactment provide for the Tasmanian Human Rights Commission to have a dispute resolution function for complaints regarding human rights contraventions.

This recommendation builds on Recommendation 23 of the 2007 Final Report relating to the powers and functions of the Human Rights Commissioner (see Appendix A).

Recommendation 20 – Independent Office (p 82)

That a Tasmanian Human Rights Commissioner be appointed independently of the Anti-Discrimination Commissioner.

This recommendation is consistent with Recommendation 23 of the 2007 Final Report (see Appendix A)

Recommendation 21- Implementation (p 83)

That a phase-in period be created as part of the operation of the Tasmanian human rights enactment.

The phase-in period should be over a two-year period.

This recommendation alters Recommendation 9 of the 2007 Final Report, which provided for an 18-month phase-in period (see Appendix A).

Executive Summary

In 2019, the Board of the Tasmania Law Reform Institute ('TLRI') accepted a request from members of the community to review and update its 2007 Final Report: *A Charter of Rights for Tasmania* ('2007 Final Report'). That Report made 23 recommendations to give better effect to human rights principles in Tasmanian law, including enacting a Charter of Rights. It is noted that a Charter of Rights has not yet been adopted in Tasmania.

The recommendations made in the 2007 Final Report followed extensive community consultation. The primary recommendation made was that a Charter of Human Rights be enacted in Tasmania, protecting a comprehensive range of civil, political, economic, social, and cultural rights. The Report also made extensive recommendations about to whom the Charter should apply and how it should operate.

The TLRI considered that a primary purpose of a Charter was to 'engender a human rights conscious culture within the Tasmanian community and across the three branches of government' (the legislature, the executive, and the judiciary) which meant that any Charter 'should reflect the needs, aspirations and values of the Tasmanian community' and provide Tasmanians with 'legal guarantees for rights ... in a comprehensive and easily accessible format'.

Key amongst the TLRI's recommendations in the 2007 Final Report were:

- That a Charter of Human Rights and Responsibilities be enacted in Tasmania and that it should:
 - be based on the dialogue model operating in the Australian Capital Territory (ACT) under the *Human Rights Act 2004* (ACT), in Victoria under the *Charter of Human Rights and Responsibilities 2006* (Vic), and in the United Kingdom pursuant to the *Human Rights Act 1998* (UK), which preserves the sovereignty of Parliament in relation to law making;
 - require effective scrutiny of the human rights implications of all legislation before it is enacted and require laws that are enacted to be interpreted as far as possible in a way that is compatible with human rights;
 - require public authorities, defined broadly to include government-funded entities providing public services, to act consistently with the Charter when making decisions;
 - allow the Tasmanian Supreme Court to declare legislation and regulations to be incompatible with human rights protected by the Charter. For legislation, the TLRI recommended that the declaration be referred to Parliament for consideration and response within seven months and, if no action is taken, for the legislation to become inoperative. For subordinate legislation, the TLRI recommended that the Court be empowered to invalidate an incompatible instrument with immediate effect.
 - require courts to interpret all Tasmanian laws (statute and common law), as far as possible, in a manner that complies with human rights;
 - allow parliament to enact 'override declarations', in exceptional circumstances and subject to periodic review, allowing legislation to operate despite an acknowledgement that it will restrict rights protected by the Charter;
 - provide standing for any person affected, or likely to be affected, by a breach of Charter rights by a public authority to bring proceedings against that authority in the Tasmanian Supreme Court, and allow the Court to make orders for any remedy it considers just and appropriate, including an award of damages; and
 - establish an independent Tasmanian Human Rights Commissioner and a Human Rights Unit within the Department of Justice to provide advice across government.

In updating and reviewing the 2007 Final report, the research questions set for this review are:

- To review and report on developments in Australian human rights law and practice that bear on the TLRI's recommendations in 2007 for a Tasmanian Human Rights Act.
- In preparing this report, the TLRI will:
 - consider if developments since 2007 require amendments or improvements to the TLRI's original model. In particular, it will consider the experience in other Australian jurisdictions with human rights statutes;
 - consider if developments since 2007 make a state Human Rights Act more or less necessary. In particular, it will consider the extent to which human rights are today more or less understood, respected and protected; and
 - seek the input of legal experts, government representatives and peak community bodies, as necessary to inform the above considerations.

In response to these questions, this Research Paper reviews relevant legislative and policy responses, focussing on the following key areas:

- response to the COVID-19 pandemic;
- political communication and protest;
- protection of privacy;
- prisoners' rights;
- housing and homelessness; and
- religion and discrimination.

This Research Paper does not review all human rights issues that have arisen in the Review Period. Rather, discussion of these issues provides insight into the different approaches adopted in human rights and non-human rights jurisdictions. Neither does this Research Paper offer a comprehensive review of how these issues have been tackled in jurisdictions with a human rights enactment. Instead, it provides a sample of approaches that have been influenced by legislative human rights frameworks.

Significant areas have been omitted from this Research Paper, principally because they have been the subject of other full, independent reports. These are:

- achieving reconciliation with Tasmania's First Nations peoples; and
- child sexual abuse in institutional settings.

In this context, it is important to stress that this review was not given to the TLRI to reopen the original reference or to be undertaken in the manner of a full reference. It has a more limited scope as a research paper confined to exploring questions about how events and human rights developments since 2007 may have relevance and import for the recommendations made in the 2007 Final Report. Accordingly, the TLRI did not undertake a full community consultation of the kind undertaken in the preparation of the 2007 Final Report. The TLRI did, however, receive advice from those who gave the reference to the Institute (see Appendix C); it also had the benefit of assistance and oversight in the preparation of this Research Paper from an Expert Advisory Group.¹ The TLRI also considered developments in other jurisdictions to inform its views and the recommendations set out in this Research Paper.

This Research Paper reviews the recommendations contained in the 2007 Final Report in view of events and experience involving human rights that have occurred in the period 2007 to 2022 (the Review

¹ See the Acknowledgments section of this Research Paper.

Period) in both Tasmania and those Australian jurisdictions with human rights enactments. It also addresses the question of whether the recommendations made in the 2007 Report require updating. This Research Paper does not review all the recommendations made in the 2007 Report, and only considers those to which events and experience since 2007 are relevant.

The experience in Tasmania and other jurisdictions since 2007 points to the continued need for a comprehensive human rights framework. Accordingly, it remains the view of the TLRI that there is a need for a Human Rights Act for Tasmania in seeking to protect human rights, develop a human rights culture across government, and to frame parliamentary debate. A human rights enactment provides a consistent and transparent framework for discussion of human rights implications in the development of policies and legislation, as well as their implementation. It also helps frame relationships between the community, individuals, public authorities, legislators, and all arms of government – Parliament, the Executive, and Courts and Tribunals. Accordingly, the TLRI maintains its view in relation to its key recommendations in the 2007 Final report and makes further recommendations with a view to strengthening some recommendations.

Developments in other jurisdictions

In the 17 years since the 2007 Final Report was published, there have been several human rights developments in other Australian jurisdictions. Human rights enactments have also been referenced in judicial proceedings. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Vic Human Rights Charter’) was subject to comprehensive statutory reviews in 2011 and 2015, which identified areas to improve its operation, including strengthening the consequences for breaches of human rights and removing barriers for people to obtain redress for breaches of their rights. Several of the recommendations made in these reviews mirror the recommendations of the TLRI in the 2007 Final Report.² It should be noted that, notwithstanding the reviews, the Vic Human Rights Charter remains largely unchanged.

The *Human Rights Act 2004* (ACT) (‘ACT Human Rights Act’) has also been reviewed, resulting in amendments made with a view to strengthening rights. Reforms include imposing a positive duty on public authorities to act compatibly with human rights obligations and expanding the rights protected to include the right to education, distinct cultural rights of Aboriginal and Torres Strait Islander peoples, the right to work, and workers’ rights. The ACT Government has committed to include a right to a healthy environment as a protected right under the ACT Human Rights Act and has also introduced legislation that would insert that right into the ACT Charter.³ Significantly such amendments would correspond with recommendations made by the TLRI for a Tasmanian Charter of Rights in its 2007 Final Report.

The ACT Human Rights Act was also amended to provide an independent and direct right of action in the Supreme Court to people affected by breaches of the Act. This goes beyond the causes of action available in other jurisdictions in Australia with human rights legislation, which continue to require human rights claims to ‘piggy-back’ on existing causes actions available under other legislation or the common law. The ACT reform to create a direct right of action is consistent with the approach that the TLRI recommended in the 2007 Final Report.

At the federal level, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires the impact of new Commonwealth legislation on human rights to be assessed by the Parliamentary Joint Committee on Human Rights (‘PJCHR’). This Act deals only with scrutiny of proposed legislation (Bills and legislative instruments), the utility of which is limited in practice due to the composition of the Scrutiny Committee and the fact that scrutiny is often completed only after legislation has already been debated and enacted. There is still no legislated national Charter of Rights.

² See Parts 2 and 3 of this Research Paper.

³ See *Human Rights (Healthy Environment) Amendment Act 2023* (ACT).

In 2019, Queensland became the third Australian jurisdiction to adopt a Human Rights Act,⁴ which was modelled closely on the ACT and Victorian laws. The *Human Rights Act 2019* (Qld) ('Qld Human Rights Act') protects 23 human rights, including a right to education and a right to health services. A feature of the Queensland Human Rights Commission is that it provides a dispute resolution mechanism for alleged contraventions of rights. This mechanism, which constitutes a key difference between the Queensland regime and its Victorian and ACT counterparts, has been identified as providing a more accessible dispute resolution process.

The value of a human rights enactment

While the absence of a single, dedicated human rights enactment in Tasmania has not meant that human rights are not considered in the development of legislation and policy or the decision-making processes of public authorities, the TLRI's view is that a legislated mandate to require the evaluation of proposed statutory instruments for compliance with human rights would be a key mechanism to embed consistent approaches to human rights in Tasmania. The approach to human rights in the development and implementation of Tasmanian law and policy since the 2007 Final Report has been uneven, with variable results for the protection of human rights. Some legislation with the potential to affect human rights has been subject to detailed review – whether by parliamentary committee or independent review – while other legislation with potential human rights implications has not. This reflects an inconsistency in the evaluation of the effect of proposed legislation on human rights and a lack of transparency as to how human rights were taken into account.

The examples discussed in this Research Paper demonstrate that, while human rights enactments do not dictate a particular legislative or policy outcome from a human rights perspective, there are indications that human rights discourse has been improved by the requirement to identify affected rights and explicitly justify limitations on those rights. Courts have confirmed that decision-makers must 'do more than merely invoke the Charter like a mantra' and actively consider options to minimise restrictions on protected rights.⁵

Further, reviews in jurisdictions with human rights enactments have found that the introduction of those enactments has resulted in the implementation of processes to build a human rights culture across government and the public sector.⁶ These reviews and the experience in other jurisdictions have also pointed to additional benefits in framing parliamentary debate, scrutiny of legislation and policies, and in improving community awareness of human rights and approaches to negotiating competing rights. Although the experience elsewhere makes clear that human rights enactments are not a panacea and – accepting that a Charter of Rights in Tasmania would not resolve all human rights problems or prevent social inequality and injustice in Tasmania either – it remains the TLRI's view that a legislated Charter of Rights or Human Rights Act would be the most effective way to embed human rights considerations consistently into the development and analysis of legislation in Tasmania. The value of a human rights enactment, as outlined in the 2007 Final Report, is that it provides a clear and accessible statement of fundamental rights and can operate as a touchstone or general gauge by which to evaluate legislative and policy decisions. It can also help to articulate and explore balancing rights, where there are multiple or conflicting rights, and so contribute to the democratic process.

In addition, experience elsewhere suggests that well-resourced Human Rights Commissions can contribute expert human rights advice in the scrutiny of legislation, through submissions to scrutiny committees, appearances at parliamentary hearings, reviewing drafts to be included in Cabinet minutes, and responding to questions from members of parliament. The opportunity for Human Rights Commissioners to intervene in court proceedings involving interpretation of human rights instruments

⁴ *Human Rights Act 2019* (Qld).

⁵ *Castles v Secretary, Department of Justice* [2010] VSC 310 [185]–[186].

⁶ For details see Part 2 and [3.3] of this Research Paper.

also assists in the development of jurisprudence and understanding within decision-making agencies. A Human Rights Commission can also provide an accessible dispute resolution mechanism.

Building on the 2007 model

Based on case law and statutory reviews in jurisdictions with human rights enactments, the TLRI's view is that changes are required to update the model recommended in 2007 with a view to improving its operation and providing an effective, best practice human rights framework for Tasmania.

Who should be covered?

In its 2007 Final Report, the TLRI recommended that the Tasmanian Charter of Rights initially should bind only 'public authorities'. The TLRI maintains its earlier recommendation of a broad definition of public authority, including organisations performing public functions and organisations that opt-in to public authority obligations. Consistent with the ACT and Qld approaches, the TLRI maintains that a Tasmanian Charter of Rights should explicitly list the sorts of functions that would be characterised as public functions, including delivery of emergency, utility, education, health, disability and transport services, public housing, and the operation of correctional and detention facilities. In the 2007 Final Report, it was recommended that non-government schools and health services should not initially be included in the definition of 'public authority'. Instead, it was recommended that, in the review of the Charter, consideration should be given to extending the definition of 'public authority' to include private businesses and enterprises that receive public funding and carry out functions which have a public benefit, including non-government schools and private health services.

As discussed in Part 3, in the Review Period, the extent to which non-government schools and private health services should be dealt with under a human rights enactment has particularly arisen in the context of religious freedom. Tensions between the right to religious freedom and the right to be free from discrimination under human rights principles, and the exemption of religious bodies from anti-discrimination laws, have been the subject of contentious public debate at both State and national levels. Given that the nature of this project as a research paper (rather than a full reference) has resulted in more limited consultations undertaken, this broader enquiry is beyond the scope of this Research Paper. The preparation of this Research Paper did not involve, and was not intended to involve, a general community consultation as occurred in the preparation of the 2007 Final Report. The extent to which non-government schools and private health services should be dealt with under a human rights enactment also involves addressing the broader question of the treatment of religious bodies within a human rights enactment and anti-discrimination framework (and the interaction between the two frameworks), rather than being a matter within the scope of the research questions.

Based on developments in the Review Period, this Research Paper has considered the extent to which a human rights enactment should apply to the development of the common law (as compared to the interpretation of statute). The TLRI's view remains that the Charter or Act should apply to the interpretation of the common law, as well as to the interpretation of statutory instruments. Accordingly, a Tasmanian Human Rights Act or Charter should include explicit provision that all non-statutory law, including substantive and adjectival (procedural) law, be amended by the Act/Charter so as to conform to human rights as defined and limited in the Act/Charter, and that any conflict with the Act's/Charter's rights be resolved in favour of the Charter. This is consistent with Recommendations 8 and 11 in the 2007 Final Report (see Appendix A).

The Research Paper also considers the extent to which courts and tribunals should be included within the definition of a 'public authority'. The TLRI endorses the approach of the 2007 Final Report that, in interpreting the law, courts should be bound to apply the Charter to the interpretation of common law as well as statutory law. The TLRI considers that Recommendation 4 of this Research Paper achieves this objective. A separate question is the application of a human rights enactment to courts and tribunals as public authorities. The TLRI's view is that courts should be included in the definition of public

authority, when acting in an administrative capacity. This means that courts and tribunals, when acting in an administrative capacity, would be subject to Charter obligations (as set out in Recommendation 9 of the 2007 Final Report) ‘to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights unless otherwise required by particular legislation’.

What rights should be protected?

In its 2007 Final Report, the TLRI set out a comprehensive list of rights to be included in a Tasmanian Charter, including civil and political rights, and a number of economic, social, and cultural rights.⁷ These included economic, social, and cultural rights beyond those protected in the ACT and Victorian Charters: the rights to work, food and housing, health, education, and a safe environment.

Other jurisdictions have taken a cautious, incremental approach to rights protected in their human rights enactments. The ACT has included a right to education and a right to work and has introduced legislation to introduce a right to a healthy environment.⁸

Victoria has not amended its legislation to include any additional rights; however, the 2015 Review of the Charter recommended that inclusion of economic, social, and cultural rights be a priority consideration for future reviews.⁹ The Qld Human Rights Act includes a right to work, a right to education, and a right to adequate health services, and requires the three-year statutory review of the Act to consider whether a broader range of rights should be protected.¹⁰

None of the Australian jurisdictions with human rights enactments currently includes a right to housing. A recent Victorian parliamentary inquiry into homelessness¹¹ has recommended the recognition of an explicit right to housing, which would enhance protections for social housing tenants. The TLRI agrees that an explicit right to adequate housing would provide a more consistent and cohesive basis for planning, advocacy, and implementation of housing policies, and clearer pathways for tenants to assert their rights. This is a specific right that was recommended for inclusion in the Tasmanian Charter of Rights in the 2007 Final Report (See Recommendation 16).

In July 2022, the United Nations General Assembly recognised the right to a safe, clean, healthy, and sustainable environment as fundamental to the enjoyment of all other human rights.¹² To date, none of the Australian jurisdictions with human rights enactments protects a right to a healthy environment, although the ACT has introduced legislation that would insert that right into the ACT Charter.¹³ A limited right to a healthy environment is also included in the Australian Human Rights Commission’s model Human Rights Act.¹⁴ Without an explicit right to a healthy environment, climate and environmental litigation may resort to the right to life as a basis for arguing against environmentally damaging projects. While legitimate, the abstraction required by this argument would be avoided were litigants able to rely on an explicit right to a healthy environment. This is a specific right that was

⁷ See Appendix B and TLRI 2007 Final Report, Recommendations 9–13 & 15.

⁸ *Human Rights (Healthy Environment) Amendment Act 2023* (ACT).

⁹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2016) 225 <https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf>. Brett Young was appointed by the Attorney-General, the Hon Martin Pakula MP, as the independent reviewer to conduct the eight-year review of the *Charter of Human Rights and Responsibilities 2006* (Vic) in March 2015.

¹⁰ Including, but not limited to, rights under the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, and the *Convention on the Elimination of All Forms of Discrimination against Women – Human Rights Act 2019* (Qld) s 95(4)(a).

¹¹ Parliament of Victoria, Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (4 March 2021) Recommendation 34.

¹² United Nations General Assembly Resolution A/76, 26 July 2022. The Resolution effectively endorsed Resolution 48/13 of the United Nations Human Rights Council, Forty-eighth Session, 8 October 2021.

¹³ See *Human Rights (Healthy Environment) Amendment Act 2023* (ACT).

¹⁴ Australian Human Rights Commission (‘AHRC’), *Free and Equal: Position Paper. A Human Rights Act for Australia* (Report, 2022) 115 <<https://humanrights.gov.au/human-rights-act-for-australia>>.

recommended for inclusion in the Tasmanian Charter of Rights in the 2007 Final Report (see Recommendations 16 and 17).

The TLRI maintains the view expressed in the 2007 Final Report that protected rights should extend beyond civil and political rights to include all the rights outlined in Appendix A of that Report. At a minimum, the economic, social, and cultural rights protected in other Australian jurisdictions with human rights enactments – cultural rights for Aboriginal and Torres Strait Islander people, the right to education, health rights, and the right to work – should be included in a Tasmanian human rights instrument, with the expansion of rights to all those recommended for inclusion in the 2007 Final Report to be considered in reviews of that enactment.

Role of Parliament

Parliament has a critical role in the protection of human rights. Key features of human rights enactments that are intended to embed consideration of human rights in the legislative process are statements of compatibility (which aim to enable thorough, open, and genuine pre-enactment scrutiny of legislation in human rights terms) and parliamentary oversight by a dedicated committee. The experience in other jurisdictions suggests, however, that the quality of statements of compatibility and the timeliness of parliamentary scrutiny committees can vary markedly and can have a significant impact on the rigour of human rights analysis.

For this reason, the TLRI adheres to its original view that a dedicated Human Rights Unit be established to prepare statements of compatibility in consultation with the responsible agencies.¹⁵ Such dialogue will foster human rights discourse across government, while maintaining quality control over the statements. Comprehensive guidance materials should be developed to assist departments to consider human rights in preparing legislation and to lift and standardise the quality of drafting and assessment.

To allow for effective scrutiny, the TLRI recommends that any Tasmanian human rights legislation prescribe a minimum amount of time for human rights scrutiny of legislation by parliamentary committees and that it require scrutiny reports to be completed before legislation is debated.

In addition, even where robust pre-debate processes exist in jurisdictions with human rights enactments, the human rights implications of amendments made during parliamentary debate are rarely examined. The TLRI recommends iterative human rights assessment, which requires any significant amendments made during parliamentary debate to be re-examined to determine whether they alter any initial assessment of human rights compatibility.

Role of courts and tribunals

Courts have three primary roles in relation to human rights protection: (1) an interpretive role that involves interpreting laws in a manner that is, as far as possible, consistent with human rights; (2) dealing with legislation considered to be inconsistent with human rights; and (3) hearing and determining claims brought by citizens alleging breaches of their rights, and granting remedies in the event of their breach.

Based on developments in the Review Period, the TLRI has re-examined the issue of providing courts and tribunals with jurisdiction to hear and determine claims brought by citizens. The 2007 Final Report recommended that a Tasmanian Charter allow any person who is, or would be, the victim of a breach of Charter rights by a public authority to bring standalone proceedings in the Supreme Court of Tasmania. The TLRI also recommended that the Supreme Court be able to make appropriate orders for remedy or relief, including damages.

¹⁵ TLRI 2007 Final Report, Recommendation 22.

Currently, the ACT allows a direct cause of action for breach of Human Rights Act obligations,¹⁶ while Victoria and Queensland require claims to ‘piggy-back’ on a claim arising under other legislation or at common law. Experience in those jurisdictions suggests that piggy-back requirements create confusion and impose unnecessary restrictions on seeking relief.¹⁷

Based on the experience elsewhere, the TLRI maintains its earlier recommendation that a direct cause of action should be available for breach of a human rights obligation. Applications should be able to be made in either the Tasmanian Civil and Administrative Tribunal (‘TasCAT’) or the Supreme Court, supported by provisions for conciliation of complaints by the Human Rights Commission.

Role of the Human Rights Commission

Following the review of developments in the Review Period, the TLRI has re-examined its recommendations concerning the role of the Human Rights Commission. The TLRI reiterates its recommendation contained in the 2007 Final Report that an independent office of the Tasmanian Human Rights Commissioner be established under the human rights enactment. The TLRI commends arrangements in the ACT that allow the Human Rights Commission to comment on draft submissions prepared by government directorates for consideration by Cabinet. This reflects the powers and functions for the Commissioner contained in the 2007 Final Report. The TLRI’s view is that this arrangement provides an important opportunity to engage with human rights issues early in the development process, which has helped to improve the human rights compatibility of legislation presented to parliament in comparable Australian jurisdiction.

In the 2007 Final Report, the TLRI also recommended that the Human Rights Commission be able to intervene or be joined as party in any proceedings involving the interpretation of the Charter. In this Research Paper, the TLRI has reconsidered this recommendation and has modified its recommendations to provide that the Human Rights Commission may intervene in any court or tribunal proceeding, when the matters raise human rights issues where intervention would be in the interests of justice. This is consistent with the approach in all three Australian jurisdictions with human rights enactments explicitly allow the Attorney-General and the Human Rights Commission to intervene in any court or tribunal proceeding that raises a question of law relating to their respective human rights legislation.¹⁸ The TLRI’s view is that this power to intervene is likely undermined where the Commission is not made aware of relevant proceedings in a timely way or lacks the resources to intervene in all matters. Accordingly, the TLRI recommends that parties to Supreme Court proceedings that raise human rights issues be required to notify the Attorney-General and the Commission, and Magistrates and tribunal members be given discretion to require parties to notify the Attorney-General and the Commission, where they are satisfied that intervention would be in the interests of justice. Further, given the benefits of intervention in developing precedents, clarifying interpretation, and identifying areas for reform, the TLRI is of the view that the government should ensure that a Tasmanian Human Rights Commission has sufficient resources to intervene in any relevant matter.

¹⁶ *Human Rights Act 2004* (ACT) s 40C.

¹⁷ *Director of Housing v Sudi* (2011) 33 VR 559 per Weinberg JA at 596. See Bruce Chen, ‘The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria’ (2020) 45(1) *Alternative Law Journal* 4, 10. Chen notes that the Explanatory Notes for the Bill says these are ‘additional relevant factors to be taken into account’, rather than limitations, but considers that the text of those provisions might be interpreted more narrowly. See also Simon Evans and Carolyn Evans, ‘Legal Redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264, 281.

¹⁸ See [4.6.7]–[4.6.9] of this Research Paper.

Part 1

Introduction

1.1 Background to this Research Paper

1.1.1 In 2019, the Board of the Tasmania Law Reform Institute ('TLRI') accepted a request from members of the community to review and update its 2007 Final Report: *A Charter of Rights for Tasmania* ('2007 Final Report'). As part of that reference, the TLRI was asked to investigate how the fundamental rights Tasmanians consider significant might be further enhanced and legally secured. In its 2007 Final Report, the TLRI indicated that it shared the view of the majority of those who made submissions: that there was currently no systematic, logical, or comprehensive protection of human rights in Tasmania. As discussed at [1.3], that Report made a range of recommendations, with the aim of giving better effect to human rights principles in Tasmanian law, including enacting a Charter of Rights for Tasmania.

1.1.2 While accepting that a Charter of Rights would not be a panacea for all human rights problems or prevent social inequality and injustice in Tasmania, the view of the TLRI was that it would provide a single, comprehensible statement of the fundamental rights applicable in Tasmania, foster community awareness of human rights, and encourage the systematic development and observance across all arms of government of processes responsive to human rights. The TLRI's view was that the current law provided no clear statement of fundamental rights and freedoms for Tasmanians and set no minimum standards for governments and public authorities. Consequently, there was no general gauge by which to judge government legislation or the actions of public authorities. Additionally, the haphazard and complex nature of rights' protection in Tasmania impeded the exercise and observance of rights.

1.1.3 Tasmania still has no Charter of Rights or equivalent legislative framework that sets out legal guarantees for rights in a comprehensive and easily accessible format. In response to a reference from a collection of community groups, the Board of the TLRI agreed to consider whether subsequent developments, within and outside Tasmania, since the 2007 Final Report support any amendments to its earlier recommendations.¹⁹

1.2 Scope of this Research Paper

1.2.1 The research questions for this review are to review and report on developments in Australian human rights law and practice that bear on the TLRI's recommendations in 2007 for a Tasmanian Human Rights Act. In preparing this report the TLRI will:

- consider if developments since 2007 require amendments or improvements to the TLRI's original model. In particular, it will consider the experience in other Australian jurisdictions with human rights statutes.
- consider if developments since 2007 make a State Human Rights Act more or less necessary. In particular, it will consider the extent to which human rights are today more or less understood, respected, and protected.

¹⁹ These community groups are listed on page vi.

- seek the input of legal experts, government representatives, and peak community bodies, as necessary, to inform the above considerations.

1.2.2 It is important to stress that this current review was not given to the TLRI to reopen the original reference or for it to be undertaken in the manner of a full reference. It has a more limited scope as a Research Paper confined to exploring questions about how events and human rights developments since 2007 may have relevance and import for the recommendations made in the 2007 Final Report. Accordingly, the TLRI did not obtain either the financial or human resources to conduct this review in the same manner as the original reference and did not undertake a full community consultation of the kind undertaken in the preparation of the 2007 Final Report. The TLRI did, however, receive advice from the people who gave the reference to the TLRI (see Appendix C) and had the benefit of advice and oversight in the preparation of this Research Paper provided by an Expert Advisory Group.²⁰ It has also taken account of reviews and developments in other jurisdictions to inform its views and the recommendations set out in this Research Paper.

1.2.3 In this context, the most relevant developments are legislative changes to the Human Rights legislation that existed in Australian jurisdictions in 2007, which were influential in the development of the TLRI's recommendations set out in the Final Report. These were the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic). Both these Acts have undergone review and reform since 2007 to improve their operational and legal efficacy. In 2020, Queensland became the third Australian State to implement a contemporary human rights regime, contained in the *Human Rights Act 2019* (Qld). The Commonwealth also took a step towards a more thorough and consistent approach to the analysis of the human rights impacts of legislation with the implementation of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

1.2.4 In addition, since 2007, the Tasmanian community has not remained static. There may have been changes in society and community standards and, potentially, attitudes and understanding of human rights (reflecting local, national, and international events). This is likely to have altered the context in which any human rights regime would operate, and so may have implications for possible changes to the TLRI's 2007 recommendations. These changes are considered further in the Research Paper.

1.2.5 Part 1 of this Research Paper outlines the main features of the TLRI's model for a Charter of Rights as recommended in the TLRI's 2007 Final Report.

1.2.6 Part 2 considers developments in other jurisdictions since 2007, including reviews of, and reforms to, existing human rights laws in Victoria and the ACT, and the introduction of human rights related legislation in Queensland and at the Commonwealth level.

1.2.7 Part 3 examines how key issues arising between 2007 and 2022 (the Review Period) affecting human rights have been dealt with in Tasmania and in Australian jurisdictions with human rights enactments. It also discusses the impact that a legislative human rights framework may have had on the discourse and transparency in relation to human rights issues. For reasons of practicality, the TLRI has been selective, rather than comprehensive, in its focus on key issues in the Review Period, namely: governments' response to COVID-19; legislative restrictions on political communication and protest; incursions on privacy rights; prisoners' rights; religious freedoms; and homelessness and housing. Discussion of these issues provides insight into the different approaches adopted in human rights and non-human rights jurisdictions.

1.2.8 Other significant areas have not been addressed in this Research Paper, on the basis that they have been the subject of other full, independent reports.

²⁰ See the Acknowledgments section of this Research Paper.

- Achieving reconciliation with Tasmania’s First Nations peoples. The *Pathway to Truth-Telling and Treaty Report*, prepared by Professor Kate Warner, Professor Tim McCormack, and Ms Fauve Kurnadi, was tabled in the Tasmanian Parliament on 25 November 2021.²¹
- Child sexual abuse in institutional settings. A Commission of Inquiry was established into to the Tasmanian Government’s response to this matter on 15 March 2021. The Report was released on 26 September 2023.²²

1.2.9 Part 4 provides updated recommendations regarding an appropriate model for the protection of human rights in Tasmania, having regard to the progress and experiences in other jurisdictions.

1.3 The 2007 Final Report

1.3.1 To inform its inquiry, the TLRI released an Issues Paper in September 2006, which asked 24 key questions arising from the Terms of Reference. Public consultation and engagement were assisted by simplified materials, in the form of a pamphlet that outlined the essential matters raised in the Issues Paper. The TLRI conducted wide-ranging consultations over a four-month period, with a series of community consultations conducted around Tasmania (66 in total).²³ The design and oversight of the consultation was directed by a specially constituted Human Rights Community Consultation Committee of the TLRI.²⁴

1.3.2 The TLRI received a total of 407 submissions to its public consultation. Ninety-four per cent (94%) were in favour of adopting a human rights instrument.²⁵ The TLRI also conducted independent legal and comparative research relevant to the Terms of Reference.

Recommendations in the TLRI 2007 Final Report

1.3.3 The primary recommendation of the Final Report was for the enactment of a Charter of Rights for Tasmania.²⁶ In total, the Final Report made 23 Recommendations, which collectively formed the basis for a comprehensive legislative model for the protection of human rights. The next section broadly summarises those Recommendations.

A statutory instrument that binds public authorities, guides legislative development and judicial interpretation, and protects natural persons

1.3.4 The TLRI recommended that a Charter of Rights be enacted as an ordinary statute, and not entrenched in the State’s Constitutional framework. This form was preferred because it would:

²¹ Kate Warner, Tim McCormack and Fauve Kurnadi, *Pathway to Truth-Telling and Treaty Report* (Report, 2021) <https://www.dpac.tas.gov.au/__data/assets/pdf_file/0029/162668/Pathway_to_Truth-Telling_and_Treaty_251121.pdf>.

²² See Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings (Web Page, 2021) <<https://www.commissionofinquiry.tas.gov.au/home>>; Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, *Who was Looking after Me? Prioritising the Safety of Tasmanian Children. Volume 1: Summary, Recommendations and Findings* (Report, 2023) <https://www.commissionofinquiry.tas.gov.au/__data/assets/file/0011/724439/COI_Full-Report.pdf>.

²³ The Issues Paper was distributed to approximately 700 individuals and community organisations; over 2,500 pamphlets were distributed. For an overview of the consultation process, see TLRI 2007 Final Report 151–154.

²⁴ That Committee was chaired by Terese Henning and comprised of members from government and community organisations (see TLRI 2007 Final Report [1.1.2] and Appendix B).

²⁵ TLRI 2007 Final Report [4.1.1].

²⁶ TLRI 2007 Final Report [4.1.49], Recommendation 2. The Recommendations from the 2007 Final Report are set out in Appendix A.

- not intrude upon Parliamentary supremacy;²⁷
- be comparatively easy to amend and therefore more responsive to changing expectations;
- be consistent with models enacted in comparable jurisdictions; and
- promote the development of a dialogue about human rights across the three arms of government and within the Tasmanian community.²⁸

1.3.5 The TLRI recommended that the Charter of Rights embed human rights considerations throughout the legislative process by mandating that Bills tabled in Parliament be accompanied by ‘statements of compatibility’ with the rights outlined in the Charter and subject to specific scrutiny of any restriction of human rights.²⁹

1.3.6 The TLRI recommended that the proposed Charter of Rights protect the rights of natural persons but not corporations.³⁰

1.3.7 The TLRI recommended that the Charter bind ‘public authorities’³¹ and exclude acts by private individuals, corporations, or community organisations, unless they are performing a public function.³² This was described as an ‘initially conservative approach’ that could be revisited over time.³³ It was recommended that statutory guidance, similar to that in the Victorian Charter, be provided as to when a particular entity was performing functions of a public nature.³⁴

1.3.8 The TLRI recommended that an independent Office of the Tasmanian Human Rights Commissioner be established to monitor the operation of the Charter, to educate and advise the community about the Charter, and to intervene in any proceedings involving the interpretation of the Charter.³⁵ The Office would also be responsible for conducting comprehensive reviews of the operation of the Charter after four and eight years from its commencement.³⁶ The TLRI further recommended that a dedicated Human Rights Unit be created within the Department of Justice to assist public authorities to implement the Charter, provide training, and guide advice to Ministers, Cabinet, and Parliament on human rights compatibility.³⁷

A Charter that encourages parliamentary dialogue about human rights

1.3.9 The TLRI identified several key roles that Parliament should perform in relation to a Charter of rights.

- **Statements of compatibility** – All government and non-government bills introduced to Parliament should be accompanied by a statement of compatibility outlining compliance with human rights standards.³⁸

²⁷ This is consistent with the Terms of Reference for the referral, which directed that any recommendations made must be compliant with the principle of Parliamentary supremacy.

²⁸ TLRI 2007 Final Report [4.2.26]–[4.2.28], Recommendation 3. The TLRI recommended that future reviews of the operation of the legislative model should assess whether to entrench such an instrument or adopt some other model to protect human rights further: TLRI 2007 Final Report, Recommendation 3, 62.

²⁹ TLRI 2007 Final Report, Recommendations 10 & 13, [4.10.6]–[4.10.9] & [4.13.7].

³⁰ Ibid Recommendation 4, [4.3.8], [4.3.13]–[4.3.14].

³¹ Ibid [4.5.1]–[4.5.13], Recommendation 7.

³² Ibid [4.5.1]–[4.5.10], Recommendation 7, [4.5.12]–[4.5.13]: at [4.6.1]–[4.6.9], [4.7.18], Recommendation 8.

³³ Ibid [4.5.12]–[4.5.13].

³⁴ Ibid Recommendation 8, [4.7.18].

³⁵ Ibid [4.20.18]–[4.20.20], Recommendation 23.

³⁶ Ibid [4.19], Recommendation 20.

³⁷ Ibid [4.20.7]–[4.20.11], Recommendation 22.

³⁸ Ibid [4.10.6]–[4.10.9], Recommendation 10.

- **Parliamentary Human Rights Scrutiny Committee** – A multi-party committee of both houses should be established to provide pre-enactment scrutiny of Bills (including proposed subordinate legislation) for compatibility with human rights standards.³⁹
- **A process for responding to ‘declarations of incompatibility’** – Under the TLRI recommendations, courts could make declarations of incompatibility where provisions of legislation were inconsistent with any Charter rights but the declaration would not automatically invalidate the legislation.⁴⁰ Instead, Parliament would be advised of the declaration of incompatibility, refer the declaration to the Scrutiny Committee, and have six months to determine how to respond. Parliament could vote to amend or repeal the legislation or make ‘override declarations’ to affirm the operation of legislation, despite the declaration of incompatibility with human rights. If Parliament failed to respond within seven months, the TLRI recommended that the legislation subject to the declaration of incompatibility become inoperative to the extent of its incompatibility with human rights.⁴¹

1.3.10 The TLRI also recommended that the Charter state that protected rights can be subject to reasonable, justifiable limits, having regard to the nature of the right, the purpose, nature, and extent of the limitation, and whether the purpose can be achieved with a less restrictive approach.⁴²

1.3.11 The TLRI recommended that, as in other jurisdictions, a Tasmanian human rights enactment should not introduce an outright prohibition on legislation that was incompatible with human rights (subject to limited powers to invalidate subordinate legislation). Instead, government, public officials, and Parliament would be encouraged to draft, amend, and implement legislation in a manner that maximised compatibility with human rights, and be required to identify and justify decisions that are not entirely compatible with human rights. The TLRI recommendations recognised Parliamentary supremacy, while promoting a dialogue approach that would assist in embedding human rights considerations into Parliamentary debate and aim to ultimately improve decision-making.⁴³

Role of the Courts

1.3.12 The TLRI identified that courts have three primary roles in protecting human rights, and made several recommendations to legislate these roles.

- **Interpretation** – The 2007 Final Report recommended that, where legislation can be interpreted in a manner that is both compatible with the purposes of an Act and the protection of human rights, that interpretation should be preferred to any others.⁴⁴ The 2007 Final Report also recommended that courts should be included in the definition of ‘public authorities’, in addition to an express provision to the effect that all non-statutory law,

³⁹ It was suggested that such a committee could also perform this scrutiny function in relation to a court’s ‘declaration of incompatibility’: Ibid [4.10.10]–[4.10.15], Recommendation 10.

⁴⁰ In contrast, a court’s declaration of incompatibility relating to subordinate legislation would immediately invalidate it. TLRI 2007 Final Report, Recommendation 12, [4.11.35] & [4.11.43].

⁴¹ Ibid [4.10.25]–[4.10.31], Recommendation 10. At the time this Recommendation was made, the recommended requirement that the legislature respond to the declaration of incompatibility would have been unique to the Tasmanian model. It was reasoned that such a requirement ‘would greatly assist in the creation of a genuine dialogue about human rights between the different arms of Government’: Ibid [4.10.26]. The Qld Human Rights Act adopts this approach and requires the relevant Minister to respond to a declaration of incompatibility within six months (see *Human Rights Act 2019* (Qld) s 56) but does not invalidate the operative provisions if a Minister fails to respond.

⁴² TLRI 2007 Final Report, Recommendation 14.

⁴³ Ibid [4.10.16]–[4.10.22], [4.10.26]–[4.20.18], Recommendation 10.

⁴⁴ Ibid [4.11.2]–[4.11.10], Recommendation 11.

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.⁴⁵

- **Dealing with incompatible legislation** – The 2007 Final Report recommended that a ‘dialogue model’ be adopted, in which the Supreme Court may make declarations of incompatibility with human rights for legislation, which would trigger consideration by Parliament to determine whether to override the declaration or amend or repeal the legislation to address the incompatibility.⁴⁶

For delegated legislation, such as regulations, the TLRI recommended that a judicial declaration of incompatibility should immediately invalidate the incompatible provisions.⁴⁷

- **Dealing with breaches of Charter rights** – The 2007 Final Report recommended that the full range of remedies (including damages) should be available to those who suffer damage as a result of breaches of Charter rights by public authorities.⁴⁸ The TLRI also recommended that citizens have a direct right to take action in the Supreme Court for breaches of human rights obligations.⁴⁹ At that time, this position was different from that adopted in other Australian jurisdictions with human rights instruments.⁵⁰

Role of the Executive

1.3.13 The TLRI observed that the Executive branch of government could support the operation of a Charter of Rights in several ways, including:

- fostering a culture of human rights awareness within government departments, including through departmental Human Rights Action Plans and annual reports on actions taken to meet human rights standards;⁵¹
- ensuring that legislation and policy for which each department is responsible complies with Charter standards, and that any proposed restriction of human rights is explicit, proportionate, and justified by:
 - preparing statements of compatibility for proposed legislation and subordinate legislation;⁵²
 - responding to issues raised by the Parliamentary Human Rights Scrutiny Committee; and
 - assisting Parliament to respond to declarations of incompatibility.⁵³

⁴⁵ TLRI 2007 Final Report, Recommendation 11.

⁴⁶ Ibid [4.11.36]–[4.11.44], Recommendation 12. Legislation in all jurisdictions with human rights enactments provides courts with discretion to make a declaration of incompatibility and trigger ‘dialogue’ with Parliament.

⁴⁷ The recommendation was made ‘on the proviso that such [delegated] legislation may be reinstated by the legislature enacting authorising legislation explicitly allowing for the inconsistency’. TLRI 2007 Final Report, Recommendation 12, [4.11.35] & [4.11.43].

⁴⁸ Ibid Recommendation 19, [4.18.1]–[4.18.10]. See further at [4.5.1]–[4.5.12].

⁴⁹ Ibid.

⁵⁰ See further at [4.5.2] & [4.5.6].

⁵¹ TLRI 2007 Final Report, Part 14.3, Recommendation 13. The TLRI recommended that, ‘The extent to which such plans have been developed and implemented should be considered in the periodic reviews of the Charter’s operation. If it is clear after the second review of the Charter that no action has been taken in this regard, then consideration should be given to including the requirement for such plans in the Charter’. TLRI 2007 Final Report 9.

⁵² Ibid Recommendations 10 & 13.

⁵³ TLRI 2007 Final Report [4.13.4], Recommendation 13.

1.3.14 The Executive would not bear any direct liability or responsibility for actions taken under legislation that was incompatible with human rights, and legislation would not be invalidated due to any apparent breach of human rights. Consistent with maintaining the supremacy of Parliament, Charter legislation would not compel the Executive to direct funding to particular outcomes or to authorise expenditure, other than with the approval of Parliament.

1.3.15 However, the TLRI was of the view that requiring both Human Rights Statements of Compatibility and Human Rights Action Plans could catalyse a cultural shift by integrating human rights consideration and compliance into decision-making and service delivery across all areas of Executive responsibility.⁵⁴

What rights should the proposed Charter protect?

1.3.16 The TLRI 2007 Final Report recommended that a Tasmanian Charter of Rights include the rights contained in the *International Covenant on Civil and Political Rights*⁵⁵ ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights*⁵⁶ ('ICESCR') (subject to modifications as required) (see Appendix B).⁵⁷ Its view was that both sets of rights are inherently intertwined and that it is artificial to ignore one. Experience in other jurisdictions has shown that rights are inherently indivisible, which means that, inevitably, civil and political rights are interpreted to protect economic, social, and cultural rights.⁵⁸

1.3.17 The TLRI did not believe that including economic, social, and cultural rights, such as a right to education, would deprive Parliament of its fiscal supremacy and capacity to determine how resources are allocated.⁵⁹ While greater scrutiny of the human rights implications of funding decisions would occur as Action Plans were implemented, authority for decisions regarding budget allocation would ultimately remain with the Executive, endorsed by Parliament.⁶⁰

⁵⁴ Ibid [4.13.8]–[4.13.14], Recommendation 13.

⁵⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁵⁷ TLRI 2007 Final Report [4.16.1]–[4.16.3], Recommendation 16.

⁵⁸ Ibid [4.15.7].

⁵⁹ Both the ACT and Qld Human Rights Acts now provide protection for a number of economic, social, and cultural rights: the right to education, workplace rights, and a right to health services. See Part 4.3 of this Research Paper.

⁶⁰ TLRI 2007 Final Report [4.15].

Part 2

Developments in Other Jurisdictions

2.1 Introduction

2.1.1 In accordance with the questions set for this Research Paper, the Tasmanian Law Reform Institute ('TLRI') has considered whether developments in the Review Period (between 2007 and 2022) require amendments or improvements to the original recommendations made in the 2007 Final Report.

2.1.2 As part of this assessment, the TLRI has considered the experience in other Australian jurisdictions that have human rights enactments: the Australian Capital Territory ('ACT'); Victoria; and Queensland. The TLRI has also examined the operation of Commonwealth *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This Part canvasses some of these developments; it is beyond the scope of this Research Paper to provide a detailed analysis of all developments that may affect the TLRI's recommendations. Instead, this Research Paper aims to address the developments that appear most relevant to the research questions.

2.1.3 Further, while this Part discusses some of the major developments in this context, Part 4 considers in more detail whether developments in other jurisdictions support the original model recommended by the TLRI and, if so, where they identify areas for amendment.

2.2 Updates from the ACT

2.2.1 The *Human Rights Act 2004* (ACT) ('ACT Human Rights Act') has undergone several reviews since its introduction:

- Department of Justice and Community Safety, *Human Rights Act 2004 – Twelve Month Review* (Report, 2006);
- ACT Human Rights Act Research Project, Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (Report, 2009);
- Australian Research Council Project, Australian National University and University of New South Wales, *Australian Capital Territory Economic, Social and Cultural Rights Research Project* (Report, 2010);
- ACT Human Rights and Discrimination Commissioner, *Look Who's Talking – A Snapshot of Ten Years of Dialogue Under the Human Rights Act 2004* (Report, 2014);
- Justice and Community Safety Directorate (ACT), *Economic, Social and Cultural Rights in the Human Rights Act 2004: Section 43 Review* (2014); and
- ACT Auditor-General, *Recognition and Implementation of Obligations under the Human Rights Act 2004* (Report No 2, 2019).

2.2.2 Significantly, an independent review of the ACT Human Rights Act conducted by the Australian National University in 2009 found that the Act had improved the quality of law making in

the ACT in respect to the consideration of human rights.⁶¹ This finding has been echoed more recently by the Human Rights and Discrimination Commissioner and others, who note greater embedding of a human rights culture across the ACT Government.⁶² While the reviews have identified strengths and weaknesses in the human rights framework in the ACT, a ‘common and consistent theme that has emerged is the [Human Rights Acts’s] positive impact on the work of the legislature and the executive’.⁶³

2.2.3 Changes made to reflect the findings of the reviews include:

- imposing a positive duty on public authorities to comply with the Act;⁶⁴
- providing an independent right of action in the Supreme Court for breaches of the Act,⁶⁵ rather than restricting human rights claims to piggy-backing on existing legal actions available under other legislation or the common law;
- expanding the rights protected by the Human Rights Act to include:
 - the right to education;⁶⁶
 - distinct cultural rights of Aboriginal and Torres Strait Island people;⁶⁷ and
 - the right to work and workers’ rights.⁶⁸

2.2.4 The ACT has also introduced legislation that would insert a right to a healthy environment into the ACT Charter.⁶⁹

2.2.5 Other developments in the ACT include the establishment of a Human Rights Unit within the Justice and Community Safety Directorate (as part of the government’s commitment to effective implementation of the Act) and the appointment of a dedicated Minister for Human Rights to oversee legislative and policy responses to the protection of human rights in the ACT. The ACT has recently established a complaints mechanism within the Human Rights Commission in relation to abuse, neglect, or exploitation of vulnerable people, including people older than 60 with specified characteristics and people with a disability.⁷⁰

⁶¹ Australian National University (ACT Human Rights Act Research Project), *The Human Rights Act 2004 (ACT): The First Five Years of Operation. Report to the ACT Department of Justice and Community Safety* (Report, 2009) 6.

⁶² Helen Watchirs, Sean Costello and Renuka Thilagaratnam, ‘Human Rights Scrutiny under the *Human Rights Act 2004 (ACT)*’ in Julie Debeljak and Laura Greenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 6 [6.10]; ACT Human Rights and Discrimination Commissioner, *Look Who’s Talking – A Snapshot of Ten Years of Dialogue Under the Human Rights Act 2004* (Report, 2014) 16.

⁶³ Watchirs, Costello and Thilagaratnam, ‘Human Rights Scrutiny under the *Human Rights Act 2004 (ACT)*’ [6.10].

⁶⁴ *Human Rights Act 2004 (ACT)* s 40B.

⁶⁵ *Human Rights Act 2004 (ACT)* s 40C. However, an award of damages may still not be made for a breach of human rights: *Human Rights Act 2004 (ACT)* s 40C(4).

⁶⁶ See *Human Rights Amendment Act 2012 (ACT)* s 6, which inserted s 27A into the Act (discussed at [4.3.3]–[4.3.4]); see also *ACT Government Response to the Australian Capital Territory Economic, Social and Cultural Rights Research Project* (Report, 2012) <<https://regnet.anu.edu.au/Centre-International-Governance-and-Justice/ACT-economic-social-and-cultural-rights-project>>.

⁶⁷ *Human Rights Amendment Act 2016 (ACT)* s 7, inserting a new s 27(2) in the *Human Rights Act 2004 (ACT)*; see also [4.3.13].

⁶⁸ See *Human Rights Act 2004 (ACT)* s 27B inserted by *Human Rights (Workers Rights) Amendment Act 2020* s 4; see also [4.3.19]–[4.3.20].

⁶⁹ See *Human Rights (Healthy Environment) Amendment Act 2023 (ACT)*.

⁷⁰ *Human Rights Commission Act 2005 (ACT)* s 41B.

2.2.6 It is noted that, despite positive findings about the impact of the legislation on the development of policy and legislation from a human rights perspective in the ACT, there has been less involvement by courts in the human rights dialogue.⁷¹ In a 2014 address marking 10 years since its enactment, Chief Justice Helen Murrell noted that the Human Rights Act

has had little direct impact on the outcome of cases. The enactment of the HRA was a powerful symbolic statement, and it was predicted that the Supreme Court would play an important role in increasing human rights compliance in the ACT. But despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome.⁷²

This trend is said to have continued.⁷³

2.2.7 The role of the amended ACT Human Rights Act in key social issues is discussed in more detail in Parts 3 and 4.

2.3 Updates from Victoria

2.3.1 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Vic Human Rights Charter') was subject to statutory reviews in 2011 and 2015. There have been no substantive changes to the legislation following these reviews, however.

2.3.2 The 2011 review, undertaken by the Parliamentary Scrutiny of Acts and Regulations Committee, considered whether the Vic Human Rights Charter should include additional human rights, including: a right to self-determination for First Nations people; whether there should be auditing of human rights compliance; and whether to provide direct remedies for breaches of protected rights. The review did not recommend any changes to the rights protected by the Charter but did recommend a number of operative changes, including that courts be excluded from the operation of the public authority obligations under the Act in all of their functions. The Victorian Government did not make any amendments to the Victorian legislation following the 2011 review.

2.3.3 The independent 2015 Review, conducted by Michael Brett Young, former CEO of the Law Institute of Victoria, observed that:

The introduction of the Charter has been a clear part of building a human rights culture in Victoria, particularly in the Victorian public sector. Over time, implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector, Parliament and the courts in key areas.⁷⁴

2.3.4 Submissions noted that there had been an increased awareness of human rights within government and public authorities, with the use of the Charter extending beyond simple compliance but also underpinning systemic initiatives.⁷⁵ The 2015 Review noted, however, that the development of a

⁷¹ Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the *Human Rights Act 2004* (ACT)' [6.170].

⁷² Chief Justice Helen Murrell, Act Supreme Court, 'ACT Human Rights Act: A Judicial Perspective', Paper presented at *Ten Years of the ACT Human Rights Act: Continuing Dialogue Conference* (Australian National University, 1 July 2014) 22 <<https://www.courts.act.gov.au/supreme/about-the-courts/judiciary/speeches#Murrell>>.

⁷³ Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the *Human Rights Act 2004* (ACT)' [6.170].

⁷⁴ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 2016) 22 <https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf>. Brett Young was appointed by the Attorney-General, the Hon Martin Pakula MP, in March 2015 as the independent reviewer to conduct the eight-year review of the Victorian *Charter of Human Rights and Responsibilities 2006*.

⁷⁵ Ibid.

human rights culture had stalled over time and considered ways to enhance the effectiveness of the Victorian Charter in building a more effective human rights culture and to improve its operation. Its 52 recommendations include:

- promoting a stronger, coherent human rights culture in the public sector;
- creating an avenue for dispute resolution through the Victorian Equal Opportunity and Human Rights Commission;
- allowing a person who claims a public authority has acted incompatibly with their human rights to apply to the Victorian Civil and Administrative Tribunal for a remedy, or to rely solely on the Vic Human Rights Charter in any legal proceedings (rather than current requirements that human rights actions ‘piggy-back’ off other legal claims); and
- allowing sufficient time for the relevant Parliamentary committee to examine a Bill.⁷⁶

2.3.5 The 2015 Review concluded that the current human rights framework in Victoria was beset by four key problems:

- (1) lack of consequences for breaches of rights;
- (2) a focus on government administration, rather than remedies for individuals;
- (3) lack of accessibility to justice for breaches of rights; and
- (4) convoluted litigation resulting from the ‘piggy-back’ approach to bringing Charter issues before the courts.⁷⁷

2.3.6 The Victorian Government’s response to the 2015 Review supported most of its recommendations;⁷⁸ however, no legislative reform has yet occurred.

2.3.7 The implications of the Victorian experience for the model recommended by the TLRI are discussed in Parts 3 and 4.

2.4 Updates from Queensland

2.4.1 Since the TLRI 2007 Final Report was released, the *Human Rights Act 2019* (Qld) (‘Qld Human Rights Act’) took effect on 1 January 2020. The Qld Human Rights Act explicitly identifies and protects 23 human rights (see Appendix B) drawn from the ICCPR, ICESCR, and the *Universal Declaration of Human Rights*. Significantly, the Act protects a right to education⁷⁹ and right to health services,⁸⁰ as well as explicitly protecting the cultural rights of Aboriginal and Torres Strait Islander peoples.⁸¹

2.4.2 The Queensland Human Rights Commission, initially established under the *Anti-Discrimination Act 1991* (Qld), was given an expanded function to provide advice on human rights issues, review public entities’ policies and procedures, develop education resources, assist with

⁷⁶ Ibid v–xi. The implications of these recommendations for the TLRI model are discussed in Part 4.

⁷⁷ Ibid 12.

⁷⁸ See Victorian Government, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (2016)

<https://static1.squarespace.com/static/5b7e1a0be2ccd10a603592f6/t/62eb12f8b0c0ae524d1867d2/1659572985972/Government+response+to+the+2015+review+of+the+Charter+of+Human+Rights+and+Responsibilities+Act+_+Department+of+Justice+and+Community+Safety+Victoria.pdf>.

⁷⁹ *Human Rights Act 2019* (Qld) s 36.

⁸⁰ *Human Rights Act 2019* (Qld) s 37.

⁸¹ *Human Rights Act 2019* (Qld) s 28.

statutory reviews of the operation of the Qld Human Rights Act, and deal with complaints made under the Act.⁸² The availability of an accessible dispute resolution mechanism for alleged contraventions of human rights by public entities is a key difference between the Queensland regime and its Victorian and ACT counterparts.⁸³

2.4.3 The Qld Human Rights Act applies to Queensland Government departments and agencies, local councils, courts (when acting in an administrative capacity) and ‘functional public entities’—organisations providing services to the public on behalf of the state government⁸⁴—and requires that all these entities consider human rights and perform public duties in a way that is compatible with the Qld Human Rights Act.⁸⁵ The Act includes exemptions for religious organisations, if the act or decision is done or made in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of the people of the religion.⁸⁶

2.4.4 As in Victoria and the ACT, the Qld Human Rights Act does not require particular human rights compatibility outcomes, but adopts a process for the Parliament to scrutinise all proposed laws for compatibility with human rights, by requiring that:

- all new Bills introduced into Parliament include a statement of compatibility with human rights;⁸⁷
- all subordinate legislation include a certificate of compatibility with human rights;⁸⁸ and
- portfolio committees⁸⁹ examine Bills and report to the Legislative Assembly about any incompatibility with human rights.

2.4.5 If a proposed instrument places limitations on protected rights, the statement (or certificate) must explain the nature and extent of the limitations.⁹⁰ Consistent with recommendations made in the TLRI 2007 Final Report,⁹¹ the *Human Rights Act 2019* (Qld) sets out factors that may be relevant in deciding whether a limit on a human right is justifiable but does not prevent the Parliament from passing legislation that does not satisfy those factors.⁹²

⁸² *Human Rights Act 2019* (Qld) Pt 4.

⁸³ Examples of complaints reviewed by the Commission are outlined in its annual reports. See Queensland Human Rights Commission, *Annual Report 2020-21* (QHRC, 2021) 156–165 <https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0015/35511/Queensland-Human-Rights-Commission-Annual-Report-2020-21.pdf>.

⁸⁴ *Human Rights Act 2019* (Qld) ss 5, 9 & 58. For guidance on when organisations will be characterised as a ‘functional public entity, see also Queensland Government, ‘Checklist: Public Entities under the *Human Rights Act 2019*’ (Queensland Government, 2019) <www.forgov.qld.gov.au/_data/assets/pdf_file/0026/182564/what-is-public-entity-under-human-rights-act.pdf>. Any organisation can seek to be declared a functional public entity and become subject to the *Human Rights Act 2019* (Qld) s 60. Agencies that outsource roles to functional public entities are not required to report on the functional public entities’ compliance with obligations under the Act. An agency that funds a functional public entity to do work on its behalf may include auditing or quality assurance management for human rights compliance in reporting obligations or procurement criteria, however.

⁸⁵ *Human Rights Act 2019* (Qld) s 58.

⁸⁶ *Human Rights Act 2019* (Qld) s 58(3).

⁸⁷ *Human Rights Act 2019* (Qld) s 38.

⁸⁸ *Human Rights Act 2019* (Qld) s 41.

⁸⁹ As a unicameral Parliament, Queensland does not have an Upper House tasked with scrutinising legislation. Consequently, all Bills are referred to portfolio committees for consideration. The Qld Human Rights Act does not establish a stand-alone Human Rights Committee, but instead requires all portfolio committees to consider human rights compatibility in their broader review of Bills: *Human Rights Act 2019* (Qld) ss 39, 40, 41.

⁹⁰ *Human Rights Act 2019* (Qld) ss 38, 41.

⁹¹ TLRI 2007 Final Report, Recommendation 8.

⁹² The factors that may be relevant to determining whether a limitation on human rights is proportionate are found in s 13(2) of the *Human Rights Act 2019* (Qld). They include the nature of the right, the purpose of the limitation and how it achieves its purpose, the importance of the purpose and whether there are any less restrictive and reasonably available ways to achieve the

2.4.6 In exceptional circumstances, Parliament may make an ‘override declaration’, exempting a law, or part of a law, from the application of the *Human Rights Act 2019* (Qld) for a period of up to five years. Override declarations may be re-enacted at the conclusion of the five years.⁹³

2.4.7 The *Human Rights Act 2019* (Qld) requires that all legislation⁹⁴ be interpreted in a way that is compatible, or most compatible, with human rights and consistent with the purpose of the legislation.⁹⁵ If the Supreme Court or Court of Appeal determines that legislation cannot be interpreted in a way that is compatible with human rights, it can make a declaration of incompatibility.⁹⁶ The Queensland Human Rights Commission and the Attorney-General must be given a reasonable opportunity to intervene or make submissions about a proposed declaration of incompatibility.⁹⁷ If a declaration is made, Parliament is advised, but the declaration does not have the effect of invalidating the legislation.⁹⁸

2.4.8 As in Victoria and the ACT, the Qld Human Rights Act requires courts and tribunals to act consistently with human rights in performing administrative functions but exempts courts from the public entity obligations when performing judicial functions.⁹⁹ As with Victoria, there is provision for the direct application of certain human rights to the courts.¹⁰⁰

2.4.9 The Qld Human Rights Act does not provide a direct right of action, where a person claims that a public authority has breached their human rights. However, where a separate legal right of action exists under other legislation or common law, an applicant may also raise incompatibility with the Qld Human Rights Act.¹⁰¹ Like the *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT), the Qld Human Rights Act does not permit damages to be awarded for breaches of human rights.¹⁰²

2.4.10 Where a question of law about the application of the Qld Human Rights Act, or interpretation of other laws consistently with the Act, arises in a lower court or tribunal proceeding, the question may be referred to the Supreme Court to decide.¹⁰³

2.4.11 The Attorney-General and the Queensland Human Rights Commission have the right to intervene in proceedings in courts and tribunals, where there is a question of law about the application of the Act or the interpretation of legislation in the way the Act requires.¹⁰⁴

purpose, and the balance between the purpose of the restriction and the protection of human rights. See also Queensland Government, ‘Guide: Developing Policy and Legislation that is Compatible with Human Rights’ (version 2, May 2020) 3. For a discussion of whether the listed factors complicate the test of proportionality unnecessarily, see Chen, ‘The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria’ 5. The Act also provides that correctional facilities will not be in breach of human rights where limitations are justified on the grounds of security and good management: *Human Rights Act 2019* (Qld) s 126.

⁹³ *Human Rights Act 2019* (Qld) ss 43, 45, 46. Any proposed override declaration must be accompanied by a statement of the exceptional circumstances upon which it relies.

⁹⁴ Other than legislation subject to an override declaration: *Human Rights Act 2019* (Qld) s 48(5).

⁹⁵ *Human Rights Act 2019* (Qld) s 48.

⁹⁶ *Human Rights Act 2019* (Qld) s 53.

⁹⁷ *Human Rights Act 2019* (Qld) s 53(3). To date, no declarations of incompatibility have been made.

⁹⁸ *Human Rights Act 2019* (Qld) ss 55–57. The relevant Minister must notify the Parliament of a declaration of incompatibility within six sitting days. The declaration is also referred to the relevant portfolio committee for consideration. The Minister must table a response to the declaration of incompatibility within six months of notifying Parliament of the declaration.

⁹⁹ *Human Rights Act 2019* (Qld) s 9(4)(b).

¹⁰⁰ *Charter of Rights Act* (Vic) s 6(2); *Human Rights Act 2019* (Qld) s 5(2)(9)(a).

¹⁰¹ *Human Rights Act 2019* (Qld) s 58.

¹⁰² *Human Rights Act 2019* (Qld) s 59(3).

¹⁰³ *Human Rights Act 2019* (Qld) s 49.

¹⁰⁴ *Human Rights Act 2019* (Qld) s 51. According to Victorian case law on this issue (which would be persuasive authority in Queensland), the question of whether a Human Rights Act issue arises does not depend on the submissions of the parties, but on the nature of the issues raised by the proceedings: *Kortel v Mirik* (2008) 28 VAR 405; [2008] VSC 103 at [16]. See also Queensland Human Rights Commission, *Intervention Guidelines* <<https://www.qhrc.qld.gov.au/resources/legal-information/intervention-guidelines>>.

2.4.12 Any person concerned that a public entity is not acting or making decisions consistently with the Qld Human Rights Act is required to complain directly to the public entity, in the first instance, to encourage early resolution.¹⁰⁵ This is said to have resulted a positive change in the processing of internal complaints before they are escalated.¹⁰⁶

2.4.13 If an internal complaint is not addressed within 45 business days, or the complainant is dissatisfied with the response,¹⁰⁷ a complaint can be made to the Queensland Human Rights Commission and referred for conciliation.¹⁰⁸ The Commission may refuse to deal with the complaint, if it is not made within one year of the public entity's decision or action.¹⁰⁹

2.4.14 In 2020-21, the Commission received 369 complaints relating to human rights: 151 were accepted for conciliation; 47 were resolved through conciliation; 26 were referred to a tribunal.¹¹⁰

2.4.15 In comparison to the Victorian and ACT human rights regimes, the Qld Human Rights Act recognises a broader suite of rights.¹¹¹ It also provides a more accessible complaints mechanism for redressing breaches of rights than exists in Victoria and the ACT, by providing a human rights complaint and dispute resolution function of the Queensland Human Rights Commission.¹¹² The Qld Human Rights Act has, nevertheless, been criticised for: maintaining override provisions; not providing a stand-alone right of action for contraventions of human rights but instead requiring human rights claims to 'piggy-back' on other legal claims (mirroring the Victorian approach); and for not allowing damages to be awarded for a breach of human rights.¹¹³ The Queensland Human Rights Commissioner has also suggested that the lack of a real threat of legal proceedings undermines any incentive for public entities to resolve matters through conciliation.¹¹⁴

2.4.16 A view expressed is that the advantages derived from a broad definition of public entity, and the capacity for organisations to elect to be recognised as public entities, are diminished by the broad-based exemption from the Act for religious organisations, particularly given the number of public services delivered on behalf of government by religious organisations.¹¹⁵ Further, it has been argued that there is a risk that provisions allowing correctional facilities (including detention facilities for children and youths) to justify policies that limit human rights on the grounds of security, good management, and the safety and welfare of those held in detention¹¹⁶ may compromise the human rights protections of people in detention.¹¹⁷

¹⁰⁵ *Human Rights Act 2019* (Qld) s 65.

¹⁰⁶ Queensland Human Rights Commission, *Annual Report 2020-21* 128–129.

¹⁰⁷ *Human Rights Act 2019* (Qld) s 65(1). The Commission may accept complaints earlier than the expiry of 45 business days in exceptional circumstances: *Human Rights Act 2019* (Qld) s 65(2).

¹⁰⁸ *Human Rights Act 2019* (Qld) s 65(1). For case studies of matters resolved through conciliation, see Queensland Human Rights Commission, *Annual Report 2020-21* 156–165.

¹⁰⁹ *Human Rights Act 2019* (Qld) s 70(1)(d).

¹¹⁰ Pursuant to s 70 of the *Human Rights Act 2019* (Qld), complaints may not be accepted for conciliation on a range of grounds, including: because no internal complaint has been made to the public entity alleged to be in contravention of the Act; that the complaint relates to a contravention which occurred more than one year prior to the making of the complaint; or that there is a more appropriate course of action under another law.

¹¹¹ See Appendix B.

¹¹² It is noted that there is a direct cause of action in the ACT for a breach by a public authority: see *Human Rights Act 2004* (ACT) s 40C and discussion at [4.5].

¹¹³ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12.

¹¹⁴ Queensland Human Rights Commission, *Annual Report 2020-21* 140.

¹¹⁵ *Human Rights Act 2019* (Qld) s 58(3) and *Youth Justice Act 1992* (Qld) s 263(7) & (8).

¹¹⁶ *Corrective Services Act 2006* (Qld) s 5A.

¹¹⁷ See Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' 10. See also *Owen-D'Arcy v Chief Executive of QCS* [2021] QSC 273.

2.4.17 As set out in the Qld Human Rights Act, the first review of the Act should occur as soon as practicable after 1 July 2023 to consider: whether additional rights should be protected;¹¹⁸ whether further opportunities to commence legal proceedings or remedies should be provided; and whether provisions relating to the *Corrective Services Act 2006* (Qld) and the *Youth Justice Act 1992* (Qld) are operating as intended and not resulting in unjustifiable incursions on human rights.¹¹⁹ The review will be conducted by the Queensland Human Rights Commission.

2.4.18 The approach adopted in Queensland, and its implications for any reforms to the TLRI model, are discussed in Parts 3 and 4.

2.5 Updates from the Commonwealth

2.5.1 In November 2008, the Australian Government established a National Human Rights Consultation Committee ('NHRCC'), chaired by Father Frank Brennan, to undertake consultation on preferred models for Commonwealth protection of human rights.

2.5.2 The NHRCC recommended adopting a Commonwealth Human Rights Act, along the lines of legislation in the Australian Capital Territory and Victoria, to protect rights identified in international treaties and ensure that legislation is compatible with human rights.¹²⁰ Consistent with the 'dialogue' approach, the proposed model allowed the High Court to declare existing legislation incompatible with the Act and to refer it to Parliament for possible amendment.

2.5.3 In April 2010, in response to the NHRCC report, the Government released *Australia's Human Rights Framework* ('the Framework').¹²¹ The NHRCC's recommendation to implement a Commonwealth Human Rights Act was not adopted; instead, the Framework proposed increasing scrutiny of laws with a view to ensuring that Parliament is properly informed on the human rights impact of proposed legislation. The Framework also included a suite of proposals to improve protection of human rights, including: consolidation and simplification of federal anti-discrimination laws; an annual Non Government Organisation Human Rights Forum; and increased resources to enable the Australian Human Rights Commission to promote understanding of human rights across the community.¹²²

2.5.4 The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('Cth Scrutiny Act') gave effect to scrutiny commitments made in the Framework by:

- establishing the Parliamentary Joint Committee on Human Rights ('PJCHR')¹²³ to scrutinise all new legislation for compatibility with human rights treaties to which Australia is a party;¹²⁴ and

¹¹⁸ Including, but not limited to, rights under the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, and the *Convention on the Elimination of All Forms of Discrimination against Women* s 95(4)(a).

¹¹⁹ *Convention on the Elimination of All Forms of Discrimination against Women* s 95.

¹²⁰ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Commonwealth of Australia, 2009), Recommendation 18 <<https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>>.

¹²¹ Attorney-General's Department, *Australia's Human Rights Framework* (Commonwealth of Australia, 2010) <<https://nswbar.asn.au/circulars/2010/april/hr.pdf>>.

¹²² *Ibid.*

¹²³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4. The Committee has 10 members (five from the House of Representatives and five from the Senate); of these, five are Government members, four are Opposition members, and one is a member from the minority parties or independents.

¹²⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7. The treaties covered by the scrutiny requirements are ICCPR, ICESCR, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Convention on the Rights of the Child*, and *Convention on the Rights of Persons with Disabilities*.

- requiring all new Bills or legislative instruments introduced in Parliament to be accompanied by a statement of compatibility with human rights.¹²⁵

2.5.5 In relation to the obligation for the PJCHR to scrutinise legislation, on the tenth anniversary of the PJCHR, it was noted that the Committee had considered (on average) 225 Bills and 1,827 legislative instruments per year.¹²⁶ In total, the PJCHR examined 2,254 Bills, of which 602 (27%) raised human rights concerns requiring the Committee to comment.¹²⁷ The PJCHR also considered 18,000 legislative instruments, commenting on 466 (3%).¹²⁸

2.5.6 The PJCHR also undertakes an education function and has released guidance on the expectations for statements of compatibility and also key human rights compatibility issues in relation to provisions that create offences and civil penalties.¹²⁹ These expectations are that the statements of compatibility are readily understandable; should identify whether any human rights are directly engaged in the legislation; and, where legislation limits human rights, the statement of compatibility should ‘provide a detailed, reasoned and evidence-based assessment of each measure that limits rights’.¹³⁰

2.5.7 The PJCHR usually releases a scrutiny report during each joint sitting week,¹³¹ providing an overview of human rights considerations for new Bills or instruments, the Committee’s views on those instruments’ compatibility with Australia’s human rights obligations, and any further information required for the Committee to make final recommendations.¹³² The PJCHR observes that it seeks to include its assessment of Bills while they are still before Parliament, so as to allow parliamentarians to consider human rights in making decisions on proposed legislation.¹³³ This does not always occur, however. The Australian Law Reform Commission has reported that, in the first five years of the Cth Scrutiny Act’s operation, more than 50 Bills were passed before the PJCHR had completed its review.¹³⁴ The PJCHR reported that, between 2012 and 2015, there was delay in reporting but that, since 2016, more than 90 per cent of all Bills have been reported on while they remained before the Parliament.¹³⁵

2.5.8 Critique of the Commonwealth approach to human rights protection relates to the absence of a human rights instrument, the lack of judicial supervision, and the ineffectiveness of the model as a way

¹²⁵ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8, 9; Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility* (Parliament of Australia, 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.

¹²⁶ Charlotte Fletcher and Anita Coles, ‘Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights’ *Senate Lecture Series* (August 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/10_year_anniversary_of_the_committee>.

¹²⁷ *Ibid.* It is noted that the Committee does not comment where the Bills may not have engaged any human rights, may have promoted human rights, may have limited rights but it appeared these were permissible limits, and/or raised only marginal human rights concerns.

¹²⁸ *Ibid.* 6.

¹²⁹ Parliamentary Joint Committee on Human Rights, *Guidance Notes and Resources*

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.

¹³⁰ Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Expectations for Statements of Compatibility* (2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>.

¹³¹ Where there is a long break in the sitting calendar or Bills are particularly controversial, the PJCHR may release scrutiny reports outside sitting weeks.

¹³² Where a Minister responds to a request for further information, the response is included in the subsequent scrutiny report. For published reports and Ministerial responses, see Parliamentary Joint Committee on Human Rights, *Scrutiny Reports* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.

¹³³ Fletcher and Coles, ‘Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights’ 8.

¹³⁴ Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (ALRC Report 129, 2016) ch 3 [3.79]. It is not stated how many Bills were passed after the PJCHR completed its review.

¹³⁵ Fletcher and Coles, ‘Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights’ 9. It was noted that there was a spike in the number of Bills that passed before the Committee’s comment in 2021. This was largely attributable to legislation which was passed in response to the COVID-19 pandemic.

to provide consistent scrutiny of legislation. The limitations of the Commonwealth approach are described by Professor George Williams and Daniel Reynolds.

This regime differs from mechanisms in other democratic nations in that the role of assessing laws against human rights standards and protecting against infringements is vested exclusively in Parliament. No role is provided to the courts, nor does Australia possess, at the federal level, a national Bill of Rights.¹³⁶

2.5.9 Williams and Reynolds express the view that the oversight provided by the Cth Scrutiny Act is often fragmented, superficial, and delayed to the point that the PJCHR's recommendations are rarely mentioned in Parliamentary debate and have not led to better laws.¹³⁷ Williams and Reynolds argue that:

It is simply not realistic in [Australian's Constitutional] system to expect that a parliamentary scrutiny regime will overcome the power imbalance between [Parliament and the Executive] ... In addition, in the absence of independent judicial supervision of Parliament's work, the incentives to comply with the regime are few.¹³⁸

2.5.10 However, the PJCHR considers that there has been a gradual acceptance by parliamentarians and the Executive of the Committee's role, with its questions and advice to Parliament leading to an engagement with its processes that 'appears to have progressively become an expected norm'.¹³⁹

2.5.11 The lessons learned from the Commonwealth experience in a scrutiny-only model are discussed in more detail in Parts 3 and 4.

¹³⁶ George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469 <https://www.monash.edu/_data/assets/pdf_file/0006/446181/Vol412_Williams.pdf>. See also Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 3.

¹³⁷ Fletcher and Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights'.

¹³⁸ Williams and Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' 507.

¹³⁹ Fletcher and Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights' 34.

Part 3

Approaches to Human Rights in the Development of Law and Policy

3.1 Introduction

3.1.1 The research questions set for this Research Paper require examination of events during the Review Period (2007–2022) which involve human rights issues and may have implications for the recommendations made by the Tasmanian Law Reform Institute ('TLRI') in its 2007 Final Report. This Research Paper does not provide a comprehensive overview of all relevant legislative and policy reforms touching on human rights in the Review Period; rather, Part 3 discusses legislative developments and the implications of approaches specifically taken in response to:

- political communication and protest;
- responses to COVID-19;
- protection of privacy;
- treatment of prisoners;
- housing; and
- religious freedom.

3.1.2 In this Part, the TLRI examines selected events in the Review Period with a view to considering whether a Human Rights Act is made more or less necessary. It also considers whether amendments or improvements should be made to the model for a human rights enactment contained in the 2007 Final Report and, if so, whether some features of the experiences of jurisdictions with human rights enactments can be used to revise and refine the model for a human rights enactment for Tasmania set out in the 2007 Final Report. Considerable differences have been identified in the approach of the various Australian Parliaments to the protection and promotion of human rights viewed from the perspectives of the 'effectiveness of ... human rights scrutiny, and the degree of sensitivity of law-making to human rights guarantees or principles'.¹⁴⁰ Relevant here is the variety of factors relating to: the structure and powers of the scrutiny body (for example, the type of body, its powers and procedures, its composition); the degree to which a human rights culture exists within the Parliament and the scrutiny body; the influence of the scrutiny body; the nature of the dialogue/engagement between the Parliament, the scrutiny body, other stakeholders and the public; the time allowed for scrutiny; and the clarity of the human rights standards used for assessment. Related to these factors is the development of human rights discourse or a 'dialogue', which has been described as 'central to the perception and practice of human rights scrutiny in Australia'.¹⁴¹

3.1.3 The examination of events in the Review Period is focused on several key themes relating to the value of a legislated human rights enactment: (1) establishing a transparent process and a mechanism for scrutiny to facilitate the development of a human rights discourse; (2) facilitating a structured process to allow for the weighing up/balancing of competing rights; (3) influencing legislative

¹⁴⁰ Julie Debeljak and Laura Grenfell, 'Diverse Australian Landscapes of Law Making and Human Rights' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 1 [1.10].

¹⁴¹ Simon Rice, 'Allowing for Dissent: Opening Up Human Rights Dialogue in the Australian Parliament' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 4 [4.40].

development and policy outcomes; and (4) application by the courts of human rights principles. This examination contrasts the experience in Tasmania with approaches taken in jurisdictions with human rights enactments and considers how those experiences can be used to inform this review.

3.1.4 As we have acknowledged, a human rights enactment does not mean that all human rights challenges will be resolved in Tasmania, or that problems of social inequality and injustice will no longer exist. Based on the results of this review, however, the TLRI remains of the view that human rights enactments have the potential to play an important role in providing greater transparency and explicit consideration of human rights in government decision-making, as well as improving community understanding of human rights and how they can be protected. The model for a human rights enactment set out in the 2007 Final Report recognised Parliamentary sovereignty, while seeking to encourage a dialogue about human rights across the three arms of government (executive, legislative and judicial) and within the community.¹⁴² The value of a human rights enactment, as outlined in the 2007 Final Report, lies in providing a clear and accessible statement of fundamental rights that can operate as a touchstone or general gauge by which to evaluate legislative and policy decisions. Human rights enactments aim to raise community awareness of human rights and encourage systematic development and observance of processes that are responsive to human rights across all arms of government.

3.2 Overview of Key Events in the Review Period

The legislation relating to the right to protest

3.2.1 Laws that place restrictions on political communication and protest activities create tension between rights of political expression and assembly, on one hand, and the safety of business operators and workers and their right not to be obstructed in the lawful pursuit of their work, on the other. These laws include anti-protest legislation that operates in workplaces and safe access zones. Human rights enactments can provide a framework to clearly articulate the competing rights and potentially provide transparency in the human rights dialogue around the balancing of different interests.¹⁴³

3.2.2 In Tasmania, the ad hoc nature of human rights scrutiny appears to be evident in the legislative response to the enactment of anti-protest laws during the Review Period.

3.2.3 The *Workplaces (Protection from Protesters) Act 2014* (Tas) sought to prevent protests from occurring on ‘business premises’ or related ‘business access areas’. The balance between political communication and the rights of workplaces reflected in this Act was the subject of criticism by the United Nations Office of the High Commissioner for Human Rights as limiting a range of civil and political rights—including freedom of speech, freedom of political communication, freedom of movement, and freedom of association.¹⁴⁴ The United Nations High Commissioner was of the view that the anti-protest Bill ‘would almost certainly run afoul of Australia’s human rights obligations, which

¹⁴² TLRI 2007 Final Report [4.2.26].

¹⁴³ See [3.3].

¹⁴⁴ See, for example, United Nations High Commissioner for Human Rights, ‘UN Experts Urge Tasmania to Drop its Anti-Protest Bill’ (Press Release, 9 September 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>; Maina Kiai, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association: Addendum – Observations on Communications Transmitted to Governments and Replies Received, 29th session, UN Doc A/HRC/29/25/Add.3 (10 June 2015) 41 [211]–[212]; Matthew Verney (Law Society of Tasmania), ‘*Workplaces (Protection from Protesters) Bill 2014*’ (Media Release, 29 October 2014); Amnesty International, ‘Draconian Anti-Protest Legislation Would Take Tasmania Back to the Dark Ages’ (Media Release, 15 November 2019) <<https://www.amnesty.org.au/draconian-anti-protest-legislation-would-take-tasmania-back-to-the-dark-ages/>>.

Tasmania is also obliged to uphold'.¹⁴⁵ The validity of this Act was challenged in the High Court; in 2017, by a majority of 6:1, the Court struck down core provisions on the ground that they impermissibly interfered with the implied freedom of political communication protected by the Commonwealth Constitution.¹⁴⁶

3.2.4 Two further attempts to make amendments to the *Workplaces (Protection from Protesters) Act 2014* (Tas) were criticised by legal and human rights experts and organisations, including the TLRI, for failing to minimise or moderate limitations on human rights and freedoms.¹⁴⁷ The draft Bills were not referred to a Committee for consideration and, in the public consultation on an exposure draft of the Bill, there was no explanation provided as to how the amendments would avoid further constitutional invalidity. Neither was there a statement on the Bill's consistency with international human rights norms, or whether and how it avoided unjustifiable intrusion on fundamental common law and statutory rights and freedoms.¹⁴⁸

3.2.5 In contrast, in Tasmania, a Committee was convened for the *Reproductive Health (Access to Terminations) Bill 2013* (Tas). The *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('Reproductive Health Act') decriminalised abortion and introduced 'safe access zones' preventing harassment and protest activity within 150 metres of facilities providing abortion services. The safe access zone provisions were designed to protect the privacy, safety, dignity, and wellbeing of patients accessing abortion services and the staff providing those services, by prohibiting certain behaviours, such as harassment, obstruction, and filming near clinics.¹⁴⁹ During the legislative process, the Bill was referred to the Legislative Council Sessional Government Administration Committee 'A' for inquiry. The Committee called for public submissions and held public hearings, before reporting to the Legislative Council. A range of submissions addressed the human rights they considered would be affected by the Bill, including the right to life, reproductive rights, religious freedoms, and freedom of political expression. The Committee's report outlined a range of competing views on the impact of the safe access zones on freedom of political communication and the right to protest. After considering the competing rights, the Committee concluded that the safe access zone provisions were 'justified because women and staff have been subject to harassment, physical violence, vilification and intimidation when

¹⁴⁵ United Nations High Commissioner for Human Rights, 'UN Experts Urge Tasmania to Drop Its Anti-Protest Bill'; see similarly, in 2016, the Report of the Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Australia, tabled 28 February 2018 A/HRC/37/51/Add.3.

¹⁴⁶ *Brown v Tasmania* [2017] HCA 43.

¹⁴⁷ For example, the Gilbert + Tobin Centre for Public Law and the Centre for Crime, Law and Justice at the University of New South Wales submitted that key provisions in the Bill infringed the implied freedom of political communication, were discriminatory in their practical operation, and effected a reversal of the onus of proof in some circumstances: Gilbert + Tobin Centre for Public Law and the Centre for Crime, Law and Justice, 'Submission to Department of Justice (Tasmania), Community Consultation: *Workplaces (Protection from Protesters) Amendment Bill 2019*' (2019); Similarly, the Tasmanian Council of Social Service ('TasCOSS') noted that the revised Bill impinged upon the right of freedom of assembly and that this right 'for the purpose of political expression' was vital for marginalised members of the community: TasCOSS, 'Submission to Department of Justice (Tasmania), Community Consultation: *Workplaces (Protection from Protesters) Amendment Bill 2019*' (2019). See also TLRI, 'Submission to Department of Justice (Tasmania), Community Consultation: *Workplaces (Protection from Protesters) Amendment Bill 2019*' (3 March 2019).

¹⁴⁸ See TLRI, 'Submission to Department of Justice (Tasmania), Community Consultation: *Workplaces (Protection from Protesters) Amendment Bill 2019*'. This Bill was not passed; the Tasmanian Government subsequently enacted anti-protest amendments to the *Police Offences Act 1935* (Tas), with the passage of the *Police Offences Amendment (Workplace Protection) Act 2022* (Tas).

¹⁴⁹ During the Second Reading Speech, then Minister for Health (Hon Michelle O'Byrne MP) said that, 'A democracy has many different freedoms, some of which conflict with each other. The right to protest, if exercised without restraint, can interfere with other people's rights of privacy and freedom from abuse ... I believe access zones provide the appropriate balance between the right to protest and protecting women from being exposed to those who seek to shame and stigmatise them'. Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 44 (Michelle O'Byrne).

attending premises at which terminations are provided'.¹⁵⁰ The Legislative Council passed the legislation.¹⁵¹ The validity of this legislation was upheld in a subsequent High Court challenge.¹⁵²

3.2.6 As with Tasmania, Victorian legislation that imposed restrictions on protest activity at workplaces has been subjected to criticism on human rights grounds.¹⁵³ Legislation has also been passed in relation to safe access zones in the vicinity of abortion services in Victoria.¹⁵⁴ In contrast to the Tasmanian position, however, a statement of compatibility document was prepared for both Victorian Bills, thus allowing for greater scrutiny and transparency of human rights considerations, as outlined below.

3.2.7 In August 2022, the Victorian Government enacted the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic), which imposed penalties on those taking part in protest action in native forest logging areas. Like the Tasmanian legislation, the Act has been criticised as disproportionate, unjustified, and lacking sufficient safeguards and oversight.¹⁵⁵ Unlike the Tasmanian position, a statement of compatibility was prepared in relation to the Act, which allowed for Parliamentary scrutiny and transparency in relation to the human rights issues that were taken into account in developing the legislation.¹⁵⁶

3.2.8 Similarly, the Victorian legislation in relation to protesting in the vicinity of abortion facilities was accompanied by a statement of compatibility. Part 9A of the *Public Health and Wellbeing Act 2008* (Vic)¹⁵⁷ prohibits behaviour within a radius of 150 metres of any facility providing abortion services, including harassment, obstruction, intimidation, or recording people accessing the facility. The Act also prohibits 'any communication in relation to abortion able to be seen or heard by a person in the safe access zone that is reasonably likely to cause distress or anxiety'. The human rights implications of this legislation were addressed in the statement of compatibility provided in accordance with the Vic Human Rights Charter. The broad prohibition of 'communications' was justified on the basis that limiting the prohibition to intimidating, harassing, or threatening conduct or conduct that impedes access, would impede enforcement and impose responsibility on vulnerable people to pursue complaints. The statement also considered that it was necessary to protect staff members and others from the 'harmful effect of the otherwise peaceful protests given their sustained nature and the background of extreme conduct against which they occur'.¹⁵⁸

3.2.9 While most protest activity is regulated by State and Territory legislation, within its limited remit, the Commonwealth has also sought to impose restrictions on protest activity. The *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth) was introduced in response to actions by animal rights activists on farming properties protesting the conditions in which animals were kept, processed,

¹⁵⁰ Parliament of Tasmania, Legislative Council Government Administration Committee 'A', *Final Report on Reproductive Health (Access to Terminations) Bill 2013* (Report, 2013) 81, Finding 25.

¹⁵¹ *Reproductive Health (Access to Terminations) Act 2013* (Tas).

¹⁵² *Clubb v Edwards; Preston v Avery* [2019] HCA 11. In this case, Preston challenged the constitutionality of the charges of engaging in prohibited behaviour in a safe access zone under s 9(2) of the *Reproductive Health Act* on the basis that the safe access zone provisions impermissibly burdened the implied freedom of political communication in the Constitution.

¹⁵³ *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic). The passage of an anti-protest law relating to workplaces in Queensland predated the enactment of the *Human Rights Act 2019* (Qld), so that the proposed legislation was not required to be accompanied by a statement of compatibility with human rights.

¹⁵⁴ *Public Health and Wellbeing Act 2008* (Vic).

¹⁵⁵ See open letter to the Premier, and Ministers for Workplace Safety and Agriculture. Environmental Justice Australia, 'Legal, Human Rights and Environment Groups call on Victorian Government to Withdraw Draconian Anti-Protest Laws' (Media Release, 8 June 2022) <<https://envirojustice.org.au/press-release/legal-human-rights-and-environment-groups-call-on-victorian-government-to-withdraw-draconian-anti-protest-laws/>>.

¹⁵⁶ Victoria, *Parliamentary Debates*, Legislative Council, 24 May 2022, 1912 (Mary-Ann Thomas).

¹⁵⁷ Inserted by the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).

¹⁵⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3973 (Statement of Compatibility). The Act

and slaughtered.¹⁵⁹ Under the process created for the review of draft legislation from a human rights perspective, the Parliamentary Joint Committee on Human Rights ('PJCHR') considered the impact of the new offences on freedoms of expression and assembly. The Committee noted that the explanatory notes and statement of compatibility were deficient and sought the Minister's advice on the proportionality of any burden on those freedoms.¹⁶⁰ Indicating a weakness of the Parliamentary scrutiny model, no response was received from the Government before the proposed legislation was debated.¹⁶¹ The Senate Standing Committee on Legal and Constitutional Affairs also held an inquiry into the Bill. Submissions to the inquiry raised concerns that it contravened the implied Constitutional freedom of political communication and would discourage whistleblowers from revealing abuses.¹⁶² Despite these concerns, the government-dominated Committee recommended that the proposed laws be passed.¹⁶³ Again, the lack of response to concerns regarding the human rights implications of this legislation points to the shortcomings of a Parliamentary committee scrutiny-only approach to protection of human rights.

Responses to COVID-19

3.2.10 As with other jurisdictions, the Tasmanian Government's coronavirus ('COVID-19') response imposed wide-ranging restrictions. Many of the legislative restrictions were enforced by threat of significant criminal penalties. In times of crisis, human rights, and the ways in which competing rights are balanced, limited, and respected, are particularly important. COVID-19 was a worldwide pandemic with significant consequences for societies and health. In response to the public health emergency, governments across Australia passed a range of laws to deal with the COVID-19 pandemic. Many of these laws were introduced rapidly and often gave authorities extraordinary powers to make decisive public health decisions that would interfere with human rights and individual liberties (such as freedom of movement and association), while seeking to protect other rights (such as the right to life and the right to health).

3.2.11 In March 2020, the Tasmanian Government responded to the threat of the COVID-19 pandemic by declaring a public health state of emergency under the *Public Health Act 1997* (Tas), allowing the Director of Public Health to 'require a person to quarantine or isolate, require a person to undergo a clinical assessment, ban entry of people to an area or remove people from an area, and take any action required to manage the threat coronavirus poses to public health'.¹⁶⁴ In addition, the Premier declared a state of emergency under the *Emergency Management Act 2006* (Tas),¹⁶⁵ allowing the State Controller to exercise broad powers, including: issuing directions that restrict movement; closing public places;

introduced a new offence into the Commonwealth *Criminal Code Act 1995* of using a carriage service to incite trespass on agricultural land. This offence carries a penalty of up to 12 months imprisonment. Another offence created by this Act (using a carriage service to incite property damage or theft on agricultural land) carries a penalty of up to five years imprisonment: *Criminal Code Act 1995* (Cth) s 474.47.

¹⁶⁰ Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report 3 of 2019* (30 July 2019) 3–10 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_3_of_2019>.

¹⁶¹ See further discussion at [3.3].

¹⁶² For example, the Law Council and the NSW Council for Civil Liberties, citing *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, concluded that the High Court would be likely to find the proposed offences invalid: see Gabrielle Bashir, Co-Chair, National Criminal Law Committee, Law Council of Australia, Committee Hansard, 12 August 2019, 20 <<https://www.lawcouncil.asn.au/about-us/advisory-committees/national-criminal-law-committee>>; NSW Council for Civil Liberties, Submission 65 (31 July 2019) 4 <https://www.nswccl.org.au/nswccl_submissions>.

¹⁶³ Senate Legal and Constitutional Affairs Legislation Committee, Report of Inquiry into *Criminal Code Amendment (Agricultural Protection) Bill 2019* (September 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Agriculturalprotection/Report>.

¹⁶⁴ A Public Health Emergency for Tasmania was declared on 17 March 2020. The declaration has been extended several times.

¹⁶⁵ *Emergency Management Act 2006* (Tas); Declaration of State of Emergency, 19 March 2020: Tasmanian Government Gazette, No 21953, 20 March 2020. This State of Emergency was extended multiple times.

searching people, places, and vehicles; and directing resources to be made available for the emergency response.¹⁶⁶

3.2.12 Under these Acts, restrictions were placed on freedom of movement and association and – in a particularly controversial aspect of the COVID-19 response – mandatory vaccination was authorised. As these restrictions were made by way of direction under *the Public Health Act 1997* and *Emergency Management Act 2006*, there was minimal parliamentary scrutiny of the ‘lockdown’ requirements, the requirements for vaccination, border restrictions, and controlling ‘the community’s daily freedom of movement and activities, with potential relevance to people’s human rights’.¹⁶⁷ Neither did Parliament or the Joint Standing Committee on Subordinate Legislation (‘JCSL’) undertake oversight of subordinate legislation.

3.2.13 While the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (‘Tas Covid Act’),¹⁶⁸ provided for the issuing of ‘notices extending, amending, suspending or protecting the operation, effect and procedure of law and government in the state’¹⁶⁹ and allowed for JCSL scrutiny of directions made under that Act, this oversight did not occur for the majority of legislative instruments responding to the public health crisis. The JCSL was empowered to meet, even during a period of parliamentary adjournment, and to review all regulations to consider whether they unreasonably trespassed on ‘personal rights and liberties’.¹⁷⁰ However, the Directions giving effect to the various restrictions and requirements outlined above were not issued under the Tas Covid Act and so did not fall within the review jurisdiction of the JCSL.¹⁷¹ In contrast, notices under the Tas Covid Act that were subjected to scrutiny by the JCSL were largely related to administrative and logistical arrangements for public authorities to satisfy public health restrictions.¹⁷²

3.2.14 The Tasmanian response to the COVID-19 pandemic has subsequently been considered by two bodies: the standing Public Accounts Committee and a specifically established Economic and Social

¹⁶⁶ These powers are contained in Schedule 2 of the *Emergency Management Act 2006* (Tas).

¹⁶⁷ Advice from Meg Webb MLC (Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Report). See also Tasmania, *Parliamentary Debates*, Legislative Council, 30 April 2020, 88 (Meg Webb).

¹⁶⁸ See also *COVID-19 Disease Emergency (Miscellaneous Provisions) Act (No. 2) 2020* (Tas), which amended the *Public Health Act 1997* (Tas) provisions regarding directions of the Director of Health the duration of emergency declarations and infringement notices.

¹⁶⁹ Brendan Gogarty and Gabrielle Appleby, ‘The Role of Tasmania’s Subordinate Legislation Committee during the COVID-19 Emergency’ (2020) 45(3) *Alternative Law Journal* 188, 191. Emergency Managers include employees of Biosecurity Tasmania, Tasmania Police and others authorised by the Director of Public Health to ensure compliance with directions. See *Authorisation of Emergency Powers under the Emergency Management Act 2006* (Tas), Darren Hine (State Controller), 21 March 2020, *Tasmanian Government Gazette*, No 21954.

¹⁷⁰ *Subordinate Legislation Committee Act 1969* (Tas) s 8(1)(a)(iii). However, analysis of previous reports by the Committee suggests that the Committee’s reports rarely ‘overtly engage with or articulate any common law rights issues’ and that ‘rights analysis plays only a limited role in the work of the Committee’: Rose Mackie and Anja Hilkemeijer, ‘Human Rights Scrutiny in Tasmania’s Parliament: Time to Move Beyond the Smoke and Mirrors’ in Julie Debeljak and Laura Greenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 17 [17.50]. The role and impact of the Committee is discussed further at [3.3.1]–[3.3.3].

¹⁷¹ Meg Webb, ‘Premier, An Emergency Committee Will Protect Tasmanian Democracy’, *Mercury* (online, 8 April 2020). Gogarty and Appleby argue that it is possible to interpret the directions and declarations made under the *Public Health Act 1997* (Tas) as regulations, which would then bring them under the remit of the Subordinate Legislation Committee. See Gogarty and Appleby, ‘The Role of Tasmania’s Subordinate Legislation Committee during the COVID-19 Emergency’ 192–194.

¹⁷² These have included waiving curfews for vaccination sites, allowing online court proceedings, extending the expiration date of planning approvals, and allowing pop-up health clinics without planning approvals: Notice under s 17 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) (*Magistrates Court – Electronic Service and Witnessing*); Notice under s 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) (*Magistrates Court – Proceedings*).

Recovery Advisory Council ('PESRAC').¹⁷³ Neither body was directed to consider the legislative or policy responses from a human rights perspective.

3.2.15 As with Tasmania, jurisdictions with human rights enactments were required to implement an urgent response to the emerging pandemic and, in responding, did impose restrictions on human rights, which, in some cases, were greater than the Tasmanian restrictions. In particular, the Victorian Government's response to COVID-19 throughout the pandemic has been criticised for raising significant human rights concerns, with some measures being viewed as discriminatory. Melbourne was the site of some of the largest protests against lockdown measures, border restrictions, and vaccine mandates.¹⁷⁴ In contrast to the process by which human rights considerations were addressed in Tasmania, there was an obligation in Victoria to identify any implications for human rights in a clear and transparent manner in the passage of legislation and associated regulations. In some instances, the scrutiny process also led to reviews and calls for redress for violations of human rights.

3.2.16 In Victoria, the Covid Bill was accompanied by a statement of compatibility detailing the Bill's effect on human rights and justifications for provisions limiting rights.¹⁷⁵ The Victorian Equal Opportunity and Human Rights Commissioner considered that the statement:

shows that [the Government] has given careful consideration to balancing human rights and any necessary limitations during this period ... This is a compelling example of the Charter in action, showing that it is possible to enact emergency measures while still ensuring human rights considerations are central to the law-making process.¹⁷⁶

3.2.17 In the ACT, the *COVID-19 Emergency Response Bill 2020* ('ACT Covid Bill') was declared to be a 'significant Bill' that required a detailed human rights analysis because it affected so many of the rights in the *Human Rights Act 2004* (ACT).¹⁷⁷ The ACT Covid Bill was accompanied by a detailed statement of compatibility outlining the human rights implications of the legislation.¹⁷⁸

3.2.18 Similarly, in Queensland, both the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld) and the *COVID-19 Emergency Response Act 2020* (Qld) were also accompanied by detailed human rights compatibility statements.¹⁷⁹ The statement of compatibility

¹⁷³ For the terms of reference for the Standing Committee of Public Accounts Inquiry into the Tasmanian Government's response to the COVID-19 pandemic, see <www.parliament.tas.gov.au/ctee/joint/Current%20Inquiries/pac/Covid-19%20response/ToR%20C19.pdf>.

¹⁷⁴ The approach to non-COVID-19 related protest activity is discussed further at [3.2.1]–[3.2.9].

¹⁷⁵ See Statement of Compatibility, COVID-19 Omnibus (Emergency Measures) Bill 2020: Victoria, *Parliamentary Debates*, House of Assembly, 23 April 2020, 1179 (Daniel Andrews). Section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) stipulates that rights are subject to 'reasonable limits' under certain conditions. See also the Victorian Equal Opportunity and Human Rights Commission register of rights, 'a real-time snapshot of which rights had been limited and the justification for those limitations': Victorian Equal Opportunity and Human Rights Commission, 'Human Rights and Victoria's COVID-19 Omnibus (Emergency Measures) Act – May 2020' <<https://www.humanrights.vic.gov.au/resources/human-rights-and-victorias-covid-19-omnibus-emergency-measures-act-2020/>>.

¹⁷⁶ Victorian Equal Opportunity and Human Rights Commissioner, 'Scrutiny of New Emergency Laws Essential to Monitor any Human Rights Impacts' (Media Release, 24 April 2020) <<https://www.humanrights.vic.gov.au/news/scrutiny-of-new-emergency-laws-essential-to-monitor-any-human-rights-impacts/>>.

¹⁷⁷ The ACT Covid Bill, which became the *Covid Emergency Response Act 2020* (ACT), made several changes to court proceedings, visits to correctional facilities, background checks on volunteers, portability of long service leave, and measures to allow for a moratorium on eviction of commercial and residential tenants, rental negotiations, and restricting property inspections. The *Public Health (Emergencies) Amendment Act 2020* (ACT) was also enacted to extend the timeframe for declared public health emergencies.

¹⁷⁸ See generally, Explanatory Statement, COVID-19 Emergency Response Bill 2020 (ACT) <<https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2020-011>>.

¹⁷⁹ See Statement of Compatibility: *COVID-19 Emergency Response Bill 2020* (State of Queensland, 2020) <<https://www.legislation.qld.gov.au/view/pdf/bill.first.hrc/bill-2020-011>>; Statement of Compatibility: *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* (State of Queensland, 2020) <<https://www.legislation.qld.gov.au/view/pdf/bill.first.hrc/bill-2020-005>>.

for the COVID-19 Emergency Response Bill noted that safeguards within the Bill and requirements and obligations found in the *Human Rights Act 2019* (Qld) would ensure that Queenslanders' human rights would be protected.¹⁸⁰

3.2.19 Given the urgency necessitated by the pandemic, the process set out in the human rights enactments was modified to allow for a timely response. For example, due to the emergency nature of the ACT Covid Bill, the Bill was passed before the scrutiny review process was completed, deferring the human rights assessment post-enactment.¹⁸¹ In its subsequent review, the Standing Committee on Justice and Community Safety ('ACT Scrutiny Committee') found that the ACT Covid Act was predominantly human rights compliant. The ACT Scrutiny Committee concluded that, where rights were limited by the Act, appropriate justification had been provided in the explanatory statement.¹⁸² In addition, the Committee was provided with a draft copy of a subsequent amending Bill and explanatory statement prior to its introduction to Parliament. The Committee raised various concerns with the Attorney-General, who made several amendments to address those concerns before the amendment Bill was introduced. The revised Bill was passed shortly after its introduction.¹⁸³

3.2.20 There was also ongoing parliamentary scrutiny of legislation under the framework of the human rights enactments. The ACT Parliament established the Select Committee on the COVID-19 Pandemic Response ('ACT Covid Select Committee') at the outset of the pandemic to consider and report on the government's response to the pandemic.¹⁸⁴ It produced five reports; the government responded to the recommendations made in each report.

3.2.21 As with the ACT, in Queensland, standing rules allow Bills declared to be urgent to be debated without scrutiny by the relevant portfolio committee, including scrutiny of human rights.¹⁸⁵ Both the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld) and the *COVID-19 Emergency Response Act 2020* (Qld) were declared urgent and passed with little consultation.¹⁸⁶ Subsequent Bills, such as the *COVID-19 Emergency Response and Other Legislation*

¹⁸⁰ *Statement of Compatibility: COVID-19 Emergency Response Bill 2020* 21, 25–26. The Statement noted that entities exercising powers under the Bill would be 'public entities' under the *Human Rights Act 2019* (Qld) and would therefore be required to 'give proper consideration to human rights and exercise the power in a manner that is compatible with human rights under section 58 of the HR Act'.

¹⁸¹ The Bill was passed on 2 April 2020, but not notified to the Standing Committee on Justice and Community Safety until 7 April 2020. As part of the Second Reading Speech, the Chief Minister noted that the 'government has also undertaken to ensure that any future regulations dealing with the COVID-19 crisis will be provided to the Assembly scrutiny committee at least 48 hours in advance': Legislative Assembly for the Australian Capital Territory, *Hansard*, 2 April 2020, 749 (Andrew Barr). It is noted that the ACT Human Rights Act requires a Parliamentary Committee to assess the human rights implications of Bills and to report to the Legislative Assembly; however, laws are not invalid if they have not been subject to this scrutiny prior to enactment: see *Human Rights Act 2004* (ACT) s 38. The relevant committee is the Justice and Community Safety (Legislative Scrutiny Role) Standing Committee ('ACT Scrutiny Committee').

¹⁸² Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Legislative Assembly for the Australian Capital Territory, *Scrutiny Report* (Report 41, 28 April 2020) 1. The Committee's report highlighted particular areas of concern, such as the defined period of emergency, issues concerning notifiable instruments and changes to the right to trial by jury, and invited the Minister responsible to respond: *Scrutiny Report* 1–5.

¹⁸³ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Legislative Assembly for the Australian Capital Territory, *Scrutiny Report* (Report 42, 19 May 2020) 1. This process took a total of seven days.

¹⁸⁴ See Select Committee on the COVID-19 Pandemic Response, Legislative Assembly for the Australian Capital Territory (Dissolved) <<https://www.parliament.act.gov.au/parliamentary-business/in-committees/previous-assemblies/select-committees-ninth-assembly/select-committee-on-the-covid-19-response>>. Notably, the Committee was established early in the emergency period, at the same time as the COVID-19 Emergency Response Bill 2020 (ACT) was passed on 2 April 2020.

¹⁸⁵ Standing Rules and Orders of the Legislative Assembly 2014 (Qld) std ord 137.

¹⁸⁶ In relation to the *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* (Qld), the Deputy Leader of the Opposition indicated that, while the Opposition would support the Bill, they were deeply concerned about the lack of time afforded for debating its provisions: Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2020, 686 (Tim Mander). The *COVID-19 Emergency Response Act 2020* (Qld) was introduced in the Legislative Assembly and assented to within 48 hours.

Amendment Bill 2021 (Qld) were subject to targeted consultation and pre-enactment inquiry by the relevant Standing Committee.¹⁸⁷

3.2.22 In regard to ongoing scrutiny, the Queensland Parliament did not establish a dedicated Committee but made separate referrals to the Economics and Governance Committee to inquire into the Queensland Government's economic response, and to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee to inquire into the Queensland Government's health response.¹⁸⁸ Both inquiries held public hearings but lapsed before final reports were tabled because of the State election.¹⁸⁹ The Interim Report of the Inquiry into the Queensland Government's health response to COVID-19 identified concerns regarding the human rights impact of mandatory quarantine and other public health directions on vulnerable Queenslanders, including people with disabilities, people in detention facilities, Aboriginal and Torres Strait Islanders, and older Queenslanders.¹⁹⁰ Concerns about the human rights compatibility of Queensland Covid legislation were also raised by the Queensland Human Rights Commissioner.¹⁹¹

3.2.23 As with ACT and Queensland, there was limited preliminary scrutiny of the initial legislation relating to COVID-19 in Victoria due to the time constraints. In Victoria, Parliament was recalled for an emergency sitting to pass the *COVID-19 Omnibus (Emergency Measures) Bill 2020* (Vic) ('Vic Covid Bill').¹⁹² Members of Parliament were offered briefings on the Victorian Covid Bill prior to its introduction, but parliamentary debate was limited, and the bill was passed by both houses on the day it was introduced. However, there was greater scrutiny of subsequent legislation from a human rights perspective. In late 2021, the Victorian Government proposed a new Bill to replace the emergency powers scheme that had been used to manage COVID-19 to that point with a new framework for pandemic-related emergencies.¹⁹³ The *Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021* (Vic) ('Vic Pandemic Bill') was subject to wide stakeholder consultation and parliamentary negotiation to address concerns regarding the scope of the powers it contained. Amendments to the Vic Pandemic Bill were made because of this consultation, and these amendments ultimately strengthened protections of rights and freedoms suggesting the potential value of human rights discourse in policy development (see [3.3]).

3.2.24 The human rights framework in Victoria also allowed for scrutiny by parliamentary committees of the COVID-19 response. In Victoria, the government tasked the standing Public Accounts and Estimates Committee with conducting an inquiry into the management of the COVID-19 pandemic in Victoria. The Committee's Final Report, issued in January 2021, covered many human rights issues relating to the government's COVID-19 response, including the flawed tower lockdown, which had

¹⁸⁷ See, for example, *COVID-19 Emergency Response and Other Legislation Amendment Bill 2021* (Qld), Report No 6, 57th Parliament, Economics and Governance Committee (April 2021).

¹⁸⁸ The Economics and Governance Committee referral was made on 8 September 2020; the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee referral was made on 22 April 2020.

¹⁸⁹ See Queensland Parliament, *Inquiry into the Queensland Government's Economic Response to COVID-19 (Lapsed)* <<https://www.parliament.qld.gov.au/Work-of-Committees/Inquiries/Inquiry-Details?id=2896>>.

¹⁹⁰ Report No 43, 56th Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (September 2020).

¹⁹¹ Queensland Human Rights Commission, Submission to the Community Support and Services Committee on *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022* (4 March 2022) 3.

¹⁹² The Victorian Parliament was also presented with urgent appropriation Bills to provide additional COVID-19 support. Amendments to the standard government business schedule were agreed to allow for urgent passage of the Bills, including limiting debate and allowing MPs to table their second reading statements rather than reading them out. See Jacinta Allan, 'Emergency Sitting of the Victorian Parliament Next Week' (Media release, 15 April 2020) <<https://www.premier.vic.gov.au/emergency-sitting-victorian-parliament-next-week>> and Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 2020, 1178 (Jacinta Allan).

¹⁹³ The *Public Health and Wellbeing Act 2008* (Vic) strictly limited the operation of the COVID-19 state of emergency declaration to 21 months beyond the initial declaration period. Without new legislation, the Victorian Government was not able to extend the existing declaration beyond December 2021.

been subject to adverse findings by the Ombudsman.¹⁹⁴ Subsequently, in response to calls to ‘follow emerging global best practice and create a specialised cross-party Parliamentary Committee’¹⁹⁵ to oversee pandemic responses, the Victorian Government established the Pandemic Declaration Accountability and Oversight Committee (‘PDAOC’),¹⁹⁶ with responsibility for reviewing all orders and instruments made under a pandemic declaration and with the power to make recommendations that instruments be disallowed.¹⁹⁷

3.2.25 At the federal level, as noted at [2.5], there is no human rights enactment, but there is a requirement that the Parliamentary Joint Committee on Human Rights (‘PJCHR’) scrutinise all new legislation for compatibility with human rights and that legislation be accompanied by a compatibility statement. As with the experience in other jurisdictions, the Commonwealth Covid-19 Bills continued to be reviewed by the PJCHR. In most cases, however, the Bills were debated and passed before the Committee had completed its review and provided advice to Parliament about any human rights concerns. As the Commonwealth approach to human rights scrutiny of legislation is limited to its initial introduction, there has been a lack of ongoing oversight and transparency in relation to amendments of Bills.

3.2.26 Another key issue that arises in evaluating the COVID-19 response across jurisdictions is the oversight of delegated legislation. This issue was identified in Tasmania, but was also an issue in jurisdictions with human rights enactments. In some jurisdictions, there was limited oversight of subordinate legislation. For example, while the ACT Select Committee on the COVID-19 Pandemic Response recommended that all delegated legislation made in response to COVID-19 (including notifiable instruments) be accompanied by a statement of compatibility outlining the instrument’s effects on human rights, the government declined to adopt this recommendation.¹⁹⁸ The ACT Government also rejected a recommendation from the ACT Select Committee on the COVID-19 Pandemic Response and the ACT Human Rights Scrutiny Committee that delegated legislation made in response to COVID-19 be in the form of disallowable instruments, rather than notifiable instruments, to provide for adequate Parliamentary oversight.¹⁹⁹

3.2.27 In contrast, in Queensland, the Attorney-General stated that the requirement for instruments to be compatible with human rights²⁰⁰ was ‘a critically important human rights protection and safeguard’²⁰¹

¹⁹⁴ Public Accounts and Estimates Committee, *Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic: Final Report* (Parliament of Victoria, 2021)

<https://www.parliament.vic.gov.au/4b00fa/contentassets/9c4e489fe9834121826347ad523e87d2/paec_59-08_vic_gov_response_to_covid-19_pandemic.pdf>. The Ombudsman’s review of the lockdown of tower housing blocks at 33 Albert Street is discussed at [3.3.21]–[3.3.22] of this Research Paper.

¹⁹⁵ See, for example, Gabrielle Appleby et al, ‘Victoria’s Controversial Pandemic Bill: 6 Ways for the Government to Show it is Serious about Scrutiny’ (*The Conversation*, 15 November 2021) <<https://theconversation.com/victorias-controversial-pandemic-bill-6-ways-for-the-government-to-show-it-is-serious-about-scrutiny-171600>>.

¹⁹⁶ The Committee is to be chaired by a non-government MP and to have a majority of members who are not from the government: *Parliamentary Committees Act 2003* (Vic) s 21A.

¹⁹⁷ Any disallowance needs the support of an absolute majority of a joint sitting of Parliament, in which the government retains the majority of votes. This is a change from the previous position, in which an order could be disallowed with the support of either House.

¹⁹⁸ Committee on COVID-19 Pandemic Response, Interim Report 2 (July 2020) 6. The Select Committee also recommended that ‘delegated legislation made in response to COVID-19 be in the form of disallowable instruments, rather than notifiable instruments to ensure appropriate and adequate oversight by the Legislative Assembly’. The government responded that, in some circumstances, notifiable instruments were more appropriate, but that many of the measures taken were in the form of disallowable instruments: *Ibid* 7.

¹⁹⁹ *Ibid*. The government stated that, ‘While the ACT Government welcomes public scrutiny of its legislative response to COVID-19, there are reasons in certain cases why delegated legislation should not be subject to parliamentary disallowance procedures. A notifiable instrument is often used for matters that might need to be changed regularly or quickly or are operational, technical or procedural in nature. As such, notifiable instruments may be more appropriate in some cases’. The government also noted that most instruments introduced had been disallowable.

²⁰⁰ See *Human Rights Act 2019* (Qld) s 48(4)(b).

²⁰¹ For details of the requirements for human rights certificates for subordinate legislation, see Queensland Government, *Queensland Legislation Handbook 2021* [6.12]. See also Queensland Human Rights Commission, *Putting People First:*

which meant that steps in Queensland's legislative response to the COVID-19 public health emergency were generally accompanied by discussion of the rights affected. While acknowledging that many public health directions were not subject to the usual scrutiny applying to such measures, the Queensland Human Rights Commission concluded that the *Human Rights Act 2019* (Qld) had proven to be an important safeguard of the rights of people in Queensland during the pandemic.²⁰² Similarly, in Victoria, as noted at [3.2.24], there was amendment to the COVID-19 response framework to require a parliamentary committee to review all orders and instruments made under the pandemic declaration with the power to recommend that the instrument be disallowed.

3.2.28 In the ACT, Victoria, and Queensland, as in Tasmania, much of the pandemic response was regulated by directives issued under public health and emergency laws.²⁰³ The human rights concerns attaching to public health directives are encapsulated in the ACT Human Rights Commission's warning to the ACT Select Committee on the COVID-19 Pandemic Response that close oversight of restrictions imposed by the Chief Health Officer was needed (where non-compliance could attract significant fines) to ensure those restrictions were limited to their purpose, featured suitable safeguards, and mitigated unforeseen consequences.²⁰⁴ The report also included recommendations in relation to greater transparency, with the Committee recommending that the ACT Government make publicly available all human rights compatibility statements with every public health directions made.²⁰⁵

Protection of privacy

3.2.29 The right to privacy is one of the most well-traversed rights available under common law, specific legislation, and human rights frameworks. In the Review Period, concern has been generated by the allegedly unauthorised transfer of Tasmanian drivers' licence photos to the National Driver Licence Facial Recognition Solution ('NDLFRS').²⁰⁶ Additional concerns arose in relation to the potential misuse of personal data submitted through the COVID-19 Check-In application for the purposes of contact tracing. Both issues have also arisen in jurisdictions with human rights legislation.

3.2.30 In 2017, the Tasmanian Government, along with the governments of all other Australian States and Territories and the federal government, entered into the Intergovernmental Agreement on Identity Matching Services. Commonwealth legislation proposed to administer the scheme, the *Identity-matching Services Bill 2019* (Cth), was introduced in July 2019, but has not been passed by Parliament. In Tasmania, regulations allowing the Registrar of Motor Vehicles to divulge information required by the Intergovernmental Agreement were made in December 2017.²⁰⁷ These regulations were not subject

Annual Report on the Operation of the Human Rights Act 2019-2020 (Queensland Human Rights Commission, 2020) 11 <https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0005/29534/Human-Rights-Act-Annual-Report-2019-20.pdf>.

²⁰² Queensland Human Rights Commission, 'Submission to Queensland Parliament, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Inquiry into the Queensland Government's Health Response to COVID-19' (6 July 2020) 2, 3-4 <<https://www.qhrc.qld.gov.au/resources/submissions>>. For a detailed discussion of the impact of reduced scrutiny, see Peta Stephenson and Jonathan Crowe, 'Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?' *Australian Public Law* (Blog Post, 21 August 2020) <<https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law/>>.

²⁰³ In Victoria, for example, directions were made under the *Public Health and Wellbeing Act 2008* (Vic). The declaration of a public health emergency under s 23 of the *Emergency Management Act 1986* (Vic) is expressly exempted from scrutiny by the Scrutiny of Acts and Regulations Committee (r 9 of the Subordinate Legislation (Legislative Instruments) Regulation 2011 (Vic); s 4A(1)(c)) of the *Subordinate Legislation Act 1994* (Vic) allows regulations to exempt a legislative instrument, or a class of legislative instruments, from the scrutiny provisions of the *Subordinate Legislation Act 1994* (Vic).

²⁰⁴ Human Rights Commission (ACT), Submission No 10 to Select Committee on the COVID-19 Pandemic, *COVID-19 Pandemic Response* (19 May 2020) [9]-[10].

²⁰⁵ Legislative Assembly for the Australian Capital Territory, Select Committee on the COVID-19 Pandemic, *COVID-19 Pandemic Response* (2021) Recommendation 1 <https://www.parliament.act.gov.au/_data/assets/pdf_file/0017/1910132/Report-Inquiry-into-the-COVID-19-2021-pandemic-response-pdf>.

²⁰⁶ The Tasmanian Human Rights Act Campaign Committee ('THRACC') and Civil Liberties provided advice to the effect. (Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Report).

²⁰⁷ *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), reg 125(2)(d) & (3).

to a regulatory impact statement, nor were public submissions sought by the Joint Standing Committee on Subordinate Legislation, despite potential privacy concerns.²⁰⁸ This is a product of the ad hoc nature of parliamentary arrangements in Tasmania, where there is no routine scrutiny of proposed laws for human rights compatibility, and a lack of transparency about how human rights considerations are taken into account.²⁰⁹

3.2.31 In Victoria, as with Tasmania,²¹⁰ data has been uploaded to the NDLFRS. The Victorian Government committed to ensuring that uploaded data would not be accessible by agencies from the Commonwealth or other jurisdictions unless and until Commonwealth legislation is enacted, and that data management under the *Road Safety Act 1986* (Vic) would comply with the Vic Human Rights Charter.²¹¹ Queensland passed the *Police and Other Legislation (Identity and Biometric Capability) Amendment Act 2018* (Qld) to facilitate participation in the scheme but is yet to upload data.²¹² This predated the *Human Rights Act 2019* (Qld). The ACT, while agreeing to participate in the scheme, has refused to upload data to the NDLFRS until the authorising federal legislation has been enacted.²¹³ Further, the ACT Government is concerned about the compatibility of any such legislation with the ACT *Human Rights Act*, with Chief Minister Andrew Barr stating that, ‘The only grounds on which the ACT signed up to that intergovernmental agreement were on the basis that it would be compatible with our Human Rights Act’.²¹⁴

3.2.32 The approach adopted in the ACT, with explicit reference to Human Rights Act obligations, has provided stronger protection of privacy by deferring data sharing until robust privacy protections are implemented.

3.2.33 The COVID-19 check-in applications (‘apps’) also raised concerns in relation to privacy. All States and Territories introduced check-in apps as part of their COVID-19 data collection and contact tracing programs, raising privacy concerns about the data collected. Concerns arose in 2021 regarding the privacy of data collected through State-based check-in apps for the purposes of contact tracing, with calls for a national approach to the protection of data. Following admissions that Western Australian Police accessed check-in data for the purposes of a criminal investigation unrelated to contact tracing, legislative amendments were passed to restrict future use in Western Australia.²¹⁵ In Tasmania, Meg Webb MLC called on the government to adopt the same approach and proactively prevent police

²⁰⁸ Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Report. In response to questions concerning the public visibility of the changes made by the Regulations, the Government stated that a regulatory impact statement was not required ‘as the regulation did not impose a significant burden, cost or disadvantage on any sector of the public’: Tasmania, *Parliamentary Debates*, Legislative Council, 17 March 2020, 16 (Leonie Hiscuitt). The Government also pointed out that the Regulations were tabled in both Houses of Parliament: Tasmania, *Parliamentary Debates*, Legislative Council, 21 November 2019, 35 (Leonie Hiscuitt).

²⁰⁹ See Mackie and Hilkemeijer, ‘Human Rights Scrutiny in Tasmania’s Parliament’ [17.40], [17.50], [17.80], [17.90].

²¹⁰ See Justin Hendry, ‘Three States Complete National Face Matching Database Upload’ (*ITnews* online, 11 December 2019) <<https://www.itnews.com.au/news/three-states-complete-national-face-matching-database-upload-53535>>. Victoria created a digital platform to facilitate participation in the scheme: Meagan Ryan, ‘Proposed Identity-Matching Services in Australia’ (2019) 16(7) *Privacy Law Bulletin* 126, 127. In its response to the Privacy Impact Assessment of participation in the scheme, VicRoads accepted all 13 recommendations, including the recommendation to monitor the ‘NDLFRS bulk upload and daily updates to identify and manage accuracy issues’: VicRoads, *Privacy: Policy Statement* (18 December 2023) <www.vicroads.vic.gov.au/website-terms/privacy>.

²¹¹ See Premier of Victoria, *Identity Fraud Crackdown* (Web Page, 17 September 2019) <<https://www.premier.vic.gov.au/identity-fraud-crackdown/>>.

²¹² As this Act was passed in 2018, it predated the requirement for a statement of compatibility with human rights under the *Human Rights Act 2019* (Qld). The Explanatory Notes accompanying the Bill discussed how, in terms of consistency with fundamental legislative principles, the Bill affected the rights and liberties of individuals, including, in particular, privacy and the treatment of personal information. See Explanatory Notes, *Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018* (Qld) 8–9.

²¹³ Sarah Basford Canales, ‘“You Can’t Ever Get Privacy Back”: ACT Delays Uploading Driver Licences to National Biometric Database until Laws Pass Parliament’, *Canberra Times* (online, 11 October 2020) <<https://www.canberratimes.com.au/story/6962043/you-cant-ever-get-privacy-back-act-delays-biometric-licence-upload/>>.

²¹⁴ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, 1791 (Andrew Barr).

²¹⁵ *Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021* (WA).

accessing check-in data without a warrant issued by a court. The Tasmanian Government emphasised that the purpose of the check-in data was public safety and that it would not be used for other purposes,²¹⁶ but no legislation was enacted to prevent such access.

3.2.34 In contrast, in jurisdictions with human rights enactments, there was greater scrutiny of the use of the data collected and dialogue about the need to protect the right to privacy resulting in legislative amendment or, at a minimum, a clear policy direction. Initially, the Victorian Government declined to legislate to prevent police access to check-in data.²¹⁷ However, following calls from the National Privacy Commissioner to restrict data access, new safeguards were introduced as part of the Victorian Pandemic Bill. Under the new laws, Victoria Police can only access check-in data with a Supreme Court warrant, where there is an ‘imminent threat to the life, health, safety or welfare of at least one person’.²¹⁸

3.2.35 In September 2021, the ACT Government enacted the *Covid-19 Emergency Response (Check-in Information) Amendment Act 2021* (ACT), which limits the use of check-in information to contact tracing or associated purposes and prevents courts or tribunals from ordering the production of check-in data for other purposes. The human rights compatibility statement for the Bill stated that the amendments ‘positively engage the right to privacy through the introduction of additional controls and safeguards about the use of contact tracing information collected’.²¹⁹

Treatment of prisoners, including strip searching detainees

3.2.36 In the Review Period, concern was raised in Tasmania about the strip-searching of young people in custody and custodial facilities.²²⁰ An investigation revealed that more than 200 strip searches were conducted on children in detention facilities in 2018, with children younger than 13 years of age being subject to intrusive searches.²²¹ In 2019, the Commissioner for Children provided a report to government, which found that the practice of routine strip search of children in custody ‘cannot be justified and should cease’.²²² Referring to ‘fundamental human rights standards’, the Commissioner recommended that children only be strip searched when reasonable, necessary, and proportionate to a legitimate aim, that force be used only as a last resort, and that the principles guiding when and how strip searches can be conducted be clearly set out in legislation.²²³ The Commissioner also recommended investigating the potential for body scanners to minimise reliance on intrusive strip searches.²²⁴ The *Youth Justice Amendment (Searches in Custody) Act 2022* (Tas) was subsequently

²¹⁶ Minister Guy Barnett, quoted in B Duggan, ‘Possible COVID Check-In Tas App Data Access Concerning, Advocates Say’, *The Advocate*, 5 July 2021.

²¹⁷ Government Services Minister, Danny Pearson MP, said, ‘I don’t think we should be legislating. The courts will be best placed to make a determination because at the end of the day courts can make a determination on any form of warrants on any sort of issues’: quoted in Denham Sadler, ‘Victoria Won’t Prevent Police Accessing QR Code Check-In Data’, *InnovationAus.com* (online, 22 June 2021).

²¹⁸ *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) (‘Vic Pandemic Act’) s 165CD(2).

²¹⁹ Legislative Assembly for the Australian Capital Territory, *Covid-19 Emergency Response (Check-in Information) Amendment Bill 2021*, Explanatory Statement and Human Rights Compatibility Statement 8 <https://www.legislation.act.gov.au/b/db_64814/>.

In response to a query from the ACT Scrutiny Committee regarding how the restrictions would be enforced, the Minister for Health said that existing legislative protection against the misuse of information by a public servant would be sufficient to ensure data collected and held by the Department of Health would be managed in accordance with the restrictions: see Rachel Stephen-Smith MLA to the Chair of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) <https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/1851909/COVID-19-Emergency-Response-Check-in-Information-Amendment-Bill-2021.pdf>.

²²⁰ Commissioner for Children and Young People Tasmania, *Memorandum of Advice: Searches of Children and Young People in Custody and Custodial Facilities in Tasmania* (7 May 2019) 6–9 <<https://www.childcomm.tas.gov.au/wp-content/uploads/2019-05-06-FINAL-Advice-to-Ministers-Searches-of-children-and-young-people-in-custody-in-custodial-facilities.pdf>>.

²²¹ *Ibid* 13, 15. For media reporting, see A Holmes, ‘Forty-Six Children Aged 13 and Under Strip-Searched After Being Taken into Police Custody in Tasmania in 2018’, *The Examiner*, 15 March 2019.

²²² Commissioner for Children and Young People Tasmania, *Memorandum of Advice* 4.

²²³ *Ibid* 4–5.

²²⁴ *Ibid* 4.

enacted. It implemented recommendations made by the Commissioner of Children and Young People and is in line with human rights principles. The Act provides that children in detention should only be searched when it is necessary for a designated purpose, and that the manner and type of the search must be proportionate to that purpose.²²⁵ The treatment of children and young people in detention in Tasmania was also addressed by the Commission of Inquiry into Tasmanian Government Responses to Child Sexual Abuse.²²⁶

3.2.37 Reforms have also responded to concerns about the treatment of children and young people, as well as adults, in custody. However, in jurisdictions with human rights enactment, there is a formalised review/audit process and a clear statement of human rights principles in the human rights instrument. For example, the ACT Human Rights and Discrimination Commissioner undertook a human rights audit of the Quamby Youth Detention Facility in 2005,²²⁷ a review of the operation of all ACT correctional facilities, including youth detention centres, in 2007,²²⁸ and a human rights audit of the Bimberi Youth Justice Centre (constructed to replace the Quamby facility) in 2011.²²⁹ Each review noted that the operation of the *Human Rights Act 2019* (ACT) had improved operations and consideration of rights in policy development and implementation, but further improvements needed to be made. For example, in the Bimberi audit, the Commission found that many policies and procedures had changed significantly in the six years since the 2005 Quamby Audit. These changes reflected the recommendations of that Audit, and the requirements of the *Human Rights Act 2019* (ACT).²³⁰ The Commission also noted that the construction of Bimberi was motivated, in part, by the desire for a Centre that could better provide a human rights compliant environment.²³¹

Housing and homelessness and the rights of tenants

3.2.38 In the Review Period, housing affordability, homelessness, and the rights of tenants have been identified as issues of concern in Tasmania. A Legislative Council Select Committee on Housing Affordability found in 2008 that housing affordability had declined significantly in Tasmania, leading to issues with housing availability and homelessness.²³² This remains the case, as evidenced by a House of Assembly Select Committee on Housing Affordability in 2020.²³³ Concerns have also been expressed by the Tenants' Union about the rights of public housing tenants. The Tenants' Union noted case law from Victoria and the ACT establishing that social housing landlords must act in a way that is compatible with human rights:

²²⁵ *Youth Justice Amendment (Searches in Custody) Act 2022* (Tas) s 6, which inserts a new Division 3 into Part 3 of the *Youth Justice Act 1997* (Tas).

²²⁶ *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings Report. Volume 5: Children in Youth Detention* (Report, August 2023) <https://www.commissionofinquiry.tas.gov.au/__data/assets/pdf_file/0007/722860/COI_Volume-5_ChildrenInYouthDetention.pdf>.

²²⁷ Human Rights and Discrimination Commissioner, ACT, (2005) *Human Rights Audit of the Quamby Youth Detention Centre* (ACT Human Rights Commission, 2005) <https://www.hrc.act.gov.au/_data/assets/pdf_file/0008/2375819/Audit-of-Quamby-2005.pdf>.

²²⁸ ACT Human Rights Commission, ACT, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation ACT* (ACT Human Rights Commission, 2007) <https://www.hrc.act.gov.au/_data/assets/pdf_file/019/2306170/Audit-on-the-Operation-of-ACT-Correctional-Facilities-2007.pdf>.

²²⁹ ACT Human Rights Commission, ACT, *The ACT Youth Justice System: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission* (ACT Human Rights Commission, 2011) <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/act-youth-justice-system-2011-report-act-legislative-assembly-act>>.

²³⁰ *Ibid* [2 7.11] 61.

²³¹ *Ibid* [2 7.12] 61.

²³² Legislative Council Select Committee on Housing Affordability in Tasmania, *Housing Affordability in Tasmania* (2008) referred to in House of Assembly Select Committee on Housing Affordability, *Final Report on Inquiry into Housing Affordability* (2020) 14 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0030/58980/ha20select20committee20on20housing20affordability20-20final20report.pdf>.

²³³ House of Assembly Select Committee on Housing Affordability, *Final Report on Inquiry into Housing Affordability* (2020) 14. Tasmania's rental market has been marked by long periods of very low vacancy rates and declining availability, with many prospective tenants unable to secure accommodation: see Jacqueline De Vries et al, *The Tasmanian Housing Market: Update 2020-21* (Housing and Community Research Unit, University of Tasmania, June 2021) 33.

In the case of social housing tenants and transitional housing tenants, human rights legislation has ensured greater protection of tenants' right to adequate housing. This can be contrasted with Tasmania which does not have the same human rights protections and where policies currently in place increase the risk that disadvantaged tenants are placed in a revolving cycle of homelessness and emergency accommodation. In turn, this increases the risk of admission to the mental health care system or corrective services, and for children in those tenants' care, the child protection system.²³⁴

3.2.39 In Victoria, under the framework of a human rights enactment, legislation has been passed reflecting an engagement with human rights as applicable to rental accommodation. The *Residential Tenancies Amendment Act 2018* (Vic) was introduced following community consultation around housing quality, security, affordability, the rights and responsibility of renters and landlords, and accessible and effective options for dispute resolution.²³⁵ The statement of compatibility accompanying the Bill enacted in this Act provided a detailed weighing of the rights of tenants to privacy, dignity, and family against the property rights of landlords, and an explanation for the balance achieved by the Fairer Rental Bill.²³⁶

Religious freedom and freedom from discrimination

3.2.40 Most Australian jurisdictions prohibit discrimination on the basis of religion in their anti-discrimination legislation.²³⁷ Discrimination laws in all Australian jurisdictions provide exceptions for religious bodies (including schools), permitting them to discriminate on the basis of religion in employing people or admitting people to their institutions, where the discrimination is reasonably necessary to conform to the doctrines, tenets, beliefs, and principles of the religion.²³⁸ The exemption of religious bodies from anti-discrimination laws has been an ongoing source of public controversy at both State and national levels. Most recently, controversy has centred on how the apparent conflict between the right to religious freedom and the right to be free from discrimination has manifested around the right to freedom of speech and religious expression.²³⁹ In relation to freedom of religious expression, the focus has been broadly on the rights of religious bodies to conduct their affairs in ways that would normally be regarded as discriminatory but which, they argue, enable them to act freely in accordance with their fundamental tenets and beliefs. This aspect of the controversy arose most acutely in relation to the marriage equality debate and later in relation to the Commonwealth government's

²³⁴ Advice provided by the Tenants' Union of Tasmania. (Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Report.)

²³⁵ State Government of Victoria, *Residential Tenancies Act Review: Laying the Groundwork – Consultation Paper* (Fairer Safer Housing, 2015) 2 <<https://engage.vic.gov.au/download/document/1839>>.

²³⁶ Minister for Consumer Affairs, Gaming and Liquor Regulation, Statement of Compatibility with Human Rights: *Residential Tenancies Amendment Act 2018* (Vic), tabled 9 August 2018. Victoria, *Parliamentary Debates*, 9 August 2018, 2731 (Marlene Kairouz).

²³⁷ *Discrimination Act 1991* (ACT) ss 7(t) & Pt 3; *Anti-Discrimination Act* (NT) s 19(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o) & (p); *Equal Opportunity Act 1995* (Vic) s 6(n) & Part 4; *Equal Opportunity Act 1984* (WA) Pt IV. Commonwealth, New South Wales, and South Australian Anti-Discrimination legislation does not prohibit discrimination on the basis of religion, but does exclude religious bodies from the operation of aspects of anti-discrimination laws.

²³⁸ *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Equal Opportunity Act 2010* (Vic) ss 81–83A; *Anti-Discrimination Act 1991* (Qld) ss 25, 41, 109; *Equal Opportunity Act 1984* (SA) ss 34, 50; *Discrimination Act 1991* (ACT) ss 7, 32(1)(a)–(d), 32(2), 46; *Equal Opportunity Act 1984* (WA) ss 72, 73; *Anti-Discrimination Act* (NT) ss 30(2), 37A, 51; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1998* (Tas) ss 51 and 51A as amended by *Anti-Discrimination Amendment Act 2001* (Tas) and *Anti-Discrimination Amendment Act 2015* (Tas).

²³⁹ The apparent conflict of some rights may occasion scepticism about their value and utility and create the impression that rights interpretations are inherently unpredictable and erratic. For a detailed appraisal of these views, see Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 5th ed, 2019) 37–39, 46–49; Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423; Hilary Charlesworth, 'International Law and Australian Law in the 21st Century' (2002) 6(1) *Newcastle Law Review* 1, 9; Jeremy Gans et al, *Criminal Process and Human Rights*, (Federation Press, 2011) 51–55.

proposal to introduce new legal protections of religious freedom that would override or reform both national and State anti-discrimination laws.²⁴⁰

3.3 Key themes from the examination of selected experiences in the Review Period

A human rights enactment can increase parliamentary scrutiny and transparency in relation to consideration of human rights factors

3.3.1 Tasmania does not have a formal mechanism for the routine scrutiny of legislation or policy from a human rights perspective and there is no requirement for the preparation of statement of compatibility or like document.²⁴¹ This does not mean that human rights considerations are not taken into account in Tasmania. Rather, the consideration of human rights issues is ad hoc and can be inconsistent. In the absence of human rights legislation, Bills introduced to the Tasmanian Parliament are not required to be accompanied by any assessment of their compatibility with human rights obligations. Select or sessional Parliamentary Committees can be convened to examine Bills with human rights implications, but the decision to establish an ad hoc inquiry is at the discretion of Parliament.

3.3.2 In contrast, all subordinate legislation must be accompanied by a Regulatory Impact Statement²⁴² (including an assessment of the costs and benefits of the proposed regulations and any alternatives, having regard to economic, social, and environmental impacts) and will be scrutinised by the Joint Standing Committee on Subordinate Legislation ('JCSL').²⁴³ While not explicitly mandating the consideration of 'human rights', this assessment requirement invites consideration of the human rights implications of regulatory decisions. There are limitations in the function of the JCSL, however. In an evaluation of the JCSL, Mackie and Hilkemeijer noted the Tasmanian Government's view that the Committee's role was limited to applying a 'technical' lens, rather than engagement in substantive policy scrutiny having regard to human rights.²⁴⁴ Further, Mackie and Hilkemeijer, in examining the role of the JCSL in scrutinising whether regulations unduly trespass on common law rights, concluded that the Committee did not 'overtly engage with or articulate any common law rights issues'.²⁴⁵

3.3.3 For the purposes of this Research Paper, an additional period of 2019 to 2020 was examined. In this period, the JCSL met 30 times, examined 63 instruments, and held public hearings in relation to three instruments.²⁴⁶ The significantly higher number of meetings was a response to new scrutiny obligations under the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* ('Tas Covid Act') (see [3.2.13]). From April to June 2020, the JCSL met twice weekly, reviewed 22 notices issued

²⁴⁰ Department of Prime Minister and Cabinet, *Religious Freedom Review* (2018) <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>> and see the ensuing Religious Discrimination Bill 2022 (Cth).

²⁴¹ Mackie and Hilkemeijer, 'Human Rights Scrutiny in Tasmania's Parliament' [17.40], [17.50]. This is consistent with the views expressed by Meg Webb MLC and Community Legal Centres Tasmania submissions to this review. (Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Research Paper.)

²⁴² *Subordinate Legislation Act 1992* (Tas) s 5, sch 2.

²⁴³ *Subordinate Legislation Committee Act 1969* (Tas) s 8.

²⁴⁴ Prior to tabling, proposed subordinate legislation must be submitted to the Chief Parliamentary Counsel for advice regarding technical compliance, including whether the instrument is clearly expressed and within the general objectives and powers conferred by the head Act. Limiting the JCSL's review to similarly technical matters is not justified by the provisions of the *Subordinate Legislation Act* (Tas).

²⁴⁵ Mackie and Hilkemeijer, 'Human Rights Scrutiny in Tasmania's Parliament' [17.50].

²⁴⁶ Joint Standing Committee on Subordinate Legislation, *2019-2020 Annual Report* <<https://www.parliament.tas.gov.au/committees/joint-committees/standing-committees/subord/previousreports>>.

under the Tas Covid Act, and held public hearings in relation to five of those notices.²⁴⁷ Despite the higher level of activity and public engagement, the JCSL still did not overtly or consistently engage in a rights assessment of subordinate legislation. Ultimately, no notices or instruments were disallowed following review by the JCSL in this period.

3.3.4 The ad hoc nature of the process to address human rights concerns relating to privacy was also identified in the Review Period in Tasmania.²⁴⁸ In contrast, generally in jurisdictions with human rights enactments, approaches to the use of COVID-19 check-in data was at least cognisant of human rights and legislative limits were placed on the use of the data. Statements of compatibility were also prepared that outlined the human rights considerations, and protections were included in the legislation to respond to human rights concerns. In this context, the Australian Human Rights Commission has stated that ‘the key value of a human rights framework [is to] ensure that human rights are considered in the planning phase, encouraging greater due diligence, transparency and accountability’.²⁴⁹

3.3.5 A feature of the experience of jurisdictions with human rights enactments has been early engagement with human rights in policy development, which has been identified as enhancing the prospect of the resulting legislation being human rights compatible.²⁵⁰ Examples exist of early engagement with human rights issues in Tasmania in the development of legislation that has allowed human rights considerations to be identified and responded to. Arguably, the depth of the analysis of and the debate about human rights that occurred during the enactment of the 2013 Reproductive Health Act (safe access zone legislation) contributed to the development of legislation that withstood the High Court challenge, unlike the original anti-protest laws that applied to workplaces. This points to the benefit that may result in Tasmania from the creation of a clear process for human rights evaluation. A human rights enactment in Tasmania would provide the framework for a more consistent, clear, and rigorous process to evaluate rights through the requirement for a statement of compatibility, the committee process and expert input from a Human Rights Commission at an early stage. This process allows for greater transparency in relation to human rights considerations, greater certainty as to the scope of the various rights, and a formal process to provide critical, specialised, and expert dialogue about the human rights implications of government policy and legislative proposals.

3.3.6 Further, there are indications in jurisdictions with human rights enactments that the legislation has contributed to the development of a more human rights focused culture within government. The Queensland Human Rights Commissioner has referred to the requirement for decision-makers to consider less restrictive measures as ‘the biggest benefit of the Act’.

We will know we have successfully built a human rights culture when public servants routinely ask themselves the question, ‘Can I do this in a less restrictive way?’

This is a profound and significant development in Queensland’s administration, and the benefit of this obligation is already being realised. For example, many departments and agencies spent considerable time last year conducting audits of their legislation,

²⁴⁷ Public hearings were held in relation to notices relating to court proceedings, residential tenancies, poisons, and waiving land tax: Joint Standing Committee on Subordinate Legislation, *2019-2020 Annual Report*.

²⁴⁸ See [3.2.29]–[3.2.35].

²⁴⁹ Australian Human Rights Commission, *A National Human Rights Act for Australia* (AHRC, 2023) 38 <<https://humanrights.gov.au/human-rights-act-for-australia>>.

²⁵⁰ Joanna Davidson, ‘Impact of the Victorian Charter upon Policy and Legislative Development’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 10 [10.220]; Chris Humphreys, Jessica Cleaver and Catherine Roberts, ‘Considering Human Rights in the Development of Legislation in Victoria’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (LawBook Co, 2020) ch 7 [7.170]; Watchirs, Costello and Thilagaratnam, ‘Human Rights Scrutiny under the *Human Rights Act 2004* (ACT)’ [6.260].

policies, and procedures to test for compatibility with human rights. I have no doubt that improvements have already been made that may not be readily apparent to outsiders.²⁵¹

3.3.7 A focus on the development of a human rights culture has been evident in Queensland. In its 2020-2021 Annual Report,²⁵² the Queensland Human Rights Commission outlined a series of indicators against which the Commission intended to measure the extent to which the *Human Rights Act 2019* (Qld) has built a human rights culture within Parliament, including how often override declarations are used, how often incompatibility is addressed and acknowledged in a statement of compatibility, how robustly statements are critiqued by Portfolio Committees, the level of dialogue between the Minister and the Committee, and whether Bills are amended in response to issues raised by Committees. Ongoing monitoring and evaluation provide insight into the success of measures to embed a human rights culture and meaningful rights discourse in Parliamentary debate, and an opportunity for reflection and changes to the model to improve its effectiveness.

3.3.8 The importance of an ongoing commitment to effective human rights scrutiny and the facilitation of a human rights dialogue was also noted in the 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act.

For the Charter to be effective, the Victorian Government must prioritise work to build a stronger human rights culture, particularly in the Victorian public sector. A strong human rights culture facilitates better government decision making. Having the law is not enough to achieve human rights protection: Victoria also needs a culture that makes human rights real in people's everyday interaction with government.²⁵³

3.3.9 To this end, this review made a suite of recommendations to strengthen the human rights culture within the public sector, including leadership, embedding human rights in organisational plans and policies, professional development, and monitoring progress against key indicators. The Victorian Government supported the recommendations, and a comprehensive Charter Education Program was developed by the Victorian Equal Opportunities and Human Rights Commission ('VEOHRC') to '[build] human rights capability across the Victorian Public Service'.²⁵⁴

3.3.10 Options for managing the risk that human rights analysis is superficial, and to embed a human rights culture within Parliament and the public sector, are discussed in Part 4.

A human rights enactment can build a consistent process for the provision of external scrutiny and advice

3.3.11 The Tasmanian Government can access external advice to inform and guide parliamentary debate on legislation, including on issues relating to compliance with human rights obligations. However, advice is typically provided at the invitation of the Government, rather than mandated, and there is no requirement for the Government to engage directly with, or even respond to, any advice provided.²⁵⁵

²⁵¹ Scott McDougall, 'Making Rights Real: The Promise and Potential Pitfalls of the *Queensland Human Rights Act 2019*', *Bond University Twilight Seminar Series* (6 February 2020) 7–8 <https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0003/29451/Bond-University-Twilight-Seminar-Series-6-February-2020.pdf>.

²⁵² Queensland Human Rights Commission, *Balancing Life and Liberty: The Second Annual Report on the Annual Operation of Queensland's Human Rights Act 2019 2020–21* (QHRC, 2021) 34–37 <https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0020/36506/Human-Rights-Annual-Report-2020-21.pdf>.

²⁵³ Brett Young, *From Commitment to Culture* 5.

²⁵⁴ See Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2020-2021* (State of Victoria, 2021) 48 <https://www.humanrights.vic.gov.au/static/17e7f07a6011ef9bf0002454f5a65611/Resource_Annual_Report-2020-21.pdf>.

²⁵⁵ Mackie and Hilkemeijer, 'Human Rights Scrutiny in Tasmania's Parliament' [17.100].

3.3.12 For example, in Tasmania, the Anti-Discrimination Commissioner ('ADC') provides some human rights input through the Commissioner's role to advise the Government on matters relating to discrimination, and to 'examine legislation and report to the Minister as to whether it is discriminatory or not'.²⁵⁶ Submissions from the ADC on policies such as the Tasmanian Women's Strategy 2018-2020 and the Disability Framework for Action 2018-2020 contributed valuable human rights analysis about discrimination and strengthened policy outcomes. It is not evident, however, that this review and advice is consistently sought or, in any event, made publicly available. For example, in relation to the Anti-Discrimination Amendment Bill 2015 (Tas), the explanatory notes for the Bill did not explicitly address human rights issues arising from the exception to the Act created by the Bill, which enables religious schools to discriminate on the ground of religion in admitting students,²⁵⁷ nor did the House of Assembly seek a briefing on the Bill from the ADC, the officer charged with the administration of the Act. In contrast, the Legislative Council sought a briefing from the ADC. The Bill was ultimately passed but did not adopt the recommendations of the ADC.²⁵⁸

3.3.13 The Tasmanian Government has also referred many important issues to the TLRI and to the University of Tasmania for review. Often, but not universally, these Reviews involve consideration of human rights. For example, the majority of the references received by the TLRI have been from the Attorney-General. To name but a few, such references have included: the Review of the Guardianship and Administration Act 1995 (Tas); Reviews of the Defences of Self-Defence, Insanity, and Intoxication under the Criminal Code 1924 (Tas); recidivist drink drivers; Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania; Bullying; Problem Trees and Hedges; and Adoption by Same Sex Couples. The initial reference to explore the need for a human rights enactment in Tasmania was provided to the TLRI. Since 2006, the TLRI has framed its advice with reference to relevant human rights. This has enabled human rights principles and jurisprudence to be incorporated into the advice given. The Tasmanian Policy Exchange²⁵⁹ was commissioned to review the End-of-Life Choices (Voluntary Assisted Dying) Bill 2020 (Tas) and to assist with risk assessment modelling of the impacts of COVID-19. However, neither Review explicitly examined the human rights implications of those matters.²⁶⁰

3.3.14 Moreover, no referral was made for external advice in respect of the Tasmanian anti-protest laws that applied to workplaces, reflecting the reality that decisions about whether to refer and the terms of reference for an inquiry are at the discretion of the Tasmanian Government. Further, while some reform recommendations are enacted, there is no obligation on the Tasmanian Government to respond to, or implement, any recommendations made by the TLRI or other organisations.

3.3.15 The Legislative Council requests or accepts offers of briefings from stakeholders and experts, including the TLRI, prior to debating legislation. Again, this provides an opportunity for discussion of human rights implications, but it is an ad hoc process, rather than a routine, structured examination of whether proposed laws are consistent with human rights, as recommended in the TLRI 2007 Final Report. In summary, the lack of a formal mechanism in Tasmania for routine external scrutiny appears to mean that referrals for advice or briefings are ad hoc and inconsistently used.

3.3.16 In contrast, several jurisdictions with human rights enactments have established mechanisms for the routine external scrutiny of legislation and policy through the establishment and resourcing of dedicated Human Rights Commissions. This allows for the consistent provision of expert human rights

²⁵⁶ *Anti-Discrimination Act 1998* (Tas) s 6(g).

²⁵⁷ *Anti-Discrimination Act 1998* (Tas) s 51A.

²⁵⁸ See advice quoted by the Hon Ruth Forrest MLC: Tasmania, *Parliamentary Debates*, Legislative Council, 27 May 2015, 46–47 (Ruth Forrest). The Anti-Discrimination Commissioner suggested that, instead of enacting an exception, an exemption be created, for which schools would have to apply.

²⁵⁹ The Tasmanian Policy Exchange was established in 2020 as a 'strategic initiative to enhance the University of Tasmania's capacity to make timely and informed contributions to policy issues and debates which will shape Tasmania's future'. For more information, see Tasmanian Policy Exchange <<https://www.utas.edu.au/community-and-partners/tpex>>.

²⁶⁰ See Tasmanian Policy Exchange, *Independent Review of the End-of-Life Choices (Voluntary Assisted Dying) Bill 2020* (2021) <https://www.utas.edu.au/_data/assets/pdf_file/0009/1475568/Independent-review-voluntary-assisted-dying.pdf>.

advice in the scrutiny of legislation. For example, in 2021-2022, the Queensland Human Rights Commission ('QHRC') provided 31 submissions to Parliamentary Committees and other bodies on the development of government policies and legislation.²⁶¹ The VEOHRC prepared four policy submissions and witness statements²⁶² and contributed to the review of proposed Covid laws, resulting in some problematic provisions being removed from the Bill.²⁶³

3.3.17 In 2020-2021, the ACT Human Rights Commission provided 63 pieces of written legal advice, comments, and submissions in relation to Territory laws and policies.²⁶⁴ As part of its arrangements with the government, the Commission also provided formal comments on 16 draft Cabinet submissions.²⁶⁵ This early input provides opportunities to strengthen proposed laws, even before they are considered by Parliament. The Report noted:

As Cabinet deliberations are classified Cabinet-In-Confidence, the issues raised by Commission comments and corresponding outcomes cannot be divulged. Generally, the Commission was satisfied that draft legislation presented during the reporting period achieved compatibility with human rights, whether initially or after suggested changes or further justification.²⁶⁶

3.3.18 The opportunity to intervene in court proceedings involving interpretation of human rights instruments also assists in the development of jurisprudence and human rights understanding in decision-making agencies. In 2020-2021, the QHRC received 26 notifications or requests to intervene, and intervened in three matters before the Queensland Supreme Court²⁶⁷ and two matters before the Queensland Mental Health Court.²⁶⁸ In 2020-2021, the ACT Human Rights Commissioner was notified of four cases involving human rights²⁶⁹ and applied for, and was granted, leave to intervene in two cases.²⁷⁰

3.3.19 Similarly, under the Victorian Charter and *Equal Opportunity Act 2010* (Vic), the VEOHRC has power to intervene in cases involving human rights. It does not intervene in all such cases and has published intervention guidelines.²⁷¹ In its 2020-2021 Annual Report, the Commission reported that it had prepared two legal interventions and 'investigation up-dates'.²⁷² In its 2019-2020 Annual Report, the VEOHRC reported intervening in one case, the Coronial Inquest into the death, after spending time

²⁶¹ Queensland Human Rights Commission, *Annual Report 2021-22* (QHRC, 2022) 37

<https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0003/40647/Queensland-Human-Rights-Commission-Annual-Report-2021-22.pdf>.

²⁶² Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2020-2021* (VEOHRC, 2021) 6 <https://www.humanrights.vic.gov.au/static/17e7f07a6011ef9bf0002454f5a65611/Resource_Annual_Report-2020-21.pdf>.

²⁶³ Ibid 28. For example, the VEOHRC raised concerns that provisions of the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (Vic) permitting authorised officers to detain 'high risk' people pre-emptively would disproportionately affect vulnerable groups (such as those with a mental illness or experiencing homelessness) and heighten the risk of people being detained arbitrarily. The Government ultimately removed that provision from the Bill.

²⁶⁴ ACT Human Rights Commission, *Annual Report 2020-21* (ACTHRC, 2021) 10, 21-22

<https://www.hrc.act.gov.au/_data/assets/pdf_file/0010/2282176/ACT-Human-Rights-Commission-Annual-Report-2020-21.pdf>.

²⁶⁵ Ibid 10.

²⁶⁶ Ibid 22.

²⁶⁷ See *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246 and *Owen-D'Arcy v Chief Executive of QCS* [2021] QSC 273; the Commission has also intervened in a further matter that was subject to reporting restrictions: see QHRC, *2020-21 Annual Report* 59.

²⁶⁸ QHRC *Annual Report 2021-22*, p 59.

²⁶⁹ See discussion below at [4.6.7]-[4.6.9] regarding notification obligations.

²⁷⁰ ACT Human Rights Commission, *Annual Report 2020-21* 25.

²⁷¹ Not notified on the VEOHRC Home Page but found, with some searching, at <<https://www.humanrights.vic.gov.au/legal-and-policy/legal-interventions/>>.

²⁷² See VEOHRC, *Annual Report 2020-2021* 7. It appears that these interventions involved just one case, which concerned the protection of cultural rights in Aboriginal lands – the preservation of Djab Wurrung birthing trees. As the case progressed, it became clear that it also involved critical questions about the extent to which people can claim remedies in the courts for breaches of Charter rights (s 39) 51.

in police custody, of Aboriginal woman, Tanya Day. The Coroner accepted the VEOHRC's submission that this case raised issues about whether systemic racism had contributed to Ms Day's death.²⁷³

Human Rights enactments can provide a framework to allow for the balancing of rights, and influencing public discourse and policy outcomes

3.3.20 A feature of the experiences in jurisdictions with human rights enactments is the ability of that framework to allow for the balancing of rights and influencing public discourse and policy outcomes. In the response to COVID-19 pandemic, as acknowledged, there was tension between the scope of the restrictions imposed, the need to balance different rights, such as the right to life and health, with the right to freedom of movement and association. This was the case for jurisdictions both with and without a human rights enactment. However, it has been suggested that human rights can provide 'a framework for making decisions in times of crisis ... Human rights not only provide an important check on executive power; they *help* us make emergency decisions that are rational, balance multiple factors, minimise human cost, and prioritise human life'.²⁷⁴

3.3.21 The Melbourne Tower Lockdown case study, below, illustrates how the existence of a human rights framework led to reflection and change in the COVID-19 response that had been assessed as being an overreach and contrary to human rights. This case study concerns a residential lockdown in Victoria. While it shows that questions were raised regarding the level of consideration given to human rights in the design and implementation of the immediate lockdown, the subsequent scrutiny of its effect on human rights arguably contributed to improvements in later approaches to localised lockdowns and the provision of ongoing support to affected communities. Further, the Victorian experience indicates that human rights enactments do not diminish parliamentary sovereignty or unduly fetter Parliament's ability to tackle emergency situations. However, they do have the potential to improve the prospect of retrospective human rights analysis and the commitment to implement any human rights lessons learnt from earlier experience.

CASE STUDY: MELBOURNE TOWER LOCKDOWN

On 4 July 2020, in response to a significant outbreak of COVID-19 amongst residents of 10 residential towers in North Melbourne and Flemington, the Deputy Chief Health Officer issued directions that prevented the 3,400 residents from leaving the towers.

The restrictions were announced by the Premier at a press conference at 4.00 pm and were said to take effect immediately.

The strict lockdown was enforced by a heavy police presence, with police forming perimeters around the towers and fencing off designated areas with barbed wire. Residents, many of whom did not speak English as a first language, were not given an adequate explanation of the scope or purpose of the lockdown until several days after the restrictions were imposed.²⁷⁵

The quick implementation of the lockdown caused concerns about access to food, health, and social services by detained residents, as well as the use of interpreters and appropriate engagement strategies to ensure residents understood the rules, public health risks, and availability of support.²⁷⁶

²⁷³ See VEOHRC, *Annual Report 2019-2020* 7, 47.

²⁷⁴ AHRC, *A National Human Rights Act for Australia* 36.

²⁷⁵ Human Rights Commission (ACT), 'Submission No 10 to Select Committee on the COVID-19 Pandemic, COVID-19 Pandemic Response' (19 May 2020) [35]–[37].

²⁷⁶ *Ibid* [864]–[867].

The situation was the subject of an investigation by the Victorian Ombudsman,²⁷⁷ who applied the human rights (including the right to life, right to equality, protection from cruel, inhuman or degrading treatment, freedom of movement, privacy, family and home, freedom of religion and cultural rights, peaceful assembly and association, protection of families and children, right to liberty, and the right to humane treatment when deprived of liberty) contained in the Charter of Rights Act to the conduct of the Department of Health and Human Services ('DHHS').²⁷⁸ The Ombudsman evaluated the conduct of the DHHS for its compatibility with human rights and the obligations of the DHHS to give proper consideration to a relevant human right when making a decision, and whether there were appropriate review mechanisms for persons deprived of their liberty.

The Ombudsman noted:

This was to be the first use of emergency detention powers to manage an outbreak of COVID-19 within the Victorian community, and the first 'hard lockdown' of a high-density residential building anywhere in Australia in response to the global pandemic. There were no Victorian or Commonwealth guidelines relating to such an intervention. The human rights implications of the decision were extraordinary and required careful consideration.²⁷⁹

The Ombudsman found that the decision to lock down the towers was most likely made by Cabinet but was instituted through a public health direction within hours of the relevant Cabinet meeting. Given the speed of the decision, the Ombudsman was not satisfied that the Deputy Chief Health Officer ('CHO') had been able to give meaningful consideration to public health advice or the human rights assessment, nor had the Deputy CHO been 'permitted to bring an independent mind to the issue'.²⁸⁰

The Ombudsman concluded that:

While the temporary detention of residents ... may have been an appropriate measure to contain the outbreak of COVID-19 sweeping the building, the imposition of such restrictions with more or less immediate effect — absent further preparation, and without specific health advice recommending such an approach — did not appear justified and reasonable in the circumstances, nor compatible with the right to humane treatment when deprived of liberty.²⁸¹

The Ombudsman similarly found that fencing off areas with barbed wire was 'clearly degrading and inhumane'.²⁸²

The Ombudsman made a series of recommendations to improve public health law and practice, including a recommendation to:

[d]evelop and implement local guidelines, procedures and training relating to the exercise of the emergency detention power ... [addressing] legislative safeguards relating to use of the power, specifying, wherever possible, measures to be adopted to ensure compliance with these safeguards.²⁸³

The Public Accounts and Estimates Committee's Final Report on the Victorian Government's COVID-19 response notes actions taken since the lockdowns, including:

- the establishment of a Tower Relocation Program, offering private rental properties outside of high-density public housing towers to high-risk tenants;

²⁷⁷ The Victorian Ombudsman determined to investigate, on its own motion, the use of emergency powers by the Department of Health and Human Services, including, inter alia, 'whether imposition of the lockdown complied with the Charter of Human Rights and Responsibilities Act 2006 (Vic)': Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (December 2020) 12 [8].

²⁷⁸ See *ibid* [300]–[340].

²⁷⁹ *Ibid* [24].

²⁸⁰ *Ibid*. Records indicate that only 15 minutes was allocated to reviewing the human rights assessment. See *ibid* [74]–[75].

²⁸¹ *Ibid* [71]–[75].

²⁸² *Ibid* [46].

²⁸³ *Ibid* 180, Recommendation 5.

- the establishment of a North Melbourne, Flemington and Yarra working group to help inform the response to COVID-19 outbreaks in public housing;
- that the Department of Health and Human Services support the Australian Muslim Social Services Agency on community engagement work through COVID recovery and provision of ongoing support.²⁸⁴

3.3.22 The Victorian experience points to the potential for a human rights enactment to influence public discourse and legislative developments. It also demonstrates how human rights protections may be embedded in other legislative regimes by subjecting their operation to human rights enactments. For example, following the public debate about Victoria's emergency powers legislation and government directives issued under it, which had prompted rallies and online 'freedom' campaigns, the Victorian Government negotiated amendments to the *Public Health and Wellbeing Act 2008* (Vic) through Parliament at the end of 2021.²⁸⁵ Key changes were designed to:

- increase Parliamentary accountability by transferring responsibility for key decisions to the Premier and Health Minister, while still requiring them to consult with and consider health advice from the Chief Health Officer;²⁸⁶
- ensure that any pandemic orders that purport to apply differently to groups based on protected attributes such as age or health must demonstrate that they are 'relevant to the serious risk to public health posed by the disease specified in the pandemic declaration to which the pandemic order relates';²⁸⁷
- subject all pandemic orders to the Vic Human Rights Charter and require that they be accompanied by a statement justifying any limitations on human rights;²⁸⁸
- remove aggravated offence provisions and, instead, insert and a new Division establishing an expeditious, independent merits review process for any person detained under the Act;²⁸⁹
- establish an Independent Pandemic Management Advisory Committee²⁹⁰ to consist of people with broad-ranging areas of expertise, including in human rights,²⁹¹ to review pandemic orders and to provide advice to, and prepare reports for, the Minister;²⁹² and
- create a statutory requirement for an independent review of the amendments to be conducted by legal and health experts within 18 months of their commencement.²⁹³

²⁸⁴ See Public Accounts and Estimates Committee, *Inquiry into the Government Response to the Covid-19 Pandemic* (Parliament of Victoria, 2021) 184–195

<https://www.parliament.vic.gov.au/48eb83/contentassets/9c4e489fe9834121826347ad523e87d2/paec_59-08_vic_gov_response_to_covid-19_pandemic.pdf>.

²⁸⁵ *Public Health and Wellbeing Amendment (Public Management) Act 2021* (Vic).

²⁸⁶ See Part 8A of the *Public Health and Wellbeing Act 2008* (Vic). For example, s 165AS(1)(b)(iv) provides for the Pandemic Declaration Accountability and Oversight Committee to report to Parliament, if an instrument or direction 'provides for the sub-delegation of powers delegated by the Act'.

²⁸⁷ *Public Health and Wellbeing Act 2008* (Vic) s 165AK.

²⁸⁸ *Public Health and Wellbeing Act 2008* (Vic) ss 165AJ, 165AP(2)(c) and (d).

²⁸⁹ Part 8A, Div 6 of the *Public Health and Wellbeing Act 2008* (Vic) provides for people detained to seek review by a Detention Appeal Officer, make a complaint to the Ombudsman, or seek review in a Court.

²⁹⁰ *Public Health and Wellbeing Act 2008* (Vic) Pt 8A, Div 9.

²⁹¹ *Public Health and Wellbeing Act 2008* (Vic) s 165CE(4).

²⁹² *Public Health and Wellbeing Act 2008* (Vic) s 165CF.

²⁹³ *Public Health and Wellbeing Act 2008* (Vic) s 165CX.

3.3.23 It can be suggested that the discourse surrounding the brokered reforms point to the value of legislative human rights frameworks as a clear touchstone in guiding reform and extraordinary emergency powers. The Human Rights Law Centre has said of the amended pandemic management regime:

[It] isn't perfect but it is a big improvement ... Overall the new bill ensures much greater transparency, oversight and human rights protections than the current law and the laws in other parts of the country ... The safeguards in the Bill will help government make better decisions and strike the right balance between our right to life and public health and other individual rights and freedoms.²⁹⁴

3.3.24 Similarly, in relation to responses to COVID-19, the AHRC has stated that a 'Human Rights Act may not lead to perfect results, but it would help us make better decisions. COVID-19 has highlighted the need for a shared set of rights and values to guide us through difficult times'.²⁹⁵

3.3.25 Progress towards fostering a stronger human rights culture underpinned by the human rights enactment was observed by the VEOHRC in its 2020 Report on the operation of the Vic Human Rights Charter in the context of the response to the COVID-19 pandemic. The VEOHRC Report noted that Parliament had not sought to override the Charter's protections in framing its response to the pandemic and that the Charter's continued role in 'guiding public decision-making, ensuring human rights were considered in new laws and [in] maintaining the role of courts and tribunals [had] shown the significance of human rights frameworks ... in difficult times'.²⁹⁶ The Commissioner also considered that a human rights culture within the public sector had strengthened Victoria's response to COVID- 19:

Perhaps the most significant impact of the Charter during the COVID-19 pandemic was the role it played in public policy decision-making. Public authorities remained bound by the Charter to consider human rights, and to act in accordance with human rights, in their decision-making. Throughout 2020, the Commission heard from public servants that the Charter was 'part of the furniture' and that they had 'never considered the Charter more' in their work.²⁹⁷

3.3.26 In contrast, in evaluating the Tasmanian response to the COVID-19 pandemic, a lack of transparency in the process means it is unclear precisely how human rights were taken into account. It is not suggested that human rights were not taken into consideration during development and implementation. Rather, the lack of a clear human rights framework meant there was no obligation to document the human rights repercussions of responses to COVID-19, set out the considerations taken into account when balancing competing rights, justify the effect of restrictions, or demonstrate that the approaches adopted were designed to minimise intrusion on those rights. This leads to a more limited opportunity to analyse any deficiencies formally, identify any over-reach and unnecessary or disproportionate violations of human rights arising from the regulatory response to the public health emergency, or engage in reflexive parliamentary dialogue on matters of concern.

3.3.27 The role of human rights enactments in setting out a framework to allow for the balancing of rights, as well as influencing public discourse and policy outcomes, can be seen in relation to other

²⁹⁴ Human Rights Law Centre, 'Proposed Amendments to Victoria's Pandemic Law Welcome, Will Increase Oversight and Strengthen Appeal Rights' (Media Release, 30 November 2021) <<https://www.hrlc.org.au/news/2021/11/30/proposed-amendments-to-victorias-pandemic-law-welcome-will-increase-oversight-and-strengthen-appeal-rights>>.

²⁹⁵ AHRC, *A National Human Rights Act for Australia* 39.

²⁹⁶ VEOHRC, *2020 Report on the Operation of the Charter of Human Rights and Responsibilities*, November 2021 (tabled 2 December 2021), in the Commissioner's letter to the Attorney-General at the outset of the Report <https://www.humanrights.vic.gov.au/static/7275f265280c4c43a025ea0d34b54c44/Resource-Charter_Report-2020.pdf>.

²⁹⁷ Ibid 28.

events in the Review Period. External reviews and auditing led to a change in policy in relation to youth detainees and adult prisoners in the ACT, for example, in response to a 2011 review ('Bimberi review'). This review found that there continued to be some unreasonable limitations on human rights of young people and recommended that the government develop a Charter of Rights for Young People in Detention.²⁹⁸ In response, in 2017, the Charter of Rights for Young People in Bimberi Youth Justice Centre was adopted, setting out the 12 rights relevant to detention, how youth detainees could expect to be treated, and how they were expected to treat other detainees and staff.²⁹⁹ Many of the other recommendations made in the Bimberi review were also implemented. Continued oversight and scrutiny of practices in youth detention facilities was undertaken by the Human Rights Commission. As with the previous review, the Commission noted improvements, but was critical of some procedure³⁰⁰ and subsequently an explicit prohibition on the strip searching was issued.

3.3.28 An examination of the rights of adult prisoners was also undertaken in the ACT, under the 'dialogue' framework created by the human rights enactment. In January 2013, the ACT Human Rights and Discrimination Commissioner initiated a human rights audit of the effect and implementation of Territory laws governing the treatment of women detainees.³⁰¹ The audit broadly found practices were compliant with human rights, particularly noting a 'very significant reduction in reliance on strip searching of women'³⁰² since the 2007 audit of all correctional facilities. The audit found that the human rights of prisoners with specific needs were less well protected, including prisoners with disability, prisoners with mental health challenges, and transgender and intersex detainees. The audit recommended a review of policies and services to meet the diverse needs of prisoners, training for officers, a range of changes to increase therapeutic care and rehabilitation, access to children, and improving privacy through reduced surveillance.³⁰³ The government response supported most of the recommendations but noted that surveillance of high needs and crisis units was essential to ensure the safety of prisoners.³⁰⁴

3.3.29 The audit process set up under the ACT human rights framework has been described as setting out clear human rights standards and so providing 'a clear, unambiguous framework from which to analyse the operation of youth and adult detention in the ACT'.³⁰⁵ It is a feature of the ACT system that generates a human rights dialogue with the Executive and the Human Rights Commissioner and is said to achieve 'systemic improvements in human rights in human rights protection to existing laws and practices'.³⁰⁶

3.3.30 Engagement with human rights and the balancing of Charter rights is also evident in the approach taken in Victoria to reforms relating to freedom of religion. In the Review Period, the *Equal Opportunity Act 2010* (Vic) was amended to remove permissions for religious bodies and schools to discriminate against people based on the personal characteristics of sex, sexual orientation, lawful sexual activity, marital status, parental status, and gender identity in making employment decisions

²⁹⁸ ACT Human Rights Commission, *The ACT Youth Justice System: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission* (Report, 2011) [2.7.13] 61, Recommendation 3.7, 82.

²⁹⁹ Department of Community Services, *Charter of Rights for Young People in Bimberi* (ACT Government, 2024) <<https://www.communityservices.act.gov.au/children-and-families/youth-justice/bimberi-youth-justice-centre/charter-of-rights-for-young-people-in-bimberi>>.

³⁰⁰ Ibid.

³⁰¹ The Alexander Maconochie Centre is the single prison facility in the ACT. It accommodates men and women in separate precincts. See Helen Watchirs et al, *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre* (ACT Human Rights Commission, 2014) initiated under s 41 of the *Human Rights Act 2004* (ACT) <https://www.hrc.act.gov.au/_data/assets/pdf_file/0003/2306163/Audit-on-the-Conditions-of-Detention-of-Women-at-the-AMC-2014.pdf>.

³⁰² Ibid at [1.2.24] 9.

³⁰³ These recommendations are made at various points throughout the audit.

³⁰⁴ Legislative Assembly for the Australian Capital Territory, *Government Response to the Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre* (tabled 15 May 2014) <https://www.justice.act.gov.au/_data/assets/pdf_file/0003/2077806/Government-Response.pdf>.

³⁰⁵ Watchirs et al, *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre* [6.220].

³⁰⁶ Ibid.

except, in limited circumstances, and if the discrimination is reasonable and proportionate. From 14 December 2022, further restrictions to religious exceptions came into effect: when providing goods or services funded by the Victorian Government, religious bodies are only able to discriminate against people based on their religious belief; they are not able to discriminate based on other personal characteristics. These reforms were intended to narrow the broad religious freedom exceptions to equal opportunity obligations previously available under the *Equal Opportunity Act 2010* (Vic).³⁰⁷ The statement of compatibility addressed the human rights issues raised by the reforms and the appropriate limitations to those rights based on the Charter. It ‘narrow[ed] the tests for discrimination on the basis of religious belief or activity, to ensure that this limitation does not extend further than is reasonably necessary to protect the right to freedom of religion’.³⁰⁸

Human rights enactment in judicial reasoning

3.3.31 A further feature of jurisdictions with human rights enactments is the identifiable role that human rights considerations play in judicial reasoning. The clear nature of the legislative statement about applicable human rights principles in these jurisdictions provides a framework for human rights values to be brought to bear in a coherent and transparent manner.

3.3.32 For example, in *Loiello v Giles*³⁰⁹ the Supreme Court of Victoria reviewed the legitimacy of public health directions imposing a 9:00 pm to 5:00 am curfew on all residents of greater Melbourne as part of the COVID-19 response for their compliance with Victorian Charter obligations. The Court identified the principles that decision-makers must apply in making such orders, holding that they must assess whether the restrictions are a proportionate response to COVID-19 risks, having regard to the human rights affected and the broader public interest, and that they must assess those risks for each individual decision made, even if it is simply to extend existing restrictions.

[T]he human right of freedom of movement was being limited significantly for the purpose of protecting public health ... proportionality analysis [required consideration of] whether there was any less restrictive means reasonably available of achieving the public health objective. Thus, it would be insufficient if [the decision-maker] had decided to continue the Curfew merely because it was already in place.³¹⁰

3.3.33 In this instance, Ginnane J was satisfied that the Acting Chief Health Officer (‘ACHO’) had given meaningful consideration to human rights principles by weighing the relevant considerations and making the curfew direction only after receiving ‘legal advice from members of the Department’s legal team about the requirements of the Charter’ and ‘individual assessments by the Legal Services Branch’ that the proposed draft directions ‘were likely to be compatible with the Charter’.³¹¹

3.3.34 This approach is contrasted with the apparent limitations of relying on common law human rights principles in a similar context in New South Wales, where there is no human rights enactment. In *Kassam v Hazard*,³¹² Beech-Jones J considered the lawfulness of mandatory vaccination orders and

³⁰⁷ For a critique of the former provisions, which some described as ‘too broad’, see Sarah Moulds, ‘Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform’ (2020) 47(112) *University of Western Australia Law Review* 112, 132–133 and references cited therein.

³⁰⁸ Natalie Hutchins, *Equal Opportunity (Religious Exemptions) Amendment Bill 2021* (Vic), Statement of Compatibility, Legislative Assembly, 28 October 2021 <<https://www.legislation.vic.gov.au/bills/equal-opportunity-religious-exemptions-amendment-bill-2021>>.

³⁰⁹ *Loiello v Giles* [2020] VSC 722.

³¹⁰ *Ibid* [248].

³¹¹ *Ibid* [69].

³¹² *Kassam v Hazard; Henry v Hazard* [2021] NSWSC 1320. The contested orders were Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) and Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW). The applicants claimed that the orders were unreasonable and beyond power as the orders interfere with their right to bodily integrity and freedom of movement.

held that the orders implicated freedom of movement,³¹³ which was the very thing authorised by Section 7 of the *Public Health Act 2010* (NSW).³¹⁴

3.3.35 In jurisdictions with human rights enactments, this legislation has also been relied upon as a basis to interpret legislation and policy raising the provision of healthcare services. In Queensland, complaints resolved by the Queensland Human Rights Commissioner since the commencement of the *Human Rights Act 2019* (Qld) have considered whether complex health needs justified modification of quarantine requirements during COVID-19. These included allowing a family with a three-year-old daughter with autism spectrum disorder to quarantine at home to avoid the distress occasioned by the hotel environment and ensuring that a woman with an anxiety disorder exacerbated by confinement was transferred to a hotel room with a balcony. In each case, the right to be treated with dignity and humane treatment was emphasised in ensuring that the complainants' health needs were taken into account.³¹⁵

3.3.36 The Victorian Supreme Court has also held that the capacity test under the *Mental Health Act 2014* (Vic) must be interpreted and applied in a way that is compatible with human rights. The decision in *PBU & NJE v the Mental Health Tribunal*³¹⁶ recognised that people with mental health issues are highly vulnerable to interference with their human rights and should therefore be assured that any test that would deprive them of agency is interpreted in a manner that is compatible with the Vic Human Rights Charter.³¹⁷

3.3.37 The extent to which reproductive healthcare is a human right has also been considered in Victoria. In *Castles v Secretary of the Department of Justice*³¹⁸ ('Castles'), the Victorian Supreme Court considered whether refusing a request from a female prisoner to leave the low security prison to continue in-vitro fertilisation treatment was contrary to the right to dignity and the right to family life under the Vic Human Rights Charter. Section 47(1)(f) of the *Corrections Act 1986* (Vic) provides that prisoners have 'the right to have access to reasonable medical care and treatment necessary for the preservation of health'.³¹⁹ The applicant argued that IVF treatments were necessary to address her infertility and that she was approaching an age that would make her ineligible for further procedures.

3.3.38 The VEOHRC intervened to argue that international agreements, including the *Convention on the Elimination of All Forms of Discrimination Against Women* and *International Covenant on Economic, Social and Cultural Rights*, recognise that decisions concerning the number and spacing of children and access to health services, including reproductive health, are components of human dignity.³²⁰ The Court accepted this argument³²¹ and held that s 22(1) of the Vic Human Rights Charter places a burden on the State to preserve the human dignity of prisoners, notwithstanding their imprisonment.³²²

3.3.39 The decision in *Castles* shows the utility of an independent office of a human rights commission being able to join in any proceedings in which a question of law arises with respect to the interpretation

³¹³ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 [9].

³¹⁴ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 [9], [23].

³¹⁵ See QHRC, *Annual Report 2020-21* 55–65.

³¹⁶ *PBU & NJE v the Mental Health Tribunal* [2018] VSC 564.

³¹⁷ *Ibid* [206].

³¹⁸ *Castles v Secretary of the Department of Justice* [2010] VSC 310.

³¹⁹ The Standard Guidelines for Corrections in Australia, adopted by the Victorian Department of Justice, also state that prisoners should be able to access to appropriate health services (including private health services, if they can cover the costs) and maintain medical treatment they received before imprisonment: see Corrections, Prisons & Parole, *Standards for Prisoners and Offenders* (State of Victoria, 2023) <<https://www.corrections.vic.gov.au/standards-for-prisoners-and-offenders>>.

³²⁰ *Castles v Secretary of the Department of Justice* [2010] VSC 310 [105].

³²¹ *Ibid* [108]. The Court also noted that s 47(1)(f) and the National Guidelines would have protected this right, even without the Charter, but that the Charter confirmed a broad interpretation of the right.

³²² *Ibid* [147].

of human rights enactment. It also highlights the role to be played by courts in the interpretation and articulation of the rights set out in the human rights legislation.

3.3.40 There has been judicial consideration of the rights of prisoners under the human rights enactment in Queensland. In one of the first cases to invoke the *Human Rights Act 2019* (Qld), the Queensland Supreme Court considered the rights of a violent prisoner, while also taking account of staff safety and prison resourcing needs.³²³ While the Court dismissed all the grounds for judicial review, it accepted that there had been a failure to take account of relevant considerations under the Qld Human Rights Act 2019.³²⁴ The Court emphasised that the rights under that Act should be construed as widely as possible and that the requirement to consider human rights and balance the competing justifications for limiting human rights imposes a ‘high standard of review’ and one that is ‘more intensive’ and ‘draws the court more deeply into the facts ... than traditional judicial review’.³²⁵ This judgment emphasises the need for decision-makers to give explicit and meaningful consideration to the impact of decisions on all potentially affected rights, in order to discharge the obligation to give proper consideration to human rights.

3.3.41 Judicial consideration of the treatment of prisoners within the framework of a human rights enactment was also undertaken in the ACT. In *Davidson v Director-General, Justice and Community Safety Directorate*,³²⁶ the ACT Supreme Court considered whether the human right of a prisoner in solitary confinement to be treated with dignity and humanity were breached when his access to ‘open air and exercise’ was limited to a small, enclosed internal courtyard.³²⁷ Loukas-Karlsson J stated that the prison had an obligation to provide access to a space that was suitable for exercise and was not satisfied that the courtyard met this requirement. Her Honour held that Mr Davidson’s human rights had been breached.³²⁸

3.3.42 In Victoria, the human rights enactment has similarly been relied upon as a basis to evaluate the treatment of prisoners.³²⁹ In *Minogue v Thompson*,³³⁰ the Victorian Supreme Court held that subjecting a prisoner to random drug and alcohol testing and a strip search before providing a urine sample violated his rights under the Vic Human Rights Charter.

3.3.43 The Victorian Civil and Administrative Tribunal (‘VCAT’) has also relied on the human rights charter in its decision-making process in relation to housing. In *Director of Housing v Sudi*,³³¹ VCAT held that the Director of Housing had breached the applicants’ rights to family and home by seeking to evict them from public housing without justification. Bell J recognised the ‘fundamental importance of housing to human dignity, to personal and family wellbeing and to democratic society’.³³² In Victoria, a responsibility for public housing providers to avoid putting tenants at risk of homelessness has also been recognised based on human rights. For example, in *Homeground Services v Mohamed (Residential Tenancies)*,³³³ VCAT considered a State-funded social housing provider’s policy mandating a maximum tenancy of 18 months for transitional housing provided to disadvantage youth. The Tribunal

³²³ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.

³²⁴ *Ibid* [80]–[81].

³²⁵ *Ibid* [148]–[149].

³²⁶ *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83.

³²⁷ Section 45 of the *Corrections Management Act 2007* (ACT) requires that the Director-General must ensure, as far as practicable, that people have access to the open air for at least one hour each day and can exercise for at least one hour each day. Section 19(1) of the *Human Rights Act 2004* (ACT) provides that anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

³²⁸ *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83 at [213], citing *Castles v Secretary, Department of Justice* [2010] VSC 310.

³²⁹ See also *Castles v Secretary of Department of Justice* [2010] VSC 310.

³³⁰ *Minogue v Thompson* [2021] VSC 56.

³³¹ *Director of Housing v Sudi* [2010] VCAT 328.

³³² *Ibid* [81]; see also *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025.

³³³ *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131.

found that strict adherence to the policy, even when it was clear tenants would be evicted into homelessness, was arbitrary and amounted to a breach of tenants' human rights.

3.3.44 As with Victoria, the protective effect of human rights enactments can be observed in the ACT through the obligation imposed on housing decision-makers to consider the human rights implications of their decisions for tenants; in particular, the risk that eviction will result in homelessness, and whether other measures might be implemented to minimise that risk. In regard to transitional housing, the decision in *Canberra Fathers and Children Services Inc v Michael Watson (Residential Tenancies)*³³⁴ addressed the rights of families in these circumstances. In this case, a father and his three teenage sons, who were at risk of homelessness, moved into transitional housing; they challenged the legality of the notice to vacate under the *Residential Tenancies Act 1997 (ACT)* and the *Human Rights Act 2004 (ACT)*. The ACT Civil and Administrative Tribunal ('ACAT') found that the notice to vacate was compliant with the *Residential Tenancies Act 1997 (ACT)* but, nevertheless, amounted to a breach of the family's right to be free from unlawful or arbitrary interference with their home and family under s 12 of the *Human Rights Act 2004 (ACT)*.³³⁵

3.3.45 It is not suggested that the recognition of the right to housing would lead the end of homelessness in Tasmania. It can be argued, however, that jurisdictions with human rights enactments have provided greater protection of tenants' right to adequate and secure housing than is currently available in Tasmania, and have a clearer framework to articulate a human rights argument for adequate and secure housing. The experience in jurisdictions with human rights enactments suggests that systemic protection of tenants' rights to adequate and secure housing has been facilitated by their human rights enactments, by providing a basis to articulate the human rights implications relating to housing security.

3.4 TLRI's views and recommendations

3.4.1 As with the 2007 Final Report, after examining several key issues raising human rights implications and the process for responding through legislative and policy in the Review Period, the TLRI's view is that, while a number of laws made since this time do provide protection for some human rights, there are gaps and shortcomings in present protections of rights in Tasmania. In the 2007 Final Report, the TLRI expressed the view that:

Although our present democratic and judicial systems are generally accepted to have delivered a comparatively sound record on human rights, and while Tasmania has enacted a number of laws that have enhanced human rights protections in important areas, violations of human rights do still occur and the rights of many are not always recognised or observed.³³⁶

3.4.2 Based on its research for this Paper, the TLRI remains of this view, and accordingly, reiterates the 2007 recommendation that the law be reformed to provide and promote specific, better, and accessible protection for human rights, and that this be in the form of a Tasmanian Charter of Rights or human rights enactment. In Tasmania, there is lack of clarity around the scope of the rights protected, and mechanisms to review legislation and policy from a human rights perspective are generally ad hoc and lack transparency.

3.4.3 Based on this review, in this Part, the TLRI concludes that human rights enactments have the potential to play an important role in providing greater transparency and explicit consideration of human

³³⁴ *Canberra Fathers and Children Services Inc v Michael Watson (Residential Tenancies)* [2010] ACAT 74.

³³⁵ See also *Commissioner for Social Housing v Jones (Residential Tenancies)* [2016] ACAT 75.

³³⁶ TLRI 2007 Final Report [2.3.28].

rights in government decision-making, as well as improving community understanding of human rights and how they can be protected. While human rights are taken into account in Tasmania in the development of policy and legislation without a human rights enactment, the TLRI's view remains that such an enactment would provide a clear, consistent framework for human rights discourse to guide legislative and policy decisions. In this context, it is important to note that the TLRI is not suggesting that the existence of human rights legislation will necessarily have a particular human rights outcome or will dictate a particular response to a balancing of competing rights or the determination of appropriate boundaries of justifiable rights limitations. Neither is it claimed that a human rights enactment in Tasmania will be a 'magic bullet' for ensuring human rights complaint laws.³³⁷ Instead, it is suggested, based on the experience of jurisdictions that have adopted a human rights enactment, that this framework can 'foster consideration of human rights implications early in the development of policy and legislation' and detect disproportionate limitations on human rights and ... can clearly assist in improving the quality of laws from a human rights perspective'.³³⁸

3.4.4 The aim of the human rights enactments is to foster a human rights culture and embed human rights considerations in the decision-making process. This was recognised by the Supreme Court of Victoria in *Castles v Secretary of the Department of Justice*,³³⁹ when considering the obligations on a decision-maker arising from the provisions of the Vic Human Rights Charter.

The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise ... There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.³⁴⁰

3.4.5 This case confirms that decision-makers must 'do more than merely invoke the Charter like a mantra': a common-sense approach is essential to embedding human rights considerations in decision-making. The Queensland Human Rights Commissioner has also said that a 'common sense approach' manages the risk that introducing an obligation for decision-makers to give 'proper consideration' to human rights would hold up decision-making and lead to bureaucratic delays.³⁴¹

3.4.6 The view of the TLRI is that the model for a legislated Charter of Rights proposed in 2007, subject to the adoption of amendments as outlined in Part 4, would assist to embed consideration of human rights in the development and implementation of law and policy. It would provide a clear mechanism to raise human rights considerations in public discourse and aim to improve the transparency and consistency in legislative approaches to the protection of human rights. The TLRI recognises that a human rights enactment is part of the process for developing a human rights culture. It provides a framework for discussion about human rights in the development of policies and legislation, as well as in their implementation. In line with the 'dialogue' model proposed by the TLRI in 2007 (as discussed further at [1.3]), a human rights enactment would also aim to engender a human rights conscious culture within the Tasmanian community and across the three branches of government, while still protecting the sovereignty of Parliament.

3.4.7 Accordingly, the TLRI recommends that the laws in Tasmania be reformed to provide and promote specific, better, and accessible protection for human rights through the enactment of a

³³⁷ Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the Human Rights Act (ACT)' [6.260].

³³⁸ Ibid; see also Davidson, 'Impact of the Victorian Charter upon Policy and Legislative Development' [10.220] for a discussion of the Victorian position.

³³⁹ *Castles v Secretary of the Department of Justice* [2010] VSC 310.

³⁴⁰ Ibid [185]–[186].

³⁴¹ McDougall, 'Making Rights Real' 9.

Tasmanian Charter of Human Rights or a Human Rights Act. This adopts Recommendations 1 and 2 of the 2007 Final Report (see Appendix A).

Recommendation 1 – Tasmanian Human Rights Enactment

That the laws in Tasmania be reformed to provide and promote specific, better, and accessible protection for human rights through the enactment of a Tasmanian Charter of Human Rights or a Human Rights Act.

Part 4

Building on the TLRI's 2007 Model

4.1 Introduction

4.1.1 As outlined in Part 3, the Tasmania Law Reform Institute ('TLRI') maintains its recommendation from the 2007 Final Report that a Human Rights Act be enacted in Tasmania.

4.1.2 Part 4 considers issues relating to the model recommended by the TLRI that have been identified in the Review Period in cases and reviews in other jurisdictions and discusses potential revisions to the TLRI's 2007 model.

4.1.3 In this Part, the following matters are discussed:

- which bodies, institutions and agencies should be subject to, or exempted from, human rights obligations;
- whether additional rights should be included in a Tasmanian human rights enactment;
- what Tasmanian human rights scrutiny requirements should look like;
- what the consequences should be where laws and conduct are incompatible with human rights; and
- what complaints mechanisms should be provided in a Tasmanian human rights enactment.

4.1.4 This Part outlines suggested amendments to the original 2007 TLRI model, which the TLRI considers would strengthen its operation and provide a best practice human rights framework for Tasmania.

4.2 Who should have human rights under a Tasmanian human rights enactment?

Public authorities

2007 Final Report and subsequent developments

4.2.1 The 2007 Final Report recommended that 'public authorities' be required to comply with human rights obligations. It then recommended that 'public authority' be defined broadly to include:

tribunals, the courts, government departments, public officials, statutory authorities, government business enterprises, State owned companies, Tasmania Police, local government, Ministers, members of Parliamentary Committees when acting in an administrative capacity, anyone whom Parliament declares to be a public authority for the purposes of the Charter and an entity whose functions are or include functions of a

public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).³⁴²

4.2.2 The model proposed in the 2010 Tasmanian Government Directions Paper, *A Charter of Human Rights and Responsibility for Tasmania* ('Directions Paper'),³⁴³ also recommended that organisations delivering services funded or controlled by a public body be required to comply with the Charter.³⁴⁴

4.2.3 This approach is consistent with the position adopted in Victoria, the ACT, and Queensland, where human rights obligations are imposed on entities whose functions are (in whole or in part) of a public nature or when they are exercising the functions for the State, Territory or public authority.³⁴⁵ However, these jurisdictions have specified constraints on the scope of the definition of a 'public authority': (1) when a court is acting in a judicial capacity (see further discussion at [4.2.21]–[4.2.29]);³⁴⁶ (2) Parliament or a person exercising functions in connection with proceedings in Parliament;³⁴⁷ and (3) if an entity is prescribed by regulation not to be a public entity (see further discussion at [4.2.30]–[4.2.33]).³⁴⁸

4.2.4 The TLRI recommended in its 2007 Final Report that a human rights enactment include both statutory guidance on determining when an entity is performing functions of a public nature (as in s 4 of the Vic Human Rights Charter) and a non-exhaustive list of such functions.³⁴⁹ The ACT and Queensland Human Rights Acts provide a non-exhaustive list of functions that are taken to be 'of a public nature', including operating detention and correctional facilities, emergency services, public health, education, housing, and transport services.³⁵⁰ The ACT list includes utilities providers (also recommended in the TLRI 2007 Final Report),³⁵¹ while the Queensland list includes public disability services.

4.2.5 The Victorian legislation describes the factors that should be considered in determining whether an entity is undertaking functions of a public nature,³⁵² but does not list examples. The 2015 Review of the Victorian Charter identified the need for greater clarity in this regard and recommended that a non-exhaustive list be added to the definition of public authority, including prisons and correctional facilities, public health services, public disability services, public education, public transport, public housing, and utility services.³⁵³ In its response, the Victorian Government gave in-principle support to

³⁴² TLRI 2007 Final Report, Recommendation 8.

³⁴³ Department of Justice (Tasmania), *A Charter of Human Rights and Responsibility for Tasmania (Human Rights Charter Legislative Project Directions Paper)* (Department of Justice, 2010) ('Directions Paper'). The Directions Paper was accompanied by two other resources: *A Charter of Human Rights and Responsibility for Tasmania (Guide to the Directions Paper, 2010)* and *A Charter of Human Rights and Responsibility for Tasmania (Community Consultation, 2010)*. See also 'Charter of Rights A Step closer', *ABC News* (online, 21 October 2010) <<https://www.abc.net.au/news/2010-10-21/charter-of-rights-a-step-closer/2306028>>.

³⁴⁴ Directions Paper 36. See also TLRI 2007 Final Report at [4.7.18], which suggested that future reviews 'consider' including in the definition of 'public authority' bodies receiving public funding (and whose services have public benefit). The recommendation did not include bodies which are 'controlled' by public authorities.

³⁴⁵ *Human Rights Act 2004* (ACT) s 40(g); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Vic Human Rights Charter') s 4(c); *Human Rights Act 2019* (Qld) s 10(h). Queensland distinguishes between State agencies as 'core public entities' and 'functional public entities', which only fall within the definition of a public entity when they are performing functions of a public nature on behalf of the State. The *Human Rights Act 2019* (Qld) also specifically confines 'public entity' to an entity 'in and for Queensland', confirming that federal authorities will not be covered by the Act.

³⁴⁶ This is the case in Victoria, the ACT, and Queensland.

³⁴⁷ This is the case in Victoria, the ACT, and Queensland.

³⁴⁸ This is the case in Victoria and Queensland.

³⁴⁹ TLRI 2007 Final Report, Recommendation 8.

³⁵⁰ *Human Rights Act 2004* (ACT) s 40A(3); *Human Rights Act 2019* (Qld) s 10(3).

³⁵¹ TLRI 2007 Final Report, Recommendation 8.

³⁵² Vic Human Rights Charter s 4.

³⁵³ Brett Young, *From Commitment to Culture*, Recommendation 12. The Review also recommended that all government contracts include terms that contracted service providers will have public authority obligations when performing particular functions under the contract, and that the Act be amended to enable this. The government agreed; no amendments have been made to date.

this recommendation, noting that any amendments would need to ‘ensure that the definition remains sufficiently flexible to reflect the variety of ways in which government services are delivered’.³⁵⁴ To date, no such amendments have been made.

4.2.6 Members of Parliamentary Committees are also subject to the Victorian and Queensland Human Rights Acts when acting in an administrative capacity. Consistent with the TLRI’s 2007 recommendation, this approach should be replicated in Tasmania to ensure the conduct of Committee proceedings is in line with human rights principles.³⁵⁵

4.2.7 The Queensland and ACT Human Rights Acts also explicitly allow entities that are not otherwise captured by the definition of ‘public entity’ or ‘public authority’ to elect to be characterised as such and thus subject to the Act.³⁵⁶ The Queensland Government describes the provisions as enabling entities ‘to commit publicly and voluntarily to acting compatibly with human rights, contributing to the dialogue of corporate social responsibility and helping to build a human rights culture in Queensland’.³⁵⁷ To date, no entities have opted in as public entities.

4.2.8 The 2015 Review of the Vic Human Rights Charter recommended that Victoria adopt an opt-in provision.³⁵⁸ While the Victorian Government supported the recommendation,³⁵⁹ it is yet to be implemented.

4.2.9 The TLRI also recommended in the 2007 Final Report that the term ‘public authority’ initially exclude non-government schools and health services, but that subsequent reviews consider whether to extend the definition to include ‘private businesses and enterprises that receive public funding and that carry out functions that have a public benefit’.³⁶⁰ This reflects the approach in Victoria, Queensland and the ACT, where non-government schools and health services are not public authorities.³⁶¹

4.2.10 In addition, in Queensland and Victoria, the obligation of public authorities to act in way that is compatible with human rights and to make decisions giving proper consideration to human rights does not apply to public authorities if to act in that way or to make that decision ‘has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with ... religious doctrines, beliefs or principles’.³⁶² The 2015 Review recommended that the Victorian Government give consideration to this exemption as part of a broader review of religious exemptions and equality measures in other Victorian laws to ensure that a consistent approach is applied.³⁶³ There have been subsequent reforms to the *Equal Opportunity Act 2010* (Vic) but no changes to the *Charter of Human Rights Act*.³⁶⁴

³⁵⁴ See Victorian Government, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (2016)

<https://static1.squarespace.com/static/5b7e1a0be2ccd10a603592f6/t/62eb12f8b0c0ae524d1867d2/1659572985972/Government+response+to+the+2015+review+of+the+Charter+of+Human+Rights+and+Responsibilities+Act+_+Department+of+Justice+and+Community+Safety+Victoria>.

³⁵⁵ Vic Human Rights Charter s 4(1)(g); *Human Rights Act 2019* (Qld) s 9(1)(g).

³⁵⁶ *Human Rights Act 2019* (Qld) ss 9(3) and 60; *Human Rights Act 2004* (ACT) s 40D. In both jurisdictions, the Minister can make or revoke a declaration that a private entity is a public entity for the purposes of the Act.

³⁵⁷ Queensland Government, *Human Rights Fact Sheet: Opt-In to the Human Rights Act 2019* <https://www.forgov.qld.gov.au/__data/assets/pdf_file/0008/203102/opt-in-to-the-human-rights-act-2019.pdf>.

³⁵⁸ Brett Young, *From Commitment to Culture*, Recommendation 15.

³⁵⁹ See Victorian Government, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act*.

³⁶⁰ *Ibid*.

³⁶¹ Vic Human Rights Charter s 4(1)(c); *Human Rights Act 2004* (ACT) s 40A; *Human Rights Act 2019* (Qld) ss 9(1)(h), 10.

³⁶² Vic Human Rights Charter s 38(4). A provision to similar effect applies in Queensland: *Human Rights Act 2019* (Qld) s 58(3).

³⁶³ See Brett Young, *From Commitment to Culture* 72–73.

³⁶⁴ See [2.3].

TLRI's current views and recommendations

4.2.11 The TLRI recommends that all public authorities be bound by the Tasmanian Human Rights Charter or Act. Public authorities should be required to act in a way that is compatible with human rights and, when making decisions, give proper consideration to relevant human rights unless otherwise required by particular legislation. This is consistent with Recommendations 7, 10 and 14 in the TLRI 2007 Final Report (see Appendix A).

4.2.12 The TLRI maintains its earlier recommendation that, in a Tasmanian human rights enactment, a broad definition of public authority be adopted, including organisations performing public functions and organisations that opt-in to public authority obligations. Consistent with its 2007 recommendation and the ACT and Queensland approaches, the TLRI maintains that a Tasmanian human rights enactment should explicitly list the sorts of functions that are to be characterised as public functions, including the delivery of emergency, utility, public housing, education, health, disability, and transport services, as well as the operation of correctional and detention facilities. This is consistent with Recommendation 8 of the 2007 Final Report (see Appendix A). This was also the recommendation in the 2015 Review of the Victorian Charter, which highlighted the need for clarity and certainty in the application of the Charter to functional public authorities in order to make the Charter more effective.³⁶⁵

4.2.13 As discussed in Part 3, in the Review Period, the extent to which non-government schools and private health services should be dealt with under a human rights enactment has particularly arisen in the context of religious freedom. This is an important issue that requires wider consultation. While the tensions between the right to religious freedom and the right to be free from discrimination under human rights principles and the exemption of religious bodies from anti-discrimination laws have been the subject of contentious public debate at both State and national levels, this broader inquiry is beyond the scope of this Research Paper. The preparation of this Research Paper did not involve, and was not intended to involve, a general community consultation, as occurred in the preparation of the 2007 Final Report. Further, aligned with the position of the 2015 Victorian Review, the approach to be taken involves addressing the broader question of the treatment of religious bodies within a human rights enactment and anti-discrimination framework (and the interaction between the two frameworks). Relevant matters are the extent to which religious bodies are included within the definition of 'public authority', whether there should be a specific exemption from human rights obligations for religious bodies under the human rights enactment, and whether (and what) changes should be made to anti-discrimination laws. These are separate issues from the question of whether a human rights enactment should recognise a right to freedom of religion. In relation to this question, the TLRI maintains that a Tasmanian Charter should include a right to freedom of religion, as recommended in the TLRI 2007 Final Report.

4.2.14 The TLRI's view is that its examination of events in the Review Period highlights that the inclusion of religious bodies within a human rights framework is a highly contentious issue that needs to be resolved and requires further consultation. Further, the TLRI considers that it should be a matter for early review. As part of this review, consideration should be given to the human rights enactment providing that non-government schools and health services be subject to any Tasmanian Charter of Rights from the outset, rather than deferring decisions about their inclusion to future reviews. The review should also consider the interaction between the human rights legislation and the anti-discrimination legislation, and other relevant Tasmanian laws.

³⁶⁵ Brett Young, *From Commitment to Culture* 58, 60, Recommendation 12.

Recommendation 2 – Human Rights Obligations of Public Authorities

That all public authorities be bound by the Tasmanian Human Rights Charter or Act.

Public authorities should be required to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights, unless otherwise required by particular legislation.

Recommendation 3 – Public Authorities: Definition

That the Tasmanian human rights enactment adopt a broad definition of public authority, including organisations performing public functions and organisations that opt-in to public authority obligations.

The Tasmanian human rights enactment should explicitly list the sorts of functions that are to be characterised as public functions, including the delivery of emergency, utility, public housing, education, health, disability, and transport services, and the operation of correctional and detention facilities.

The treatment of religious bodies within a human rights enactment and anti-discrimination framework (and the interaction between the two frameworks) should be a matter for further review. As part of this review, consideration should be given to the human rights enactment providing that non-government schools and health services be subject to any Tasmanian Charter of Rights from the outset, rather than deferring decisions about their inclusion to future reviews.

Courts and tribunals

4.2.15 In the 2007 Final Report, the TLRI considered the role of courts and tribunals under the proposed model for a human rights enactment. Fundamental to the approach taken was the objective of requiring courts to interpret all Tasmanian laws, as far as possible, in a manner that complies with human rights. This remains the view of the TLRI, as discussed below. In the 2007 Final Report, Recommendations 8 (What is a ‘public authority?’) and 11 (Role of the courts) were closely related and sought to give effect to the TLRI’s view that the Charter should apply to courts in the interpretive role of the Charter to the common law. As stated in the 2007 Final Report, the purpose of the Charter is ‘to provide over-arching, clearly articulated principles that provide a compass in the interpretation, implementation, formulation and development of all Tasmanian laws’.³⁶⁶

Interpreting the law

2007 Final Report and subsequent developments

4.2.16 In the 2007 Final Report, the TLRI’s view was that courts and tribunals should be required to interpret all Tasmanian laws (statutes and common law) in a manner that was consistent with Charter rights. Recommendation 11 provided that:

Subject to the requirement to interpret statutory provisions consistently with their purpose, all Tasmanian courts and tribunals should be required to interpret all Tasmanian laws, including statutory provisions, as far as it is possible to do so in a way that is compatible with human rights.

³⁶⁶ TLRI 2007 Final Report [4.7.11]; see also [4.7.10].

As it related to statutes, Recommendation 11 was aligned with the position in Victoria, the ACT and Queensland.³⁶⁷ Similarly, in its position paper, the AHRC recommended that the formulation that best expresses the approach is that ‘all ... legislation is to be interpreted, so far as is reasonable possible, in a manner that is consistent with human rights’.³⁶⁸

4.2.17 In relation to the common law, as set out in Recommendation 11, the TLRI's view was that the Charter should also apply to the development of the common law. This differed from the approach taken in Victoria, Queensland, and the ACT, where the human rights enactments specify that they apply only to the interpretation of statute.³⁶⁹ The TLRI view instead reflects the position in the United Kingdom and New Zealand. While the human rights enactments in these jurisdictions do not specify that the rights set out apply to the interpretation of both statute law and common law,³⁷⁰ this is the interpretation of the application of Charter set out in case law, following from the inclusion of courts within the definition of government agencies to be bound by the human rights enactment.³⁷¹

4.2.18 In other Australian jurisdictions, a reason advanced for not applying human rights enactments to the common law rests on the doctrine of the unity of the common law.³⁷² This doctrine provides that under Australia's federal system there is one ‘unified common law’, which applies in each State but is not itself the product of any State. In this view, because no State can have a separate and unique common law, it may not be possible for State legislatures to direct the courts to develop the common law in any one State according to principles that differ from those that apply elsewhere in Australia. While State Parliaments may directly modify or abrogate the common law, they cannot indirectly influence its development in the courts. Accordingly, it has been thought that it might be unconstitutional for State Parliaments to direct State courts to develop the common law in accordance with a State Charter of Human Rights, as to do so would be to require the court to develop a separate common law for a particular State, distinct from that applying elsewhere.

4.2.19 The unity of the common law doctrine was considered in detail in the 2007 Final Report, and, while acknowledging the arguments that may arise, the TLRI's view was that issues of constitutionality may be avoided by addressing the law rather than focusing on the courts.³⁷³ This was the approach set out by Perry J, who suggested that a human rights enactment applying to the interpretation of the common law was an example of modification of the common law by statute (which is not exceptional) and as such is not unconstitutional.³⁷⁴ This reasoning was adopted by the TLRI and so, in the 2007 Final Report, it recommended that all laws be interpreted as far as it is possible to do so in a way that is compatible with human rights (Recommendation 11) and that the Tasmanian Charter ‘should contain explicit provision to the effect that all non-statutory law, including the substantive and adjectival

³⁶⁷ Vic Human Rights Charter s 32(1); *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2019* (Qld) s 48(1).

³⁶⁸ AHRC, *A National Human Rights Act for Australia* 251, adopting the formulation developed by the Law Council in its Human Rights Charter policy, Law Council of Australia, *Human Rights Charter Policy* (November 2020) <<https://humanrights.gov.au/human-rights-act-for-australia>>. It is noted that the Law Council added that ‘such a provision should require courts, tribunals and others interpreting legislation to depart from accepted interpretations of legislative provisions [in a way that is consistent with human rights] where this is reasonably possible and does not fundamentally undermine or distort the purpose of the legislation’: AHRC, *A National Human Rights Act for Australia* 251, quoting the Law Council.

³⁶⁹ Vic Human Rights Charter s 32(1); *Human Rights Act 2004* (ACT) ss 3 (dictionary), 30; *Human Rights Act 2019* (Qld) s 48(1).

³⁷⁰ In the *Human Rights Act 1998* (UK) s 3, the interpretative role of courts is confined to the interpretation of legislation. This is also the case in New Zealand. See *Bill of Rights Act 1900* (NZ) s 6.

³⁷¹ See, for example, *Venables & Thompson v New Group Newspapers Ltd and Ors* [2001] 2 WLR 1038, 1049; *Hosking v Bunting* [2005] 1 NZLR 1. See discussion of courts as a public authority at [4.2.21]–[4.2.29].

³⁷² See Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (Department of Justice, 2005) 59.

³⁷³ See TLRI 2007 Final Report [4.7].

³⁷⁴ John W Perry, *International Human Rights and Domestic Law and Advocacy* (Paper presented at the Human Rights Law Resource Centre, Melbourne, 7 August 2006) 12–16 <<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59e42794f14aa11443222fba/1508124567051/justice+perry+paper.pdf>>.

(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' (Recommendation 8).

TLRI's current views

4.2.20 The TLRI's views expressed in the 2007 Final Report about the application of the Charter to the common law are reiterated and it remains the view of the TLRI that the approach of Perry J addresses any issues of unconstitutionality that may arise from requiring courts to develop the common law to reflect human rights. The TLRI adheres to Recommendation 11 of the 2007 Final Report in relation to the role of courts in interpreting Tasmanian laws. The TLRI maintains the view that a Tasmanian human rights enactment should apply to the common law as well as statutory law (Recommendation 11) and should include 'explicit provision to the effect 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' (Recommendation 8).

Courts and tribunals as public authorities

4.2.21 A separate question is the application of a human rights enactment to courts and tribunals as public authorities. As noted, there are distinct functions for courts and tribunals under a human rights enactment, including an interpretative role (as discussed at [4.2.16]–[4.2.20]) and an enforcement role (as discussed at [4.5]). Courts and tribunals may also be required to comply with a human rights enactment as a public authority (a compliance function).³⁷⁵ The issue of how a human rights enactment should apply to the courts as a public authority involves a consideration of whether a human rights enactment should apply to courts and tribunals when acting in an administrative capacity.

4.2.22 Considering developments in the Review Period, the TLRI has re-examined its 2007 recommendations relating to the application of a human rights enactment to courts and tribunals as public authorities.

2007 Final Report and subsequent developments

4.2.23 In the 2007 Final Report, the TLRI recommended that the definition of a 'public authority' should include tribunals and the courts (Recommendation 8). This recommendation (in conjunction with Recommendation 11) was concerned with binding the courts in their interpretative function.

4.2.24 The approach taken in the 2007 Final Report was different from that taken in other Australian jurisdictions with human rights enactments (the ACT, Queensland, and Victoria). In these jurisdictions, courts and tribunals have been treated differently from most other public authorities and have been specifically excluded from the human rights obligations imposed on public authorities, other than when they are performing administrative functions.³⁷⁶ The Australian Human Rights Commission's 2023 Position Paper, *A Human Rights Act for Australia*, also proposed an approach that would adopt this

³⁷⁵ Brett Young, *From Commitment to Culture* 74.

³⁷⁶ Vic Human Rights Charter s 4(1)(j); *Human Rights Act 2004* (ACT) s 40(2)(a); *Human Rights Act 2019* (Qld) s 9(4)(b). For example, other entities excluded from the definition of public authority are Parliament and those exercising functions in connection with Parliamentary proceedings (Vic Human Rights Charter s 4(1)(i)) and members of Parliamentary Committees 'except when acting in an administrative capacity' (Vic Human Rights Charter s 4(10)(g)). The model outlined in the 2010 Tasmanian Government Directions Paper, *A Charter of Human Rights and Responsibility for Tasmania*, proposed to exclude courts and tribunals from the definition of public authority, other than when acting in an administrative capacity.

position and so include courts in the definition of a public authority only when acting in an administrative capacity.³⁷⁷

4.2.25 At the time of the 2007 Final Report, despite the ACT and Victorian legislation making a distinction between administrative and judicial functions of courts and tribunals, the distinction was considered to give rise to considerable uncertainty. In the 2007 Final Report, the TLRI noted that making a distinction between the judicial and administrative function of courts and tribunals may create confusion and uncertainty about the application of the Charter. This was also the view of the 2011 Review of the Victorian Charter, which, instead of including the judicial functions of a court as a public authority, recommended exempting courts from public authority obligations in all their functions, arguing that distinguishing between administrative and judicial functions was fraught.

4.2.26 In the intervening period, however, case law concerning this distinction has provided greater clarity about the principles to be applied in making this determination, and concerns around the distinction have lessened. For example, the 2015 Victorian Review concluded that:

The courts have not had difficulty determining when a court or tribunal is acting in an administrative capacity and, therefore, when it is bound by the public authority obligations in the Charter.³⁷⁸

4.2.27 The distinction between administrative capacity and judicial capacity has been interpreted to mean a distinction made in the public law sense; that is, by considering the legal character of the function in question.³⁷⁹ Judicial capacity includes determination of criminal guilt, actions in contract and tort, and generally actions for the endorsement of existing legal rights.³⁸⁰ Examples provided of the administrative functions of a court are committal proceedings, issuing of warrants, listing cases, and adopting practices and procedures.³⁸¹ It would also include hiring staff.³⁸² The Queensland Human Rights Commission provides the following examples of when a court or tribunal is acting in an administrative capacity: 'staffing matters, registry functions (including managing records, receiving and processing appeals, and listing cases) and developing an applying policies and procedures'.³⁸³ It also gives examples of the work of tribunals that involve acting in an administrative capacity, such as 'reviewing administrative decisions of government agencies, disciplinary proceedings, appointing guardians and administrators and reviewing involuntary treatment orders'.³⁸⁴

³⁷⁷ It is noted that there are provisions in Victoria and Queensland which directly apply human rights to courts (even though courts and tribunals are not included within the definition of 'public authority' when acting in a judicial capacity): see Vic Charter of Rights s 6(2) and *Human Rights Act 2019* (Qld) s 5(2)(a). These provisions provide that the relevant human rights enactment applies to courts and tribunals to the extent the court or tribunal has functions under Part 2 and Part 3, Division 3. Part 2 sets out the specific human rights protected by the enactment and the limitations on those rights and Part 3 Division 3 contains the provisions about the interpretation of laws. The AHRC also proposed that a provision to this effect be included in the Charter: AHRC, *A Human Rights Act for Australia* 149.

³⁷⁸ See Brett Young, *From Commitment to Culture* 74–75.

³⁷⁹ Judicial College of Victoria, *Charter of Human Rights Bench Book* [2.4] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57269.htm>>.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.* It is noted that the 2015 Victorian Review noted that references to committal proceedings and issuing warrants have been largely uncontroversial, but that case law had raised questions about listing cases and adopting practices and procedures. The example provided was listing of cases which could be the exercise of an administrative power if done by administrative or registry staff and the exercise of judicial power when done by a judicial officer: Brett Young, *From Commitment to Culture* 76, referring to *Kracke v Mental Health Tribunal* [2009] VCAT 646.

³⁸² Judicial College of Victoria, *Charter of Human Rights Bench Book* [2.4]

³⁸³ See Queensland Human Rights Commission, *Factsheet: The Role of Courts and Tribunals under the Human Rights Act 2019* (2019) <QHRC_factsheet_HRA_RoleOfCourtsAndTribunals.pdf>.

³⁸⁴ *Ibid.*

TLRI's current view

4.2.28 The TLRI's view is that courts should be included in the definition of public authority when acting in an administrative capacity.³⁸⁵ This means that courts and tribunals when acting in an administrative capacity would be subject to Charter obligations (as set out in Recommendation 9) 'to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights unless otherwise required by particular legislation'.³⁸⁶ This is also consistent with the obligation placed on courts and tribunals in other Australian jurisdictions. Further, it is consistent with the approach to the obligations of courts and tribunals under the *Personal Information Protection Act 2004* (Tas) s 7(a), which makes a distinction between administrative and judicial functions of courts and tribunals and provides that courts and tribunals are exempt from the provisions of the Act in the performance or exercise of judicial or quasi-judicial functions or powers. The TLRI endorses the approach of the 2007 Final Report that, in interpreting the law, courts should be bound to apply the Charter to the interpretation of common law as well as statutory law. The TLRI considers that Recommendation 4 achieves this objective. On this basis, and following the reasoning of the 2007 Final Report, there is no reason to include courts in their judicial capacity.

4.2.29 Following the acceptance of this approach, a related matter that arises is the interaction of the role of courts and the imperative of judicial independence with other aspects of the proposed Tasmanian model, particularly the avenues of redress provided to individuals for the enforcement of rights. It can be seen from the definition of administrative capacity at [4.2.27] that some court/tribunal proceedings, such as disciplinary proceedings and the review of government decisions and the like, would fall within the definition of administrative capacity. 'Redress' for these decisions is appropriately provided for by way of usual appeal pathways. Under the model for a human rights enactment proposed by the TLRI, a direct cause of action would be created that would allow individuals to bring actions in the Supreme Court or Tasmanian Civil and Administrative Tribunal ('TasCAT') alleging breaches of their rights and granting remedies, including damages.³⁸⁷ This is not the approach in other Australian jurisdictions, which do not currently provide a direct cause of action for an alleged breach of a human right (with the exception of the ACT) or provide for an award of damages.³⁸⁸ It also not the approach taken in the United Kingdom, where the general position is that a direct cause of action is available and an award of compensation can be made in certain circumstances,³⁸⁹ but it is made clear that, where any proceedings involve a judicial act, proceedings may only be brought by the exercise of the right of appeal or judicial review.³⁹⁰ It is the view of the TLRI that the inclusion of courts within the definition of public authority needs to be reconciled with the other features of the proposed model, particularly the enforcement provisions that are adopted in the human rights enactment. For example, there may be a carve-out in the case of proceedings to the effect that the usual appeal mechanism applies, rather than the enforcement provisions adopted in the Tasmanian human rights enactment that apply to other public authorities. A model for such a carve-out may be found in the approach taken in the United Kingdom, as outlined above.

³⁸⁵ See AHRC, *A Human Rights Act for Australia* 149.

³⁸⁶ This is Recommendation 9 of the TLRI 2007 Final Report, which sets out the obligations of public authorities. As noted, the TLRI also adheres to Recommendation 11 of the 2007 Final Report in relation to the role of courts in interpreting Tasmanian laws.

³⁸⁷ See Recommendation 19 of the 2007 Final Report and Recommendations 15 and 16 of this Research Paper.

³⁸⁸ See [4.5].

³⁸⁹ *Human Rights Act 1998* (UK) ss 7 and 8.

³⁹⁰ *Human Rights Act 1998* (UK) s 9.

Inclusion of Courts and Tribunals

Recommendation 4

That a Tasmanian human rights enactment apply to the interpretation of the common law as well as statutory law and should include an explicit provision to the effect 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.

Recommendation 5

That courts and tribunals be included in the definition of public authority when acting in an administrative capacity or in the exercise of procedure. However, this inclusion needs to be reconciled with the enforcement provisions adopted in the human rights enactment, particularly the avenues of redress.

Other exempted organisations

TLRI 2007 Final Report and subsequent developments

4.2.30 In addition to the limited application to courts, both Queensland and Victoria provide for regulations to declare that particular entities are, or are not, public entities for the purposes of the obligations of their Human Rights enactments.

4.2.31 In Victoria, the Adult Parole Board, the Youth Residential Board, and the Youth Parole Board have been declared not to be public authorities.³⁹¹ In Queensland, grammar schools and their boards are prescribed not to be public entities.³⁹² In the 2015 Victorian Review, the exemption of the parole boards from public authority obligations was considered, with a number of submissions (including from the Law Institute of Victoria, VEOHRC, Community Legal Centres) recommending that the exemption be revoked.³⁹³ Comment was also made about the complex nature of the work undertaken by parole boards and the work that would be required to build a human rights framework into their decisions. In the report, no recommendation was made in relation to exempted organisation and was identified as a matter for government to consider at the expiry of the current regulations.³⁹⁴

4.2.32 The TLRI 2007 Final Report considered the question of who should be bound by a charter of rights. As discussed at [1.3.7], the TLRI recommended an initially conservative approach with the charter to initially to bind only public authorities. Other than discussing the scope of the definition of public authority and the inclusion (or otherwise) of courts and non-government schools and health services), consideration was not given to creating a more general provision to allow for other organisations to be exempted from the charter by regulation.

TLRI's current views and recommendation

4.2.33 In line with the 2007 Final Report, the TLRI's view remains that the scope of 'public authority' should be as broad as possible. The TLRI considers that concerns arise if there is provision to exempt or exclude organisations engaged in performing public services (including criminal justice responsibilities) from the operation of a Tasmanian human rights enactment. Evidence given in the investigation of the Tasmanian Commission of Inquiry into Child Sexual Abuse in Institutional Settings

³⁹¹ Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013 (Vic) clause 5.

³⁹² *Human Rights Act 2019* (Qld) s 9; Human Rights Regulation 2020 (Qld) clause 2.

³⁹³ Brett Young, *From Commitment to Culture* 66.

³⁹⁴ *Ibid* 68.

in Tasmania³⁹⁵ alerts us to the dangers of excluding institutions from human rights obligations. It is acknowledged that bodies such as a parole board undertake complex and sensitive work, but this is true of many other public authorities that would be required to comply with the human rights enactment.³⁹⁶

4.2.34 Accordingly, the TLRI recommends that, if provision is made in a Tasmanian human rights enactment for exempting or excluding institutions from human rights obligations, any instrument containing such exemptions or exclusions be subject to disallowance to enable parliamentary scrutiny of whether the exemption or exclusion is justifiable.

Recommendation 6 – Exempt organisations

That, if provision is made in a Tasmanian human rights enactment for exempting or excluding institutions from human rights obligations, any instrument containing such exemptions or exclusions should be subject to disallowance to enable parliamentary scrutiny of whether the exemption or exclusion is justifiable.

4.3 What rights should be protected?

Extension beyond civil and political rights

2007 Final Report and subsequent developments

4.3.1 In the 2007 Final Report, the TLRI said:

the arguments for limiting rights protection to civil and political rights are not compelling. They speak of timidity rather than rationality. ... The Tasmanian Law Reform Institute recognises that human rights are indivisible and that the separation of rights into civil and political rights on the one hand and economic, social and cultural rights on the other is artificial.³⁹⁷

4.3.2 The TLRI set out a comprehensive list of rights to be included in a Tasmanian Charter, including civil and political rights and a number of economic, social, and cultural rights.³⁹⁸ Significant rights recommended in 2007 for inclusion in a Tasmanian Charter, which went beyond the rights protected in the ACT and Victorian Charters, were rights to work, food, housing, health, education, and a safe environment. Since the 2007 Final Report, the right to education and the right to health services have been included in the Queensland human rights enactment; the rights to work, food, and a safe environment have not.

4.3.3 Other jurisdictions have taken a cautious, incremental approach to rights protected by their human rights legislation (emphasising civil and political rights over economic, social, and cultural rights) and largely deferring the inclusion of additional rights to future reviews. The Report of the Economic, Social and Cultural Rights Research Project in 2010 recommended including rights included in the *International Covenant on Economic, Social and Cultural Rights* in the *Human Rights Act 2004*

³⁹⁵ The Commission of Inquiry into the Tasmanian Government's response to this matter was established on 15 March 2021 <<https://www.commissionofinquiry.tas.gov.au/home>>.

³⁹⁶ This argument was advanced by the VHREOC in its submission to the review: Brett Young, *From Commitment to Culture* 67.

³⁹⁷ TLRI 2007 Final Report [4.15.13].

³⁹⁸ See Appendix B of this Report and TLRI 2007 Final Report, Recommendations 15, 16 and 17.

(ACT) – if not immediately, then by selecting a few and ‘leaving open the possibility of expansion of the list of rights protected in subsequent reviews of the HRA’.³⁹⁹ The government response stated:

The Government believes that an incremental approach, such as the one identified by the Report, is the best way forward. This approach will mirror the approach taken in 2004 with the introduction of the *Human Rights Act* which ensured that public authorities were fully engaged with the civil and political rights contained within the *Human Rights Act* and confident in their scope and application. The success of this approach provides a best practice model for the introduction of additional rights.⁴⁰⁰

4.3.4 In 2020, the ACT Human Rights Commission strongly recommended that more economic, social, and cultural rights (such as housing and health rights) be included in the *Human Rights Act 2004* (ACT).⁴⁰¹ On 30 June 2022, the ACT Government released a Discussion Paper to inform consideration of the inclusion in the *Human Rights Act 2004* (ACT) of a right to a healthy environment; the government has committed to protecting this right.⁴⁰² Subsequently, legislation has been introduced that would insert that right into the ACT Charter.⁴⁰³ The ACT Government has also recognised a right to work⁴⁰⁴ and a right to education.⁴⁰⁵

4.3.5 The 2011 Review of the Vic Human Rights Charter found no case for adding new categories of rights to the Charter. This issue was revisited in the 2015 review, which, while not calling for the protection of any additional economic, social, and cultural rights at that time,⁴⁰⁶ did recommend that their inclusion be a priority consideration for future reviews.⁴⁰⁷ No further progress has been made on this recommendation.⁴⁰⁸

4.3.6 The *Human Rights Act 2019* (Qld) explicitly provides that the first review of the Act, due to commence in 2023, must consider whether a broader range of rights should be protected.⁴⁰⁹

TLRI's current views

4.3.7 Consistent with the views of the TLRI set out in the 2007 Final Report, the TLRI remains of the view that the rights protected in the Tasmanian Human Rights Act or Charter should extend beyond

³⁹⁹ Andrew Byrnes et al, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (Report, 2010) [9.39]

<https://www.researchgate.net/publication/228158594_Australian_Capital_Territory_Economic_Social_and_Cultural_Rights_Research_Report>.

⁴⁰⁰ ACT Government, *Response to ACT Economic, Social and Cultural Rights Research Project Report* (March 2012) 7 <<https://regnet.anu.edu.au/Centre-International-Governance-and-Justice/ACT-economic-social-and-cultural-rights-project>>.

⁴⁰¹ ACT Human Rights Commission, *Annual Report 2019-2020* (Report, 2020) <https://www.hrc.act.gov.au/_data/assets/pdf_file/0009/2282175/ACT-Human-Rights-Commission-Annual-Report-2019-20.pdf>.

⁴⁰² ACT Government, *Your Say Conversations: The Right to a Healthy Environment* (Web Page, 2022) <<https://yoursayconversations.act.gov.au/right-healthy-environment>> and see further at [4.3.30] of this Report.

⁴⁰³ See *Human Rights (Healthy Environment) Amendment Act 2023* (ACT).

⁴⁰⁴ See discussion at [4.3.19]–[4.3.20].

⁴⁰⁵ See discussion at [4.3.8]–[4.3.10].

⁴⁰⁶ The 2015 Victorian Review noted that several rights already protected by the Charter had elements of economic, social, and cultural rights, such as cultural rights (protected by s 19), property rights, and the protection of families and children. Brett Young, *From Commitment to Culture* 225.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ See for example, VEOHRC, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, 2018) 84; *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, 2019) 115. The VEOHRC's *2019 Report on the Operation of the Charter* does not mention this recommendation.

⁴⁰⁹ Including, but not limited to, rights in the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, and the *Convention on the Elimination of All Forms of Discrimination against Women: Human Rights Act 2019* (Qld) s 95(4)(a).

civil and political rights to include a number of economic, social, and cultural rights. This is addressed in Recommendation 7 (see [4.3.35]–[4.3.37]).

Right to education

2007 Final Report and subsequent developments

4.3.8 The 2007 TLRI Final Report recommended that a right to education be included in a Tasmanian human rights enactment.⁴¹⁰

4.3.9 While not included in the initial ACT Human Rights Act, a 2016 amendment included the right to education as a right with which public authorities are obligated to comply under Part 5A of the *Human Rights Act 2004* (ACT).⁴¹¹

4.3.10 The *Human Rights Act 2019* (Qld) also includes the right to education, providing that every child has the right to appropriate primary and secondary education, and that every person has the right to access further vocational education and training.⁴¹²

TLRI's current views

4.3.11 The TLRI maintains its earlier recommendation that a right to education be included as an independent right in a Tasmanian human rights enactment, requiring public authorities delivering education services to act consistently with that right.⁴¹³ This is set out in Recommendation 7 (see [4.3.35]–[4.3.37]).

Rights of Tasmania's First Nations people

2007 Final Report and subsequent developments

4.3.12 The 2007 TLRI Final Report recommended that a Tasmanian human rights enactment should protect the right of Tasmania's First Nations people to maintain their distinctive identity, culture, kinship ties, and spiritual, material, and economic relationship with the land. It also recommended the separate recognition of the rights of ethnic, religious, and linguistic minorities to enjoy their own culture.⁴¹⁴ The TLRI remains of the view that the rights outlined in the 2007 Final Report should be protected.

4.3.13 This is consistent with the position in Victoria and the ACT. Victoria has now recognised the distinct cultural rights of Aboriginal and Torres Strait Islander peoples.⁴¹⁵ The *Human Rights Act 2004* (ACT) initially protected cultural rights broadly but was amended in 2016 to recognise the distinct rights of Aboriginal and Torres Strait Islander people.⁴¹⁶

4.3.14 *Human Rights Act 2019* (Qld)⁴¹⁷ also includes a specific provision protecting the cultural rights of Aboriginal and Torres Strait Islander people. Those cultural rights were discussed in detail in the development of the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld), which gives important legislative recognition to traditional adoption practices. The statement of compatibility for this Act discussed the cultural practice it formalised and the risk that

⁴¹⁰ TLRI 2007 Final Report, Recommendations 15, 16 and 17.

⁴¹¹ *Human Rights Amendment Act 2016* (ACT) s 8.

⁴¹² *Human Rights Act 2019* (Qld) s 36.

⁴¹³ TLRI 2007 Final Report, Recommendations 15, 16 and 17.

⁴¹⁴ *Ibid.*

⁴¹⁵ Vic Human Rights Charter s 19(2).

⁴¹⁶ *Human Rights Act 2004* (ACT) s 27(2).

⁴¹⁷ *Human Rights Act 2019* (Qld) s 28.

requiring disclosure of customary knowledge would limit the rights of Torres Strait Islanders to preserve their culture. The statement concluded that the limits were reasonable and justified to protect the rights of Torres Strait Islander families and children engaged in customary adoption.⁴¹⁸

4.3.15 In Queensland, cultural rights have also been relied upon by traditional custodians of land to protect their rights to perform ceremonies on land leased to Bravus (Adani) for its mining operations. Wangan and Jagalingou community leader, Adrian Burragubba, filed a complaint with the QHRC after police asked a group conducting ceremonies on the site to leave. Following conciliation, the Queensland Police Service issued a public apology to Mr Burragubba.⁴¹⁹ Queensland Police subsequently recognised that the men were practising cultural rights and declined to remove them from the site while it was not necessary to do so.⁴²⁰ In relation to this, the Queensland Human Rights commissioner said that the outcome

indicates a strong commitment by the Queensland Police Service to uphold the cultural rights of Aboriginal peoples and Torres Strait Islander peoples and demonstrates the value of the [Human Rights] Act for Queensland's First Nations peoples.⁴²¹

TLRI's current views

4.3.16 The approach in Queensland and Victoria accords with the TLRI's 2007 recommendation to include distinct protection of the rights of First Nations people in a Tasmanian human rights enactment.⁴²²

4.3.17 In Tasmania, a clear expression of cultural rights might usefully have informed public debate in several areas, including proposals to reopen four-wheel drive tracks within the Aboriginal Cultural Heritage Landscape in the northwest of Tasmania and development within the Tasmanian Wilderness World Heritage Area. The implementation of the recommendations in the *Pathway to Truth-Telling and Treaty* report⁴²³ might also potentially benefit from a formalised commitment by the Tasmanian Government to uphold human rights, as evidenced by the enactment of Tasmanian human rights legislation. Future discussion regarding cultural hunting and fishing, management of sea country, cultural burning, and return of land and artefacts to Aboriginal ownership may also benefit from a legislated right to maintain cultural practices.

4.3.18 The recommendation in relation to this issue is set out in Recommendation 7.

Right to work

2007 Final Report and subsequent developments

4.3.19 The 2007 TLRI Final Report recommended that a Tasmanian Charter of Rights protect the right to work and associated just conditions of work consistent with the *International Covenant on Civil and*

⁴¹⁸ *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020* (Qld), Statement of Compatibility 15–16 <<https://www.legislation.qld.gov.au/view/pdf/bill.first.hrc/bill-2019-021>>.

⁴¹⁹ See Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 11 <<https://www.qhrc.qld.gov.au/about-us/annual-reports>>.

⁴²⁰ Ben Smee, 'Queensland Police refuse to remove Traditional Owners occupying Adani's Coalmine Site' *Guardian* (online, 3 October 2021) <<https://www.theguardian.com/australia-news/2021/oct/03/queensland-police-refuse-to-remove-traditional-owners-occupying-adanis-coalmine-site>>.

⁴²¹ See Queensland Human Rights Commission, *Annual Report 2020-21* 12.

⁴²² TLRI 2007 Final Report, Recommendations 16 and 17.

⁴²³ The *Pathway to Truth-Telling and Treaty* report, prepared by Professor Kate Warner, Professor Tim McCormack, and Ms Fauve Kurnadi, was tabled in the Tasmanian Parliament on 25 November 2021. Based on an understanding of the significant human rights abuses of First Nations people, it explores options for an agreed way forward. See <https://www.dpac.tas.gov.au/_data/assets/pdf_file/0029/162668/Pathway_to_Truth-Telling_and_Treaty_251121.pdf>.

Political Rights as modified in accordance with the TLRI recommendations at [4.14.25] of the 2007 Final Report.⁴²⁴

4.3.20 In 2020, the ACT explicitly recognised a right to work, encompassing the right to choose an occupation freely, the right to just conditions of work, the right to form or join a union or other work-related organisation, and the right not to be discriminated against as a result of association with such an organisation.⁴²⁵

TLRI's current views

4.3.21 The TLRI remains of the view that the bundle of rights protecting the right to work and associated just conditions should be protected by a Tasmanian human rights enactment. This is set out in Recommendation 7.

Health rights

2007 Final Report and subsequent developments

4.3.22 The 2007 TLRI Final Report recommended that a Tasmanian human rights enactment include protection of the right to health, expressed as the highest attainable standard of physical and mental health consistent with the *International Covenant on Economic Social and Cultural Rights* modified in accordance with the TLRI recommendations at [4.14.25] of the 2007 Final Report.⁴²⁶

4.3.23 The right to the highest attainable standard of physical and mental health may also encourage the implementation of culturally safe health practices. For example, in 2019, a NSW Coroner's report into the death of a pregnant Wiradjuri woman, Naomi Williams, found 'clear and ongoing inadequacies' in the care Ms Williams had received across multiple visits to local health providers and recommended reforms to address systemic racism affecting the care offered to Aboriginal and Torres Strait Islander patients.⁴²⁷ An explicit right to the highest attainable health may assist in the promotion of inclusive and culturally safe health practices across all public hospitals to avoid similar situations arising in Tasmania.

4.3.24 The *Human Rights Act 2019* (Qld) protects a right to health services, which provides that every person has a right to access health services without discrimination and must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.⁴²⁸ The inclusion of a right to the highest attainable standard of physical and mental health was contested in Queensland as potentially undermining parliamentary discretion regarding budgetary allocations to health services and putting frontline workers at risk, if they were not able to deny access to service. To date, and despite the intervening pandemic placing health services under intense pressure, the right to health services was not invoked in the Review Period.

TLRI's current views

4.3.25 The TLRI continues to support inclusion of a broadly expressed right to the highest attainable standard of physical and mental health consistent with the *International Covenant on Economic Social and Cultural Rights*, but recommends that, if such a right is not adopted, a Tasmanian Charter should include a right to adequate health services similar to that in s 37 of the *Human Rights Act 2019* (Qld). This is set out in Recommendation 7.

⁴²⁴ TLRI 2007 Final Report, Recommendations 15, 16 and 17.

⁴²⁵ *Human Rights (Workers' Rights) Amendment Act 2020* (ACT), which enacted s 27B.

⁴²⁶ TLRI 2007 Final Report, Recommendations 15, 16 and 17, and see para [4.14.25] of the 2007 Final Report.

⁴²⁷ NSW Coroners Court, *Inquest into the Death of Naomi Williams*, 29 July 2019 [107].

⁴²⁸ *Human Rights Act 2019* (Qld) s 37.

Right to housing

2007 Final Report and subsequent development

4.3.26 The 2007 TLRI Final Report recommended that a Tasmanian human rights enactment include the right to adequate housing and that public housing services be named as 'public authority' for the purposes of that enactment.⁴²⁹

4.3.27 Lack of access to housing and security of tenure consistently emerge as issues for civil society organisations working in child protection, mental health, family and domestic violence, and disability.⁴³⁰

4.3.28 As outlined in Part 3.3, existing rights in jurisdictions with human rights enactments, particularly rights to privacy, protection of the family and children, and the right to equality, have been interpreted by courts and tribunals to incorporate a right to housing.

4.3.29 A recent Victorian Parliamentary inquiry into homelessness recognised that social housing is a protective factor against homelessness, particularly for people with complex needs, and recommended that a right to housing be included into the Vic Charter of Human Rights.⁴³¹

TLRI's current views

4.3.30 While other jurisdictions have relied on the existing civil and political rights of the right to be free from unlawful and arbitrary interference with family and home to protect housing rights, the TLRI remains of the view that an explicit right to adequate housing would provide a more consistent and cohesive basis for planning, advocacy, and implementation of housing policies, and clearer pathways for people to gain protection for this right.⁴³² This is set out in Recommendation 7.

Right to a safe environment

2007 Final Report and subsequent developments

4.3.31 The TLRI recommended the inclusion in a human rights enactment of a right to a clean and safe environment and to the protection of the environment from pollution and ecological degradation, modelled on s 24 of the South African *Bill of Rights*.⁴³³ To date, none of the Australian jurisdictions with human rights enactments have recognised a similar right; the ACT Government has introduced legislation that would insert that right into the ACT Charter.⁴³⁴

4.3.32 A 2021 landmark resolution of the United Nations Human Rights Council recognised the right to a clean, healthy, and sustainable environment as fundamental to the enjoyment of all other human

⁴²⁹ TLRI 2007 Final Report, Recommendations 8, 16 and 17.

⁴³⁰ See for example, Justice Connect, *Fairer Responses to Homelessness for all Australians: Submission to the Parliamentary Inquiry into Homelessness in Australia* (2020) <https://justiceconnect.org.au/wp-content/uploads/2020/06/Submission_to_the_Federal_Inquiry_into_Homelessness_in_Australia_June_2020.pdf>; Law Council of Australia, *The Justice Project Final Report – Part 1: People who are Homeless* (2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/People%20who%20are%20Homeless%20%28Part%201%29.pdf>>.

⁴³¹ Parliament of Victoria, Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (Final Report, 2021) Recommendation 34 <<https://apo.org.au/sites/default/files/resource-files/2021-03/apo-nid311270.pdf>>.

⁴³² This accords with advice provided by the Tenants' Union of Tasmania. (Appendix C contains a list of all those who provided advice to the TLRI pursuant to requesting that the Institute prepare this Report.)

⁴³³ TLRI 2007 Final Report, Recommendation 17.

⁴³⁴ See *Human Rights (Healthy Environment) Amendment Bill 2023* (ACT).

rights.⁴³⁵ While the resolution is not binding on Australia, the UN High Commissioner for Human Rights has called on Member States to take ‘bold actions to give ‘prompt and real effect’ to this right.’⁴³⁶

TLRI’s current views

4.3.33 Reviewing the international jurisdictions that have enacted a right to a healthy environment, Pepper concludes:

the real proof that there are tangible benefits of recognising the right to a healthy environment is that formal recognition of the right has in fact resulted in healthier people and ecosystems. Evidence shows that recognition of the right to a healthy environment has resulted in millions of people, including vulnerable populations, breathing cleaner air, gaining access to safe drinking water, and reducing their exposure to toxic substances, amongst other positive outcomes both for human health and the environment.⁴³⁷

4.3.34 This view supports the TLRI’s original view that a Tasmanian human rights enactment should include a right to a safe, healthy environment. This is set out in Recommendation 7.

Summary of the TLRI’s views and recommendations on specific rights to be included in the Charter

4.3.35 The TLRI maintains the view in the 2007 Final Report that protected rights should extend beyond civil and political rights. The suite of rights outlined in the 2007 TLRI Report (see Appendix B) should be adopted in a Tasmanian human rights enactment. While many economic, social, and cultural rights have been indirectly protected in other jurisdictions through broad interpretation of existing civil and political rights, more explicit recognition of rights will improve community awareness, policy development, and consistency of implementation.

4.3.36 As a midway position, if this full suite of economic, social, and cultural rights is not initially included in the Tasmanian human rights enactment, then the economic, social, and cultural rights currently protected in other jurisdictions with human rights enactments (namely, cultural rights of Aboriginal and Torres Strait Islander people, the right to education, the health rights, and the right to work) should be included. This is line with the rights that have been recognised in other jurisdictions.⁴³⁸

4.3.37 Further, modelled on section 95 of the *Human Rights Act 2019* (Qld), if economic, social, and cultural rights are not initially included in a Tasmanian Human Rights Act, then the enactment should explicitly require the first review to consider the inclusion of additional human rights, including all the rights recommended for inclusion in the TLRI 2007 Final Report. It is noted that Recommendation 20 of the 2007 Final Report contains the TLRI’s recommendations for the review process of the Human Rights enactment (see Appendix A).

⁴³⁵ United Nations Human Rights Council, Forty-eighth session, Resolution 48/13, 8 October 2021. The decision was upheld by the United Nations General Assembly on 28 July 2022: <<https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session48/res-dec-stat>>.

⁴³⁶ See Office of the High Commission for Human Rights, ‘Bachelet Hails Landmark Recognition that having a Healthy Environment is a Human Right’ (Media Release 8 October 2021) <<https://www.ohchr.org/en/2021/10/bachelet-hails-landmark-recognition-having-healthy-environment-human-right?LangID=E&NewsID=27635>>.

⁴³⁷ Melaine Montalban, “‘Bold Action’ Required Following Recognition of the Human Right to a Healthy Environment” *Environmental Defenders Office* (Web Page, 19 October 2021) <https://www.edo.org.au/2021/10/19/bold-action-required-following-recognition-of-the-human-right-to-a-healthy-environment/#_ftn3> referring to John Knox and David R Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/73/188 (19 July 2018) [45]–[46].

⁴³⁸ See [4.3.2]–[4.3.6].

Recommendation 7 – Inclusion of Economic, Social, and Cultural Rights

That the rights protected in the Tasmanian Human Rights Act or Charter extend beyond civil and political rights.

Specifically, the specific rights outlined in the 2007 Final Report (Recommendation 16, see Appendix A) should be adopted in a Tasmanian human rights enactment.

If all of the economic, social, and cultural rights that the TLRI 2007 Final Report recommended be included in a Tasmanian human rights enactment are not initially included, then the economic, social, and cultural rights currently protected in other jurisdictions with human rights enactments (cultural rights of Aboriginal and Torres Strait Islander people, the right to education, the health rights, and the right to work) should be included.

Further, if economic, social, and cultural rights are not initially included in a Tasmanian human rights enactment, then it should explicitly require the first review to consider the inclusion of additional human rights, including all the rights recommended for inclusion in the TLRI 2007 Final Report.

4.4 Role of Parliament

Scrutiny: Preparation of statements of compatibility and Human Rights Unit

2007 Final Report and subsequent developments

4.4.1 In the 2007 Final Report, the TLRI recommended that statements of compatibility be prepared by the Members of Parliament and government departments that will have responsibility for implementing and administering the new legislation.⁴³⁹ The TLRI considered that a de-centralised model would help to embed a whole of government human rights culture and encourage dialogue within and between departments regarding human rights. The disadvantage of this model is potential variability in the quality of the assessment of compatibility and the potential partisanship of the analysis.

4.4.2 The TLRI also recommended establishing a dedicated Human Rights Unit within the Department of Justice to assist in the preparation of statements of compatibility in consultation with the responsible agencies.⁴⁴⁰

4.4.3 In the ACT and New Zealand, all compatibility statements are prepared by Justice Departments.⁴⁴¹ Where an initial review identifies that a proposed law is potentially incompatible with human rights, a detailed explanatory statement is required.

4.4.4 In contrast, Queensland, Victoria, and the Commonwealth require compatibility statements to be prepared by the proponents of the laws – in practice, the relevant administering department. For private members' Bills, statements are prepared by the members themselves.

4.4.5 The advantage of giving Justice Departments responsibility for the preparation of compatibility statements is that it fosters the development of departmental expertise and promotes consistency in the

⁴³⁹ TLRI 2007 Final Report, Recommendations 10 and 13.

⁴⁴⁰ TLRI 2007 Final Report, Recommendation 22.

⁴⁴¹ In practice, the Human Rights Unit within the Legislation, Policy and Programs branch of the ACT Justice and Community Safety Directorate conducts an initial assessment: <<https://justice.act.gov.au/legislation-and-policy>>. In New Zealand, the Ministry initially vets the laws and issues a statement of compatibility where no significant issues are identified. Where satisfied a Bill is potentially incompatible with human rights, the Bill is referred to the Attorney-General to prepare a detailed 'Section 7 Report', as occurred with the New Zealand Safe Access Bill.

quality and independence of assessments. For example, Watchirs, Costello and Thilagaratnam consider the ACT system is working well, observing that, ‘The evidence to date suggests that the Compatibility Statement requirement is being taken seriously and that it is not being treated as a mere box ticking exercise’.⁴⁴² During the Review Period, no Bills in the ACT have been introduced with a Statement of Incompatibility. Watchirs et al argue that this indicates a strong human rights culture in which human rights are considered in the legislative development process to ensure that the final Bill is human rights compatible.⁴⁴³ The Human Rights Unit within the ACT Justice and Community Safety Directorate works with the agency responsible for introducing the Bill to identify and rectify any potential human rights issues before the Bill is tabled.⁴⁴⁴

4.4.6 In contrast, while only two statements of compatibility prepared in Queensland in 2020-2021 identified potential incompatibility with human rights, portfolio committees found approximately half of the statements of compatibility failed to address relevant human rights adequately and to explain how the proposed limitations on rights were reasonable or proportionate.⁴⁴⁵

4.4.7 In relation to the Commonwealth approach, Williams and Reynolds have expressed doubt that human rights are taken seriously, where there are no direct implications for non-compliance.

Although in [statements of compatibility] and via direct correspondence, Ministers have started justifying their policies through a human rights lens, there is no evidence that this burgeoning ‘culture of justification’ has in fact led to better laws. On the contrary, there is evidence that recent years have each seen extraordinarily high numbers of rights-infringing Bills passed into law.⁴⁴⁶

4.4.8 The Human Rights Watch assessment of the human rights implications of Commonwealth laws enacted in response to COVID-19 also raised concerns that rights-infringing laws are more readily enacted when human rights assessments are perfunctory, rather than embedded in decision-making.⁴⁴⁷

4.4.9 An issue that has arisen since Australian jurisdictions enacted human rights legislation requiring Bills to be assessed for their rights compliance is that amendments made during Parliamentary debate may have significant human rights implications but will not be subject to detailed human rights assessment. An example of this type of situation occurred in Tasmania, in relation to amendments to the *Justice and Related Legislation (Marriage and Gender Amendments) Bill 2019*, which raised significant new questions about human rights.⁴⁴⁸

TLRI’s current views and recommendations

4.4.10 The TLRI remains of the view that statements of compatibility should accompany all Bills introduced into Parliament. This is in accordance with Recommendation 10 of the 2007 Final Report (See Appendix A). In addition, the TLRI is of the view that human rights assessment should be iterative and that any amendments made during Parliamentary debate should be re-examined to determine

⁴⁴² Watchirs, Costello and Thilagaratnam, ‘Human Rights Scrutiny under the Human Rights Act 2004 (ACT)’ [6.150].

⁴⁴³ Ibid [6.10]; see also ACT Human Rights and Discrimination Commissioner, *Look Who’s Talking – A Snapshot of Ten Years of Dialogue Under the Human Rights Act 2004* (Report, 2014) 16. As noted at [4.6.5], the ACT Human Rights Commissioner regularly reviews draft legislation prior to its consideration by Cabinet, strengthening the quality of legislation introduced to Parliament.

⁴⁴⁴ See ACT Auditor-General, *Recognition and Implementation of Obligations Under the Human Rights Act 2004* (Report No 2, 2019) [2.5]–[2.8]. The Human Rights Unit has developed a Human Rights Scrutiny Assessment document to help in the assessment of Bills. Ibid [2.9].

⁴⁴⁵ Queensland Human Rights Commission, *Annual Report 2020-21*.

⁴⁴⁶ Williams and Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ 506.

⁴⁴⁷ Human Rights Watch, *World Report 2022* (Report, 2022) 55 <<https://www.hrw.org/world-report/2022>>.

⁴⁴⁸ These changes were subject to a detailed post-enactment review by the Tasmanian Law Reform Institute. TLRI, *Legal Recognition of Sex and Gender* (Final Report No 31, 2020) <https://www.utas.edu.au/_data/assets/pdf_file/0018/1342080/tlri-legal-recognition-of-sex-final-report.pdf>.

whether they alter any initial assessment of human rights compatibility. This reflects the views expressed in the 2015 Victorian Review that amendments of a Bill should also have consideration of human rights compatibility to improve human rights scrutiny.⁴⁴⁹ Accordingly, any amendments to Bills made during Parliamentary debate should also be accompanied by further statements of human rights compatibility. Where amendments are introduced and passed in the House of Assembly, the amendments should be referred to the Parliamentary Human Rights Scrutiny Committee for review prior to the amended Bill being introduced in the Legislative Council. This is an addition to the recommendations contained in the 2007 Final Report about the Role of Parliament (Recommendation 10, see Appendix A).

4.4.11 Further, on balance and having regard to the size and capacity of the Tasmanian public service, the TLRI adheres to its original view that a dedicated Human Rights Unit should be established⁴⁵⁰ to prepare statements of compatibility in consultation with the responsible agencies. Such dialogue will foster human rights discourse across government, while maintaining quality control over these statements. This is consistent with Recommendation 22 of the 2007 Final Report (see Appendix A).

4.4.12 The TLRI notes the recommendation in the Tasmanian Government's 2010 Directions Paper to establish a Human Rights Advisory Council 'to provide advice on human rights to all branches of government, and to conduct four-year reviews of the Charter'.⁴⁵¹ The TLRI considers that this role would be performed by the proposed Human Rights Unit but does not oppose the establishment of a separate Advisory Council, if it were preferred to establish a separate body.

4.4.13 Whether or not a separate advisory council is established, the TLRI recommends that guidelines be developed for identifying and assessing human rights implications of proposed legislation. This is consistent with Recommendation 22 of the TLRI 2007 Final Report (see Appendix A).

4.4.14 In addition, any amendments to Bills made during Parliamentary debate should also be accompanied by further statements of human rights compatibility.

4.4.15 Further, where amendments are introduced and passed in the House of Assembly, the amendments should be referred to the Parliamentary Human Rights Scrutiny Committee for review prior to the amended Bill being introduced in the Legislative Council.

Recommendation 8 – Statements of Compatibility

That statements of compatibility accompany all Bills and amendments to Bills introduced into Parliament.

In addition, any amendments to Bills made during Parliamentary debate should also be accompanied by further statements of human rights compatibility.

Further, where amendments are introduced and passed in the House of Assembly, the amendments should be referred to the Parliamentary Human Rights Scrutiny Committee for review prior to the amended Bill being introduced in the Legislative Council.

⁴⁴⁹ Brett Young, *From Commitment to Culture* 189–190; see also [2.3].

⁴⁵⁰ TLRI 2007 Final Report, Recommendation 22.

⁴⁵¹ Department of Justice (Tasmania), Directions Paper 43.

Recommendation 9 – Human Rights Unit

That a Human Rights Unit be established to prepare statements of compatibility in consultation with responsible agencies.

Such dialogue will foster human rights discourse across government, while maintaining quality control over these statements.

Further, guidelines should be developed for identifying and assessing human rights implications of proposed legislation to assist responsible agencies and departments in developing human rights compatible policies and proposals for legislation.

Scrutiny: delegated legislation

2007 Final Report and subsequent developments

4.4.16 Delegated or subordinate legislation is made by the Executive arm of government. It is not enacted by Parliament in the same way as primary legislation. In the 2007 Final Report, the TLRI's view was that, even though such legislation is not enacted by Parliament, Parliament should nevertheless have a role in scrutinising subordinate legislation in human rights terms. Accordingly, in the 2007 Final Report, the TLRI recommended that subordinate legislation should be accompanied by statements of human rights compatibility and subject to the usual disallowance procedures, where non-compliance with human rights is identified.

4.4.17 In Queensland, the process for scrutiny of subordinate legislation is for the responsible minister or ministers to prepare a human rights certificate for subordinate legislation which addresses the issue of compatibility with human rights.⁴⁵² Subordinate legislation is subject to parliamentary scrutiny under the *Parliament of Queensland Act 2001* (Qld), which provides for scrutiny by a portfolio committee of legislation in its portfolio area. In Victoria, the Scrutiny of Acts and Regulations Committee of Parliament has a human rights scrutiny role in relation to delegated legislation, and reports to Parliament if it considers the statutory rule to be incompatible with human rights.⁴⁵³ Under the *Subordinate Legislation Act 1994* (Vic) s 12A, the responsible minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule. In contrast, the ACT Human Rights Act does not require subordinate legislation to be accompanied by a statement of compatibility and the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) does not have a mandate under the Act to report on human rights issues raised by subordinate legislation.⁴⁵⁴ This has been identified as a gap in the scrutiny process and an area where oversight of human rights issues could be improved in the ACT.⁴⁵⁵

TLRI's current views and recommendations

4.4.18 The TLRI maintains its view that subordinate legislation should be accompanied by statements of human rights compatibility and subject to the usual disallowance procedures, where non-compliance with human rights is identified. This is consistent with Recommendation 10 of the TLRI 2007 Final Report (see Appendix A).

4.4.19 Where a statement of compatibility identifies potential incompatibility with human rights, the Tasmanian human rights enactment should provide that the regulation will not commence unless approved by both houses of Parliament or at the expiration of a disallowance period of five sitting

⁴⁵² *Human Rights Act 2019* (Qld) s 41.

⁴⁵³ *Subordinate Legislation Act 1994* (Vic) s 21.

⁴⁵⁴ See discussion in Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the *Human Rights Act 2004* (ACT)' [6.120]–[6.130].

⁴⁵⁵ *Ibid.*

days.⁴⁵⁶ This elevates the significance of human rights compliance and prompts consideration of human rights before significant regulatory restrictions commence. This approach is aimed to motivate drafters to consider at the outset ways to avoid a statement of incompatibility by ensuring regulations adopt 'least restrictive' approaches.

Recommendation 10 – Subordinate Legislation

That subordinate legislation be accompanied by statements of human rights compatibility and subject to the usual disallowance procedures, where non-compliance with human rights is identified.

Scrutiny: Parliamentary Human Rights Scrutiny Committee

2007 Final Report and subsequent developments

4.4.20 The 2007 TLRI Final Report recommended that a Parliamentary Human Rights Scrutiny Committee ('PHRSC') be established to provide pre-enactment scrutiny of all Bills.⁴⁵⁷ The TLRI recommended that the PHRSC 'be constituted across party lines and consist of members of both Houses' and be 'adequately resourced and able to seek independent, expert advice'.⁴⁵⁸ In relation to other Tasmanian parliamentary committees, the closest comparable committee to a proposed PHRSC would be the Joint Standing Committee on Integrity. This consists of three members of the Legislative Council and three members of the House of Assembly.⁴⁵⁹ In relation to the members from the House of Assembly, at least one member of any political party that has three or more members in the House of Assembly is to be a member of the Joint Committee.⁴⁶⁰ The other joint standing committees do not specify a requirement in relation to party affiliation.⁴⁶¹

4.4.21 In Queensland, scrutiny is undertaken by a relevant portfolio committee, rather than a dedicated human rights scrutiny committee. As with the preparation of statements of compatibility, there are advantages on the one hand, in decentralising the scrutiny obligation and requiring all committees to consider the human rights implications of laws within their portfolios, and, on the other hand, comparable advantages in developing expertise in one dedicated human rights committee.

4.4.22 In Victoria, the Scrutiny of Acts and Regulations Committee ('SARC') undertakes scrutiny of all Bills and statutory rules.⁴⁶² In terms of approach, this Committee follows the best traditions of non-partisan legislative scrutiny, with membership being determined according to the 'practice of Parliament'.⁴⁶³

4.4.23 At the Commonwealth level, the Commonwealth Parliamentary Joint Committee on Human Rights consists of 10 members: three Members of the House of Representatives to be nominated by the Government Whip; two Members of the House of Representatives to be nominated by the Opposition Whip or by any minority group or independent Member; two Senators to be nominated by the Leader of the Government in the Senate; two Senators to be nominated by the Leader of the Opposition in the Senate; and one Senator to be nominated by any minority group or independent Senator.⁴⁶⁴

⁴⁵⁶ A similar approach is adopted under s 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) for regulations relating to the governance standards for charities.

⁴⁵⁷ TLRI 2007 Final Report, Recommendation 10.

⁴⁵⁸ Ibid [4.10.14]–[4.10.15].

⁴⁵⁹ *Integrity Commission Act 2009* (Tas) s 23(2).

⁴⁶⁰ *Integrity Commission Act 2009* (Tas) s 23(3).

⁴⁶¹ Email from Department of Justice (Tasmania), 16 October 2023.

⁴⁶² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30; *Subordinate Legislation Act 1994* (Vic) s 21.

⁴⁶³ Email from Department of Justice (Tasmania), 16 October 2023.

⁴⁶⁴ Email from Department of Justice (Tasmania), 16 October 2023.

4.4.24 While the 2007 TLRI Final Report did not explicitly recommend minimum timeframes for scrutiny, subsequent developments have made it clear that an effective model requires that sufficient time be allocated to enable meaningful dialogue and consideration of expert views. This requires allowing time for the PHRSC to review a Bill, identify any issues not addressed in the statement of compatibility and request clarification from the relevant minister, and receive and consider any ministerial responses prior to finalising its assessment. There should also be sufficient time between publication of the assessment report and Parliamentary debate to allow members to review the report and engage with the human rights implications identified. Short timeframes would undermine the rigour of the Committee's assessment and risk 'mere lip-service being provided to human rights'.⁴⁶⁵

4.4.25 In the three Australian jurisdictions with human rights enactments, Bills are rarely debated prior to finalisation of the scrutiny report, other than in emergency situations. The 2015 Review of the Vic Human Rights Charter recommended that the government consider 'how best to ensure that the [Scrutiny of Acts and Regulations Committee] has sufficient time to scrutinise Bills that raise significant human rights issues'.⁴⁶⁶

TLRI's current views and recommendations

4.4.26 The TLRI maintains its 2007 view that a dedicated PHRSC should be established and given responsibility for scrutiny of all Bills for compatibility with human rights. This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A). There are different models for Committee membership and, as noted in the 2007 Final report, the TLRI recommended that the Committee should be constituted across party lines and consist of members of both Houses of Parliament. No party should have dominant representation on the Committee (Recommendation 10). This remains to the view of the TLRI.

4.4.27 Further to its 2007 Final Report recommendations, the TLRI recommends that the Tasmanian human rights enactment provide a guaranteed minimum time period for the PHRSC to consider each new Bill before it can be debated in Parliament.⁴⁶⁷ This time may be extended if the statement of compatibility indicates that a Bill is potentially incompatible with human rights. Additional time may be sought by the PHRSC if, despite no statement of incompatibility, the Committee is satisfied that the Bill might be incompatible with rights and would reasonably require a longer assessment period.

Recommendation 11 – Parliamentary Human Rights Scrutiny Committee

That a dedicated Parliamentary Human Rights Scrutiny Committee ('PHRSC') be established and given responsibility for scrutiny of all Bills for compatibility with human rights.

The PHRSC should be constituted across party lines and consist of members of both Houses of Parliament.

The Tasmanian human rights enactment should provide a guaranteed minimum time period for the PHRSC to consider each new Bill before it can be debated in Parliament. This time may be extended, if the statement of compatibility indicates that the Bill is potentially incompatible with human rights. Additional time may also be sought by the PHRSC if, despite no statement of incompatibility, it is satisfied that the Bill may be incompatible with rights and will reasonably require a longer assessment period.

⁴⁶⁵ McDougall, 'Making Rights Real' 6.

⁴⁶⁶ Brett Young, *From Commitment to Culture*, Recommendation 37.

⁴⁶⁷ Exceptions could apply for emergency Bills or Bills that seek to introduce amendments previously recommended by the PHRSC.

Override provisions

2007 Final report and subsequent developments

4.4.28 In the 2007 Final Report, the TLRI set out the process for the Supreme Court to make a declaration of incompatibility with a requirement for Parliament to respond to this declaration. It recommended that Parliament should have the ability to enact an override clause in the legislation, if it wished to confirm the legislation. It was recommended that the override clause should lapse after two years, unless Parliament reconfirms its continued operation. All subsequent renewals of the legislation should operate for only two years.

4.4.29 One of the key differences between the ACT and other jurisdictions with human rights enactments is that Victorian and Queensland legislation provides for an 'override provision' to exclude particular legislation (or parts of legislation) from the operation of the Human Rights Act in exceptional circumstances. Override declarations are in effect for up to five years and can be renewed at the expiry of that time.

4.4.30 The 2015 Review of the Vic Human Rights Charter recommended that the override declaration be repealed.⁴⁶⁸ It was noted that, under the statutory human rights model adopted, 'Parliament retains its supremacy and does not need (in an emergency or at any time) a provision to allow it to pass legislation that is incompatible with human rights'.⁴⁶⁹ Both the 2011 and 2015 Reviews of the Vic Human Rights Charter recommended removing the override provision because it was unnecessary, given that the 'Parliament can enact any legislation, including legislation that it or a court regards as incompatible with human rights'.⁴⁷⁰ It was observed that 'the use of the provision has been inappropriate and confusing to the public', given that it fails to make clear that Parliament can pass legislation that is incompatible with human rights without an override declaration.⁴⁷¹ However, the government did not support the recommendation, preferring to retain the section as a 'clear statement of Parliament's sovereignty'.⁴⁷² Others have viewed the override provision as making a 'powerful statement of human rights'.⁴⁷³

4.4.31 In Victoria, override declarations have been made on only two occasions: in relation to the Legal Profession Uniform Application Bill 2013 and the Corrections Amendment (Parole) Bill 2014 (which related to one prisoner).⁴⁷⁴

TLRI's current views and recommendations

4.4.32 The TLRI's view is that provision for an override declaration should be included in recognition of the primacy of Parliament. Under the 'dialogue model' proposed in the 2007 Final Report, the Supreme Court has the power to make a declaration of incompatibility (see [4.4.34]–[4.4.44]), and if Parliament does not amend, repeal, or confirm the legislation within seven months of tabling a declaration of incompatibility, the legislation should be inoperative to the extent of its incompatibility.⁴⁷⁵ If the Parliament wishes for the legislation to be confirmed, it needs to enact an override clause. This is different from the situation in Victoria, where legislation that has been declared to be incompatible does not become inoperative. Accordingly, in Tasmania, the TLRI continues to

⁴⁶⁸ Brett Young, *From Commitment to Culture*, Recommendation 46.

⁴⁶⁹ *Ibid* 14.

⁴⁷⁰ *Ibid* 197.

⁴⁷¹ *Ibid* 196.

⁴⁷² See Victorian Government, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act*.

⁴⁷³ Brett Young, *From Commitment to Culture* 198.

⁴⁷⁴ *Ibid* 197.

⁴⁷⁵ TLRI 2007 Final Report, Recommendation 10. It is noted that this process is different from the model under the Victorian Charter, as legislation is not invalidated if a court declares it to be incompatible: *Ibid* [4.11.13]–[4.11.18].

support allowing the use of override declarations in exceptional circumstances. This is consistent with Recommendation 10 of the 2007 Final Report (see Appendix A).

4.4.33 As with the 2007 Final Report, the override clause should be subject to a two-year sunset clause. The TLRI also recommended that Parliament be able to reinstitute override declarations prior to expiration of the two-year period.⁴⁷⁶

Recommendation 12 – Override Clauses

That, in recognition of the primacy of Parliament, Parliament be able to respond to a court's declaration of incompatibility by enacting an override clause to confirm the legislation.

The override clauses should be confined to exceptional circumstances.

The override clauses should be subject to a two-year sunset clause.

Parliament should be able to reinstitute override clauses prior to expiration of the two-year period.

Responding to declarations of incompatibility

2007 Final report and subsequent developments

4.4.34 In the 2007 Final Report, the TLRI recommended that, where the Supreme Court makes a declaration of incompatibility regarding legislation, the Parliament should respond within seven months of receiving notice of the declaration. If no action is taken within that period, the impugned legislation should be inoperative to the extent of its incompatibility.⁴⁷⁷

4.4.35 In relation to subordinate legislation, which is made by the Executive branch of government and is not expressly debated or approved by Parliament, a power for a court to invalidate subordinate legislation does not involve any challenge to the sovereignty of Parliament (unlike legislation). Given this, if the Tasmanian Supreme Court determines that subordinate legislation is not compatible with human rights, the TLRI's recommendation in the 2007 Final Report was that the Court can declare it to be invalid and inoperative, unless the applicable primary legislation expressly authorises the subordinate legislation to breach human rights.⁴⁷⁸

4.4.36 All jurisdictions with human rights enactments currently require notice of a declaration of incompatibility⁴⁷⁹ to be given to the relevant Attorney-General.

4.4.37 In the ACT, the Attorney-General must then present a copy of the declaration to Parliament within six sitting days of receiving notice and prepare and table a response to the declaration within six months.⁴⁸⁰

4.4.38 In Queensland, upon receiving notice of a declaration of incompatibility, the Attorney-General must pass the declaration to the relevant Minister, who must notify Parliament within six sitting days and table a response within six months. Parliament is also required to refer the declaration of incompatibility to the relevant portfolio committee.⁴⁸¹

⁴⁷⁶ Ibid [4.10.29].

⁴⁷⁷ TLRI 2007 Final Report, Recommendation 10.

⁴⁷⁸ Ibid Recommendation 12.

⁴⁷⁹ *Human Rights Act 2004* (ACT) s 32(4); *Human Rights Act 2019* (Qld) s 53(4); Vic Human Rights Charter ss 36(3), (4) and (6). This is called a 'declaration of inconsistent interpretation' in the Vic Human Rights Charter.

⁴⁸⁰ *Human Rights Act 2004* (ACT) s 33.

⁴⁸¹ *Human Rights Act 2019* (Qld) ss 55–57.

4.4.39 In Victoria, the Attorney-General must notify the relevant Minister of the declaration as soon as practicable, and the relevant Minister must table the declaration and a response within six months.⁴⁸²

4.4.40 No provision is made for the immediate invalidation of a human rights incompatible instrument in other Australian human rights enactments, and further declarations of incompatibility in other jurisdictions do not have the potential effect of invalidating the statutory instrument.⁴⁸³ However, it is noted that, where subordinate legislation is disallowed or determined to be ultra vires, the instrument is immediately invalidated, as, for example, in *Evans v New South Wales*,⁴⁸⁴ which involved regulation of conduct in connection with World Youth Day. The Full Court of the Federal Court applied the principle of legality and concluded that the regulation making power was circumscribed by fundamental common law rights and freedoms with the result that the regulation in question was ultra vires and invalid.

4.4.41 In its 2010 Directions Paper, the Tasmanian Government proposed that subordinate legislation declared to be incompatible should become invalid within 30 days of the declaration, rather than immediately, to give Parliament an opportunity to consider whether to validate the incompatible instrument.⁴⁸⁵ Allowing time to consider a response to a statement of incompatibility for subordinate legislation would be consistent with provisions allowing time for a response when legislation is declared to be incompatible. However, the immediacy and ease with which a regulation can be re-made should be contrasted with the time taken to pass legislation or legislative amendments to address a declared incompatibility.

TLRI's current views and recommendations

4.4.42 The TLRI remains of the view that the Government should be required to respond to a declaration of incompatibility made by the Supreme Court of Tasmania, consistent with the dialogue model of human rights, and that Parliament and the public should be notified of a declaration as soon as possible. Consistent with other jurisdictions, the response should be tabled within six months of notice being given. However, in recognition of the complexity of some matters that may give rise to incompatibility, Parliament should be able to grant one extension of no more than two months if satisfied that additional time is required. This is consistent with Recommendation 10 in the 2007 Final Report (see Appendix A), consistent with the dialogue model of human rights, and the requirement that Parliament and the public should be notified of a declaration as soon as possible.

4.4.43 To inform the Government's response, the declaration should be referred to the PHRSC for review within the response period. The TLRI maintains the view that impugned legislation should cease to operate to the extent of its incompatibility with human rights, if the government fails to respond to a declaration of incompatibility within the designated time period of notice of the declaration being received, or no more than eight months if an extension is granted. This recommendation builds on Recommendation 10 in the 2007 Final Report (see Appendix A).

4.4.44 For the reasons outlined in the 2007 report, the TLRI remains of the view that the Supreme Court should have power to invalidate subordinate legislation that is the subject of a declaration of incompatibility. This is consistent with Recommendation 12 of the 2007 Final Report.

⁴⁸² Vic Human Rights Charter ss 36(7) and 37.

⁴⁸³ See discussion at [3.2]–[3.3] of TLRI 2007 Final Report.

⁴⁸⁴ *Evans v New South Wales* [2008] FCAFC 130.

⁴⁸⁵ Department of Justice (Tasmania), Directions Paper 45.

Recommendation 13 – Declarations of Incompatibility

That the Minister administering the legislation be required to respond to a declaration of incompatibility with human rights made by the Supreme Court of Tasmania.

Consistent with the dialogue model of human rights, Parliament and the public should be notified of a declaration as soon as possible.

The written report to Parliament responding to the declaration should be tabled within six months of notice being given. However, Parliament should be able to grant one extension of no more than two months, if satisfied that additional time is required.

Impugned legislation should cease to operate to the extent of its incompatibility with human rights, if the government fails to respond to a declaration of incompatibility within the designated time period after notice of the declaration has been received, or no more than eight months after, if an extension to the time period is granted.

Recommendation 14 – Invalidation of Subordinate Legislation

That the Supreme Court of Tasmania have the power to invalidate subordinate legislation that is the subject of a declaration of incompatibility.

4.5 Role of courts and tribunals⁴⁸⁶

Remedies and relief

2007 Final report and subsequent developments

4.5.1 The 2007 TLRI Final Report recommended that a Tasmanian Charter allow any person who is, or would be, the victim of a breach of Charter rights by a public authority to bring proceedings against that authority in the Supreme Court, and that it allow the Supreme Court to make appropriate orders for remedy or relief, including damages.⁴⁸⁷

4.5.2 Currently, only the ACT allows a direct cause of action for breaches of human rights.⁴⁸⁸ Both Victoria and Queensland provide that relief or remedy is available for a breach of human rights, only if the claim ‘piggy-backs’ on an action arising under other legislation or at common law. The piggy-back requirements have been criticised as unnecessarily restrictive and ‘drafted in terms that are convoluted and extraordinarily difficult to follow’.⁴⁸⁹ The decision in *Thorpe v Transport Victoria*⁴⁹⁰ demonstrates how a significant human rights issue – whether authorising damage to a site of cultural significance to

⁴⁸⁶ For discussion of courts’ human rights obligations, see TLRI 2007 Final Report at [4.2.1] and [4.212]–[4.2.20] on public authorities.

⁴⁸⁷ TLRI 2007 Final Report, Recommendation 19.

⁴⁸⁸ *Human Rights Act 2004* (ACT) s 40C.

⁴⁸⁹ *Director of Housing v Sudi* (2011) 33 VR 559 per Weinberg JA at 596. See Chen, ‘The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria’ 10; Evans and Evans, ‘Legal Redress under the Victorian Charter of Human Rights and Responsibilities’ 281.

⁴⁹⁰ *Thorpe v Transport Victoria* [2001] VSC 750; 66 VR 56.

First Nations people breaches cultural rights – may not be resolved where the related non-human rights claim could not be sustained.⁴⁹¹

4.5.3 In the 2015 Victorian Review, it was recommended that the Charter be amended to enable a person to apply to the VCAT for a remedy or to rely on the Charter in any proceedings, with such a provision being modelled on the *Human Rights Act 2004* (ACT) s 38.⁴⁹² It was stated that the current ‘piggy-back’ model ‘leads to contortions in litigation just to get a Charter question before a court or Tribunal. ... It seems absurd to require people to make unsuccessful arguments on other grounds before they can raise Charter grounds. This situation also creates complex jurisdictional and procedural question’.⁴⁹³ It was also viewed as undermining the effectiveness of the Charter by creating ‘a flawed regulatory model that does not include an ability to enforce the standards that it sets’.⁴⁹⁴

4.5.4 One argument against creating a direct cause of action is the potential to increase civil litigation.⁴⁹⁵ The 2015 Victorian Review noted, however, that this was not likely to be the case (based on the ACT experience) and that it was the preferable approach because it ‘should ... reduce unnecessary litigation that occurs because the current remedies provision is obscure’.⁴⁹⁶ In addition, it is noted that, despite the direct claim provisions in the *Human Rights Act 2004* (ACT), there has not been a significant volume of cases relying on that Act. In 2020-2021, the ACT Human Rights Commission intervened in only two cases involving human rights issues.⁴⁹⁷

4.5.5 An additional matter raised in the Review Period is the need for accessible remedies. It is noted that that Qld Human Rights Act allows for dispute resolution by the Human Rights Commissioner.⁴⁹⁸ In February 2022, the ACT Parliament referred a petition calling for more accessible remedies under the ACT Human Rights Act to a Standing Committee for inquiry. The petition sought the following reforms:

- to enable complaints about any breach of the *Human Rights Act 2004* (ACT) to be made to the Human Rights Commission for confidential conciliation; and
- if conciliation is unsuccessful, to enable a complaint to be made to the ACT Civil and Administrative Tribunal for resolution.⁴⁹⁹

4.5.6 The Committee Report, released in June 2022, recommended, ‘[t]hat the ACT Government support and enact the terms of the petition to create a system that mirrors the current approach with respect to discrimination complaints’.⁵⁰⁰ At the time of writing, this reform has not been implemented.

TLRI's current views and recommendations

4.5.7 Having regard to the experience in other jurisdictions, the TLRI maintains its 2007 recommendation that a direct cause of action should be available for breaches of a human rights, rather

⁴⁹¹ The *Human Rights Act 2019* (Qld) s 59(2) clarifies that a human rights claim can succeed, even where the non-human rights claim does not.

⁴⁹² Brett Young, *From Commitment to Culture*, Recommendation 27.

⁴⁹³ Ibid 127.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ ACT Human Rights Commission, *Annual Report 2020-2021* 21.

⁴⁹⁸ See discussion at [4.6.13].

⁴⁹⁹ Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21. No Rights Without Remedy* (Report, 7 June 2022) 1 <https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2023764/JCS-Report-7-Report-into-the-Inquiry-into-Petition-32-21-No-Rights-Without-Remedy.pdf>

⁵⁰⁰ Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21. No Rights Without Remedy*.

than human rights claims having to rely on piggy-back provisions. This is consistent with Recommendation 19 of the TLRI 2007 Final Report (see Appendix A).

4.5.8 The TLRI is also of the view that cases should be able to be brought in either the Tasmanian Civil and Administrative Tribunal ('TasCAT') or the Supreme Court. This builds on Recommendation 19 of the 2007 Final Report, which referred only to actions in the Supreme Court of Tasmania. Direct applications to TasCAT are likely to be less time and cost restrictive than proceedings in the Supreme Court. This approach was supported in the 2015 Victorian Review, where VCAT was identified as the appropriate forum for claims under the Charter as a 'more accessible, and less costly forum compared to the Supreme Court'.⁵⁰¹ This option would be usefully supported by provisions for conciliation of complaints by a Tasmanian Human Rights Commission (see below at [4.6.13]–[4.6.16]). Implementation of this recommendation should be supported by statutory procedural provisions covering the relationship between different institutions, the Human Rights Commission, TasCAT, and the Courts, and also dealing with jurisdictional matters, such as where proceedings are to be commenced, and with rights of appeal. These provisions should be constructed in a way that ensures parties' accessibility. This recommendation reflects developments in the Review Period and builds on Recommendation 19 of the 2007 Final Report.

Recommendation 15 – Cause of Action for Breaches of Human Rights

That a direct cause of action be available to a person who is, or would be, the victim of unlawful action where a public authority has acted, or proposes to act, in a way that is made unlawful by the human rights enactment.

Proceedings against a public authority should be able to be brought in either the Tasmanian Civil and Administrative Tribunal ('TasCAT') or the Supreme Court of Tasmania.

Implementation of this recommendation should be supported by statutory procedural provisions covering the relationship between different institutions, the Human Rights Commission, TasCAT, and the Courts, and also dealing with jurisdictional matters, such as where proceedings are to be commenced, and with rights of appeal. These provisions should be constructed in a way that ensures parties' accessibility.

Damages (financial compensation)

2007 Final report and subsequent developments

4.5.9 The TLRI recommended in its 2007 Final Report that the Supreme Court be able to grant 'any remedy that is just and equitable in the circumstances' where a person has suffered damage as a result of a public authority breaching Charter rights.⁵⁰² In contrast, the Tasmanian Government's 2010 Directions Paper recommended that people not be able to seek damages.⁵⁰³ The latter position is consistent with the current approach in all three Australian jurisdictions with human rights enactments.⁵⁰⁴

4.5.10 While the 2015 Review of the Victorian legislation recognised that there were good arguments for making damages a remedy, it did not recommend that damages be available as a remedy for a breach of the Charter at that time. This was on the basis that the introduction of a direct cause of action was a significant step (along with other measures recommended by the review), so making damages a remedy 'should be considered only as an incremental step once the direct cause of action is established and

⁵⁰¹ Brett Young, *From Commitment to Culture* 128.

⁵⁰² TLRI 2007 Final Report, Recommendation 19.

⁵⁰³ Department of Justice (Tasmania), Directions Paper 45.

⁵⁰⁴ *Human Rights Act 2019* (Qld) s 59(3); Vic Human Rights Charter s 39(3); *Human Rights Act 2004* (ACT) s 40C(4).

there is experience of its operation'.⁵⁰⁵ It was noted that the remedies available should include having a decision set aside and a new decision made, the granting of an injunction, having evidence excluded from a trial (for example, if it was obtained in breach of the right to privacy), and having an order made to require a public authority to take positive steps to remedy the breach.⁵⁰⁶

TLRI's views and recommendations

4.5.11 In many cases, the appropriate remedy for human rights contraventions will be practical directions to reverse a decision, cease the conduct that is causing harm, or apologise to the victim. However, the TLRI is satisfied that there will be situations where breaches of human rights are sufficiently serious that damages may be the only way to compensate a victim fairly; accordingly, it adheres to its original recommendation that damages not be excluded from available remedies under a Tasmanian Charter.⁵⁰⁷

4.5.12 The TLRI remains of the view that the Supreme Court of Tasmania should be able to grant any remedy that is appropriate for breaches of human rights including damages. This should also be extended to TasCAT.

Recommendation 16 – Remedies

That the Supreme Court of Tasmania and Tasmanian Civil and Administrative Tribunal ('TasCAT') be able to grant any remedy or relief or make such order that is appropriate for breaches of human rights, including damages.

4.6 Establishment and Role of the Commission

Establishment

2007 Final report and subsequent developments

4.6.1 In the 2007 Final Report, the TLRI gave consideration to establishing an independent Office of a Human Rights Commissioner.⁵⁰⁸ The TLRI's view was that the role of the Human Rights Commissioner should be separate from the role of the Anti-Discrimination Commissioner and so a separate office should be created.

4.6.2 In other jurisdictions with human rights enactment, similar independent human rights bodies have been created with responsibility for reviewing legislation and statements of compatibility, inquiring into alleged breaches of human rights, conducting educational programs, reviewing the operation of human rights instruments, and advising on policy relating to human rights. As noted, a human rights commissioner has been valuable in shaping policy and legislation from pre-enactment human rights scrutiny of legislation, the informal role in pre-legislative human rights scrutiny of cabinet submissions and undertaking consultations, dialogue with the legislature by consulting on private members' Bills, and engaging in dialogue with the courts by intervening in proceedings.⁵⁰⁹

⁵⁰⁵ Brett Young, *From Commitment to Culture* 131.

⁵⁰⁶ *Ibid* 130.

⁵⁰⁷ TLRI 2007 Final Report, Recommendation 19.

⁵⁰⁸ See *ibid* [4.20.12]–[4.20.20].

⁵⁰⁹ See Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the Human Rights Act 2004 (ACT)'; Humphreys, Cleaver and Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' ch 7; see [4.6].

TLRI's current views

4.6.3 The TLRI remains of the view that an independent office of Tasmanian Human Rights Commissioner should be established under a Tasmanian human rights enactment.⁵¹⁰ Several benefits would accrue from the establishment of this office, including but not limited to:

- creating an easily identifiable entity to deal with human rights issues, both for members of the community and policy and law makers;
- recognising the complexity of human rights matters, that they often involve multiple rights problems, and that there are significant barriers facing people in activating and observing human rights;
- alleviating problems associated with not having an easily identifiable, accessible, and independent body to deal with human rights matters;
- creating a body with the necessary skills and expertise to promote the development of a human rights culture in Tasmania;
- establishing a skilled educational and advisory body on human rights;
- allowing the Human Rights Commissioner to act as a gatekeeper in relation to human rights complaints with power to filter out unmeritorious complaints.⁵¹¹

Consultation with Cabinet

TLRI 2007 Final report and subsequent developments

4.6.4 In the TLRI 2007 Final Report, Recommendation 22 proposed that the Human Rights Unit have responsibility for providing advice to Cabinet about human rights implications and compatibility of new legislation. Recommendation 23 set out the proposed powers and functions of the independent office of the Tasmanian Rights Commissioner but did not recommend an explicit role for the Human Rights Commissioner to provide advice directly to Cabinet.

4.6.5 Review of the arrangements in the ACT, which allow the Human Rights Commission to comment on draft submissions prepared by government directorates for consideration by Cabinet, has identified this process as providing an important opportunity for human rights issues to be flagged early in the development of laws and policies.⁵¹² The statutory functions of the Human Rights Commission mean that it makes a valuable contribution to the development of human rights dialogue with the Executive through the Cabinet submission and by providing human rights advice on legislative and policy proposals.⁵¹³

TLRI's current views and recommendations

4.6.6 Based on the experience in the ACT, the TLRI recommends that the functions and powers of a Tasmanian Human Rights Commission include advising government and Cabinet in the preparation of legislation, and that explicit arrangements be put in place to provide for early review of all laws identified as potentially affecting human rights. In developing the mechanism for the provision of this advice and comment, the experiences in the ACT can be used to develop a framework. This

⁵¹⁰ See TLRI 2007 Final Report, Recommendation 23.

⁵¹¹ In relation to the powers and role of the Anti-discrimination Commissioner, see *State of Tasmania v Anti-Discrimination Commissioner* [2022] TASSC 20.

⁵¹² Watchirs, Costello and Thilagaratnam, 'Human Rights Scrutiny under the Human Rights Act (ACT)' [6.200].

⁵¹³ *Ibid* [6.190].

recommendation is an expansion of the function of the Human Rights Commissioner to reflect the experience in the ACT and is consistent with Recommendation 19 of the TLRI 2007 Final Report (see Appendix A).

Recommendation 17 – Human Rights Commissioner

That an independent office of Tasmanian Human Rights Commissioner be established under a Tasmanian human rights enactment.

The functions and powers of a Tasmanian Human Rights Commissioner should include advising government and Cabinet on the preparation of legislation.

Further, explicit arrangements should be put in place to provide for early review of all laws identified as potentially affecting human rights.

Intervention

TLRI 2007 Final report and subsequent developments

4.6.7 In the 2007 Final Report, the TLRI recommended that the powers and functions of the office of the Tasmanian Human Rights Commissioner include the power to intervene as *amicus curiae* or be joined as a party in any proceedings (court or tribunal) involving interpretation of the Charter.⁵¹⁴

4.6.8 All three Australian jurisdictions with human rights enactments explicitly allow the Attorney-General and the Commission to intervene as of right in any court or tribunal proceeding that raises a question of law relating to their respective human rights legislation.⁵¹⁵ Parties to relevant proceedings in the Supreme Court are required to notify the Commission.⁵¹⁶

4.6.9 The 2015 Review of the Vic Human Rights Charter recognised the usefulness of interventions by the Attorney-General and Commission in superior court matters but noted that the requirement for lower courts to give notice was an administrative burden and a perceived barrier to parties raising Charter issues. The 2015 Review recommended that the requirement be removed for courts other than the Supreme Court.⁵¹⁷ Intervention by the Commissions in other jurisdictions has been useful in developing jurisprudence in relation to the Human Rights Act and in embedding a human rights culture across the government and judiciary. Intervention should be encouraged and facilitated in Tasmania.

TLRI's current views and recommendations

4.6.10 Balancing concerns raised in Victoria that notification obligations are perceived as a barrier to raising human rights issues in lower courts, the risk that opportunities to intervene may be lost, and the size of Tasmania's legal framework, the TLRI recommends that parties to Supreme Court proceedings be required to notify the Attorney-General and the Tasmanian Human Rights Commission, where the proceeding raises human rights issues. In proceedings held in the Magistrates Court or TasCAT, the magistrates or Tribunal members (as applicable) should also have discretion to require parties to notify the Attorney-General and the Tasmanian Human Rights Commission when matters raise human rights issues where intervention would be in the interests of justice.

⁵¹⁴ TLRI 2007 Final Report, Recommendation 23.

⁵¹⁵ Vic Human Rights Charter ss 34 and 40; *Human Rights Act 2004* (ACT) ss 35–36; *Human Rights Act 2019* (Qld) ss 50–51.

⁵¹⁶ *Ibid.* Notice is also required to be given of relevant proceedings in a Queensland District Court or Victorian County Court: *Human Rights Act 2019* (Qld) s 52.

⁵¹⁷ Brett Young, *From Commitment to Culture*, Recommendation 33.

4.6.11 The TLRI recommends that proceedings not be adjourned while notice is given, and that there be a rebuttable presumption that the costs of the intervention will be borne by the Commission. Given the benefits of intervention in developing precedents, clarifying interpretations of the law, and identifying areas for reform, the Tasmanian Human Rights Commission should be adequately resourced to intervene in any relevant matter. This recommendation builds on Recommendation 23 of the TLRI 2007 Final Report relating to the powers and functions of the Human Rights Commissioner (see Appendix A).

Recommendation 18 – Notification to Human Rights Commissioner

That parties to Supreme Court proceedings be required to notify the Attorney-General and the Tasmanian Human Rights Commission where proceedings raise human rights issues.

In proceedings held in the Magistrates Court or Tasmanian Civil and Administrative Tribunal ('TasCAT'), the magistrates or Tribunal members (as applicable) should also have discretion to require parties to notify the Attorney-General and the Tasmanian Human Rights Commission, when matters raise human rights issues where intervention would be in the interests of justice.

Proceedings should not be adjourned while notice is given, and there should be a rebuttable presumption that the costs of the intervention will be borne by the Commission.

The Commission should be adequately resourced to intervene in any relevant matter.

Dispute resolution

2007 Final report and subsequent developments

4.6.12 In the 2007 Final Report, the TLRI did not consider the issue of whether the Human Rights Commissioner should be given a dispute resolution function.

4.6.13 The Qld Human Rights Commission's dispute resolution process has been identified as a significant feature of Queensland's human rights framework and encourages both the early resolution of complaints and a stronger human rights culture within public authorities to avoid complaints being made. Even where conciliation is unsuccessful, the Commission can make recommendations to the authority for practice improvements to avoid future complaints.⁵¹⁸

4.6.14 The ACT Human Rights Commissioner has powers to resolve disputes in a range of areas, but no general dispute resolution powers.⁵¹⁹ The Commissioner has called the introduction of a human rights complaints mechanism 'the most pressing reform required for the HR Act'.⁵²⁰ This need for more accessible remedies was also identified by the Standing Committee on Justice and Community Safety.⁵²¹

4.6.15 This call is echoed in the 2015 Review of the Vic Human Rights Charter:

Drawing on the Ayers and Braithwaite model of the enforcement pyramid (a regulatory model), I found the Charter is missing key elements of an effective regulatory system. To address this issue, the Charter should be enhanced to enable the Victorian Equal Opportunity and Human Rights Commission to offer dispute resolution under the Charter. ... This enhancement would support the Commission's facilitative role in the compliance pyramid and provide a clear path for people to raise concerns with

⁵¹⁸ See, for example, Queensland Human Rights Commissioner, *Annual Report 2020-21* 153–155.

⁵¹⁹ See ACT Human Rights Commission, *Complaints* <<https://www.hrc.act.gov.au/complaints>>.

⁵²⁰ ACT Human Rights Commission, *Annual Report 2019-20* 12–13.

⁵²¹ See discussion at [2.2].

government if they feel their human rights are not being respected. Flexible alternative dispute resolution can be particularly effective in delivering access to justice when disputes arise between government and the community it serves.⁵²²

TLRI current views and recommendations

4.6.16 The TLRI's view is that a Tasmanian human rights enactment should provide for the Tasmanian Human Rights Commission to have a dispute resolution function for complaints regarding human rights contraventions. Further, once a cause of action is with the Supreme Court, the Court should have a discretion as to whether the dispute resolution is remitted to the Commission or whether it says under the auspices of the Supreme Court. Based on developments in the Review Period, this recommendation builds on Recommendation 23 of the TLRI 2007 Final Report relating to the powers and functions of the Human Rights Commissioner (see Appendix A).

Recommendation 19 – Dispute Resolution

That the Tasmanian human rights enactment provide for the Tasmanian Human Rights Commission to have a dispute resolution function for complaints regarding human rights contraventions.

Amalgamation with Equal Opportunity Tasmania

TLRI 2007 Final Report and subsequent developments

4.6.17 In its 2007 Final Report, the TLRI cautioned against amalgamating *the role* of Anti-Discrimination Commissioner and Human Rights Commissioner on the grounds that each of the Commissioners had 'fundamentally different yet necessary roles to play in relation to rights protection'.⁵²³ Though recommending a separate office of Human Rights Commissioner, the TLRI expressed support for the office of the Anti-Discrimination Commission (now Equal Opportunity Tasmania) and the office of the Human Rights Commission being 'carried under a single umbrella organisation'.⁵²⁴

TLRI's current views and recommendations

4.6.18 The TLRI's view remains that the role of the Anti-Discrimination Commissioner and the Human Rights Commissioner should not be amalgamated. A Tasmanian Human Rights Commissioner should be appointed independently of the Anti-Discrimination Commissioner. This recommendation is consistent with Recommendation 23 of the TLRI 2007 Final Report (see Appendix A).

4.6.19 Given the considerable overlap in jurisdictions, there are advantages in bringing both offices under one umbrella. Accordingly, the TLRI supports the proposal to bring the offices of a Tasmanian Human Rights Commission and Equal Opportunity Tasmania under one umbrella.

Recommendation 20 – Independent Office

That a Tasmanian Human Rights Commissioner be appointed independently of the Anti-Discrimination Commissioner.

⁵²² Brett Young, *From Commitment to Culture* 11 and Recommendation 23.

⁵²³ TLRI 2007 Final Report [4.20.18].

⁵²⁴ *Ibid* [4.20.19].

4.7 Implementation

TLRI 2007 Final Report and subsequent developments

4.7.1 In the 2007 Final report, it was recommended that the Charter be phased in over an 18-month period to enable adequate time for public authorities to undertake education programs with respect to their human rights obligations, and also to provide sufficient opportunity for the review and adjustment, if necessary, of existing practices (Recommendation 9).

4.7.2 The Tasmanian Government's 2010 Directions Paper recommended that implementation of the Tasmanian human rights enactment be 'phased in' over a four-year period to reduce the regulatory burden.⁵²⁵

TLRI's current view and recommendations

4.7.3 The TLRI acknowledges the need for a phase-in period and the requirement to allocate appropriate resources to support the implementation of the human rights enactment. In light of the proposal for a four-year phase-in, the TLRI has reconsidered its earlier recommendation of 18 months. Given the considerable experience in other jurisdictions which can be drawn upon, and the existing institutional structure of Equal Opportunity Tasmania, the TLRI's view is that implementation should be expedited over two years.

Recommendation 21 – Implementation

That a phase-in period be created as part of the operation of the Tasmanian human rights enactment.

The phase-in period should be over a two-year period.

⁵²⁵ Ibid 9.

Appendix A

TLRI 2007 Final Report: Recommendations

Recommendation 1 – Enhanced protection of human rights

The Tasmanian Law Reform Institute recommends that the law be reformed to provide and promote specific, better and accessible protection for human rights.

Recommendation 2 – A Tasmanian Charter of Human Rights

The Tasmanian Law Reform Institute recommends the enactment of a Tasmanian Charter of Human Rights.

Recommendation 3 – Form of Tasmanian Charter

- The Institute recommends that a Tasmanian Charter of Human Rights should be enacted as an ordinary statute.
- The Institute further recommends that prescribed reviews of the Charter should include an assessment of the success of this model and consideration of whether it should be replaced by an entrenched model or some other model.

Recommendation 4 – Whose rights should be protected?

- The Tasmanian Law Reform Institute recommends that human rights protections in a Tasmanian Charter of Human Rights should apply to all people in Tasmania regardless of their status as Tasmanian citizens and residents. It should also apply to people who are not in Tasmania but who are affected by Tasmanian laws or decisions of Tasmanian public authorities.
- The Tasmanian Charter should contain express provision to the effect that only human beings have human rights.
- The Tasmanian Law Reform Institute recommends that corporations as defined by the *Corporations Act 2001*⁵²⁶ be expressly excluded from any human rights protection measures in the Tasmanian Charter.

Recommendation 5 – Statement of whom the Charter binds

A Tasmanian Charter of Rights should specify whom it binds.

⁵²⁶ *Corporations Act 2001* (Cth) ss 9, 57A.

Recommendation 6 – Application to Parliament

- A Tasmanian Charter of Human Rights should not disturb the sovereignty of Parliament to enact laws that balance, limit or abrogate human rights.
- A Tasmanian Charter of Human Rights should, however, bind Parliament when scrutinising Bills in relation to the production of statements of compatibility and when deciding whether to enact legislation that overrides or encroaches upon human rights.
- A Tasmanian Charter of Human Rights should also bind Parliament when it is performing non-legislative functions.

Recommendation 7 – Application to public authorities

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights initially should bind only ‘public authorities’.
- The Institute further recommends that, in prescribed reviews of the Charter, the issue of who should be bound by the Charter should be revisited and consideration given to extending its application to private bodies and individuals. A narrowing of its application should not be an objective of such reviews.

Recommendation 8 – What is a ‘public authority’?

- The definition of ‘public authority’ should include tribunals, the courts, government departments, public officials, statutory authorities, government business enterprises, State owned companies, Tasmania Police, local government, Ministers, members of Parliamentary Committees when acting in an administrative capacity, anyone whom Parliament declares to be a public authority for the purposes of the Charter and an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).
- As a precautionary measure, the Institute suggests that the Charter should specify that if the extension of the Charter’s obligations to courts and tribunals is judged to be an invalid exercise of the Tasmanian Parliament’s legislative power, it is the intention of Parliament that the remainder of the Charter, including its application to other arms of Government, is to continue to operate.
- Statutory guidance should be provided as to when an entity is performing functions of a public nature. This guidance should be in the same terms as is provided by s 4(2) of the Victorian *Charter of Human Rights and Responsibilities 2006* but should additionally include a non-exhaustive list of functions considered to be of a public nature. This list should include: operation of detention/correctional facilities; provision of essential services, (gas, electricity, water); provision of emergency services; provision of government controlled health care or medical services; provision of government educational services; provision of public transport; and provision of public housing.
- Non-government schools and health services should not initially be included in the definition of ‘public authority’, but in reviews of the Charter consideration should be given to extending the definition of ‘public authority’ to include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit, including non-government schools and private health services.

- 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, it should contain explicit provision to the effect 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.
- If the immediately preceding recommendation is not enacted, courts should, nevertheless, be included within 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.

Recommendation 9 – Obligations of public authorities

- All ‘public authorities’ should be required to act in a way that is compatible with human rights and, when making decisions, to give proper consideration to relevant human rights unless otherwise required by particular legislation. The approach of the Victorian *Charter of Human Rights and Responsibilities 2006* in this regard could usefully be adopted in a Tasmanian Charter.
- In this context, ‘to act’ should be defined as including ‘failure to act’.
- The operation of the Charter should be phased in over an 18-month period to enable adequate time for educational programs to be undertaken by public authorities with respect to their human rights obligations and also to provide sufficient opportunity for the review, and adjustment if necessary, of existing practices.

Recommendation 10 – Role of Parliament

- Members of Parliament who propose to introduce new legislation should be required to provide reasoned statements of compatibility to Parliament concerning its compliance with human rights standards. These statements should address the following issues:
 - the purpose of the Bill;
 - the proposed legislation’s effect upon any human rights in the Charter;
 - any limitation placed upon any human right in the Charter by the Bill, the importance and purpose of this limitation, the nature and extent of this limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve that purpose.
- To encourage a whole of legislature approach to human rights protection, responsibility for the provision of statements of compatibility should rest with all Members of Parliament who introduce new legislation.
- Statements of compatibility should accompany all subordinate legislation tabled in Parliament.
- A Parliamentary Joint Standing Committee to be called the Parliamentary Human Rights Scrutiny Committee should be established and charged with responsibility for:
 1. Considering and reporting on the human rights compliance of all Bills and subordinate legislation and with responsibility for reporting on human rights issues raised by Bills generally.
 2. The Committee may also consider other questions arising under the Tasmanian Charter that are referred to it by either House of Parliament.

3. The Committee should be constituted across party lines and consist of members of both Houses of Parliament. No party should have dominant representation on the Committee.
 4. The Committee should also inquire into and report on courts' declarations of incompatibility within three months of the declaration being laid before Parliament.
 5. The Committee should be adequately resourced and supported so that it can effectively perform its functions under the Charter.
- Where courts have issued a declaration of incompatibility in respect of legislation the Minister administering the legislation, having been notified of the declaration by the Registrar of the Supreme Court, should:
 - within six sitting days of receiving the declaration present a copy of it to Parliament;
 - within seven days of receiving it refer the declaration to the Parliamentary Human Rights Scrutiny Committee;
 - within six months of receiving the declaration, present a written report to Parliament, responding to the declaration. This report should also be provided to the Parliamentary Human Rights Scrutiny Committee.
 - Parliament should respond to courts' declarations of incompatibility within seven months of their being tabled in Parliament by amending, repealing or explicitly confirming the legislation.
 - If Parliament does not amend, repeal or confirm the legislation within seven months after the tabling of a declaration of incompatibility, the legislation should, as at the date of the expiration of the seven-month period, be inoperative to the extent of its incompatibility with the Charter. The effect of this should be the same as a partial or, where relevant, total repeal of the legislation and its inoperability should not be retrospective.
 - Where Parliament wishes to confirm the legislation it should enact an override clause in the legislation.
 - Override clauses should be enacted only in response to courts' declarations of incompatibility. There should be no provision for Parliament to enact override legislation/clauses in other situations. Enactment of override clauses should be subject to other strict limitations:
 - Non-derogable rights should be excluded from their operation.
 - The power to enact override declarations should be confined to exceptional circumstances.
 - The Minister who administers the legislation should set down in a statement of incompatibility to Parliament the 'exceptional circumstances' that justify the enactment of the override clause.
 - Legislation containing an override clause should lapse after two years unless Parliament reconfirms its continued operation. All subsequent renewals of the legislation should operate for only 2 years.
 - Subsequent renewal of override legislation must be subject to the same limitations and procedures as the original enactment.

Recommendation 11 – Role of the courts

- Subject to the requirement to interpret statutory provisions consistently with their purpose, all Tasmanian courts and tribunals should be required to interpret all Tasmanian laws, including statutory provisions, as far as it is possible to do so in a way that is compatible with human rights.
- Provision should be included in a Tasmanian Charter for international human rights law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered by Tasmanian courts when interpreting human rights.

Recommendation 12 – Declarations of incompatibility

- Where the Tasmanian Supreme Court is satisfied that an Act or part of an Act cannot be interpreted in a way that complies with Charter rights, it should have the power to make a declaration of incompatibility in respect of that legislation.
- Only the Tasmanian Supreme Court should have power to make declarations of incompatibility.
- Where a question relating to the human rights compatibility of legislation arises in the Magistrates' Courts or in Tribunal proceedings, it should be referred as a question of law to the Supreme Court and the Magistrate or Tribunal should have the power to defer the final determination of the case until the Supreme Court has determined the issue.
- Where the Tasmanian Supreme Court finds that subordinate legislation is not compatible with Charter rights it should have the power to declare the subordinate legislation to be invalid and inoperative unless the applicable primary legislation expressly authorises the subordinate legislation to breach Charter rights. In such a case the Supreme Court should have the power to make a declaration of incompatibility in respect of it.
- Where a declaration of invalidity is made in respect of subordinate legislation its operation should cease, but not retrospectively, and it should no longer be enforceable.
- Where a declaration of incompatibility is made in respect of subordinate legislation the same processes involved in invoking a Government response to declarations about primary legislation should apply.
- The Supreme Court should not make a declaration of incompatibility in respect of primary or subordinate legislation or an order invalidating subordinate legislation unless satisfied that the Tasmanian Attorney General and the Tasmanian Human Rights Commissioner have been given notice that the Court is considering making such an order.
- Where a court makes a declaration of incompatibility or an order invalidating subordinate legislation the Registrar of the Supreme Court should provide a copy of the order to the Attorney General and to the Minister administering the legislation within seven days.
- In periodic reviews of the Charter the Tasmanian Government should assess the extent to which it has generated a genuinely responsive dialogue about human rights between the different arms of Government. If it is found that Parliament does not respond to what the courts say, then consideration should be given to enabling courts to invalidate legislation that does not comply with Charter rights.

Recommendation 13 – Role of the Executive

- The Tasmanian Law Reform Institute recognises the central role that the Executive arm of Government plays in the protection and enhancement of human rights. It also recognises the benefits of encouraging a whole of government approach to human rights protection. Accordingly, it recommends that the preparation of statements of compatibility should be undertaken by those government departments that will have responsibility for implementing and administering the new legislation and not by a single government department or unit within government. It also recommends that preparation of responses to courts' declarations of incompatibility should rest with those departments responsible for administering the legislation in question.
- The Tasmanian Law Reform Institute recommends that processes be developed to ensure that all policy formulation is undertaken in a manner that takes account of human rights. Accordingly, the Institute recommends that Human Rights Impact Statements be prepared in relation to all policy and legislation proposals and that these statements be provided to Cabinet to ensure that the Government is aware of the human rights implications of all new proposals.
- The Institute recommends that all government departments be encouraged to develop human rights action plans referenced against legislation, policy administration and service delivery. Preparation of these plans should be the responsibility of each individual department. The extent to which such plans have been developed and implemented should be considered in the periodic reviews of the Charter's operation. If it is clear after the second review of the Charter that no action has been taken in this regard, then consideration should be given to including the requirement for such plans in the Charter.
- All Tasmanian Government departments should include detailed advice in their annual reports about what they have done to comply with human rights under the Charter.

Recommendation 14 – Limitations on rights

- Subject to the principle that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law are non-derogable rights, the Tasmanian Charter should state that the rights it protects may be subject 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:
 - the nature of the right; and
 - the importance of the purpose of the limitation; and
 - the nature and extent of the limitation; and
 - the relationship between the limitation and its purpose; and
 - any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- The rights set out in the Tasmanian Charter should not be subject to inbuilt specific limitations, qualifications or caveats. In translating rights in International and other Australian human rights instruments to the Tasmanian context, any specific limitations they contain should be removed as set out at para [4.14.25].
- Freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and

the right to be recognised as a person before the law should be explicitly excluded from the operation of the Tasmanian Charter's reasonable limits clause and from Parliamentary override provisions.

- The immunity of freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law to legislative override or limitation should be entrenched in the Charter. Their limitation or override should only be able to be effected with the agreement of the Tasmanian people to be ascertained by referendum.
- The courts should have the power to invalidate legislation that is inconsistent with freedom from torture and cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, freedom from genocide, freedom from retrospective criminal punishment and the right to be recognised as a person before the law.

Recommendation 15 – What rights?

- The Tasmanian Law Reform Institute recommends that the Tasmanian Charter of Human Rights should protect economic, social and cultural rights as well as civil and political rights.
- If the Tasmanian Charter only covers civil and political rights, then the Tasmanian Law Reform Institute recommends that in prescribed reviews of the Charter further consideration should be given to the inclusion of economic, social and cultural rights.

Recommendation 16 – Specific rights

- The rights in the Tasmanian Charter of Human Rights should be modelled on *the International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* subject to the modifications recommended at paras [4.14.22]–[4.14.25] and [4.16.4]–[4.16.58] and in Recommendation 17.
- The specific rights that the Tasmanian Law Reform Institute recommends for inclusion in the Tasmanian Charter are:
 - The right to life;
 - The protection of the family and children;
 - The right to liberty and security of the person;
 - The right to humane treatment when detained;
 - The right to a fair hearing;
 - The right of children to special treatment in the criminal justice process;
 - The right to compensation for wrongful conviction;
 - The right not to be tried or punished for conduct that was not a criminal offence when it was engaged in (freedom from retrospective criminal punishment);
 - The right not to be imprisoned for a contractual debt;
 - The right to privacy and reputation;
 - Freedom of movement;
 - Freedom of conscience, thought, religion and belief;
 - Freedom of expression;

- Freedom of association and peaceful assembly and the right to form and join trade unions;
- The right to vote and to participate in public life;
- The right to self-determination;
- The right to recognition as a person before the law;
- The right to equality before the law and to equal protection of the law;
- Freedom from discrimination;
- The right of ethnic, religious and linguistic minorities to enjoy their own culture;
- The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land;
- The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment;
- Freedom from slavery and forced work;
- The right to work and just conditions of work;
- The right of children not to be exploited economically or socially;
- The right to adequate food, clothing and housing;
- The right to the highest attainable standard of physical and mental health;
- The right to education;
- The right not to be deprived of property except on just terms;
- The right to a safe environment and to the protection of the environment from pollution and ecological degradation;
- Freedom from genocide.

Rights whose protection constitutionally falls outside the jurisdiction of the State Government are:

- The right to social security;
- The right to marry;
- The right of foreign nationals not to be expelled from Australia without due process;
- The right to leave and re-enter Australia.

The Tasmanian Law Reform Institute recommends that these rights not be included in a Tasmanian Charter.

Recommendation 17 – Dealing with particular rights

The following rights should be dealt with in a Tasmanian Charter of Human Rights as follows:

- The provision enacting the right to life should specify that every person has the right to life and the right not to be deprived of life and that this right applies to a person from the time of birth.
- The provision relating to freedom from discrimination should conform to s 16 of the *Anti-Discrimination Act* (Tas) and specify as prohibited grounds of discrimination the matters listed in that section. A possible formulation is set out at para [4.16.14]. This provision should also state that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

- The right of children to special protection by reason of being children and to be free from economic and social exploitation should be enacted as specified in para [4.16.35]. The distinct rights of children in the criminal justice process as set out at para [4.16.35] should be included in the Tasmanian Charter.
- Property rights should be protected by a provision that states that every person has a right not to be deprived of his or her property except on fair and just terms. This right must be expressed in general terms to ensure that it covers deprivations of property by any means and also deprivations of all forms of property including realty, intellectual property and all other forms of personal property.
- The right to a fair hearing should be expressed broadly to encompass the rights of all participants in the process and should state that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court, tribunal or administrative decision-making body after a fair and public hearing.
- There should be provision that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty beyond reasonable doubt. The rights of an accused person in criminal trials should include the right to examine or have examined all the evidence against him or her and to adduce evidence on his or her own behalf. This right should not be limited to the examination of witnesses.
- The right to silence and the right not to incriminate oneself should be protected at the pre-trial as well as at the trial stages of the criminal justice process. A recommended formulation is set out at para [4.16.31].
- The right to self-determination modelled on clause 12 of the ACT Bill of Rights Consultation Committee's draft Human Rights Bill appended to the Committee's Report, *Towards an ACT Human Rights Act* should be enacted in the Tasmanian Charter.
- A provision protecting the cultural rights of Indigenous Tasmanians and other minority cultural groups modelled on s 19 of the Victorian Charter should be included in the Tasmanian Charter.
- The right to a clean and safe environment and to the protection of the environment from pollution and ecological degradation modelled on s 24 of the South African *Bill of Rights* should be enacted in the Tasmanian Charter.
- Other civil and political rights and economic, social and cultural rights listed in Recommendation 16 should be included and modified and adapted to the Tasmanian context as recommended at para [4.14.25].

Recommendation 18 – Responsibilities

- It is not necessary to include in a Tasmanian Charter separate provisions relating to responsibilities.
- It is not necessary to include the word 'responsibilities' in the proposed title of the Tasmanian Charter.
- The preamble of a Tasmanian Charter should set down the principles on which it is founded including the principle that human beings are the holders of rights and that they have the duty to promote and uphold the rights of all other human beings.

Recommendation 19 – Enforcement

- The Tasmanian Charter of Human Rights should contain express provision that where a public authority has acted in a way or proposes to act in a way that is made unlawful by the Charter, a person who is or would be the victim of that unlawful act may bring proceedings against the authority in the Supreme Court of Tasmania or may rely on the Charter rights in any legal proceedings.
- The Tasmanian Charter should state that the Supreme Court may grant such remedy or relief or make such order as it considers just and appropriate in the circumstances in relation to any act or proposed act of a public authority which it finds is or would be unlawful under the Tasmanian Charter.

Recommendation 20 – Review of the Charter

- The Tasmanian Law Reform Institute recommends that the operation of the Tasmanian Charter be comprehensively reviewed after four and eight years from the date of its commencement.
- The review should be conducted by an independent body such as the proposed Office of the Tasmanian Human Rights Commissioner and should involve public consultation.
- The review should assess the following matters:
 - Whether the model implemented, (for example, the ‘dialogue model’), is operating to protect human rights and whether it should be amended to enact a different model, (for example, an entrenched model), to strengthen the protection of human rights;
 - Whether additional rights should be included in the Charter;
 - Whether the Charter is fostering the development of a culture of human rights awareness across government and in the community;
 - Whether the different arms of government are implementing and applying the Charter effectively and whether changes need to be made to improve compliance with the Charter;
 - Where the enacted Charter differs from the recommendations made in this report, or where an incremental approach has been adopted in respect of rights protection, whether the full recommendations in this report should be introduced and/or what further steps should be taken to achieve the progressive realisation of rights protection;
 - If a ‘dialogue model’ is enacted, the extent to which the Parliament and executive respond to declarations made by the courts;
 - Whether the definition of ‘public authority’ should include private businesses and enterprises that receive public funding and that carry out functions that have a public benefit including non-government schools and private health services;
 - Whether the Charter should bind not only public authorities but all citizens and entities in the community.

Recommendation 21 – Education programs

The Tasmanian government should implement and support the following education programs:

- Those working for public authorities (government departments, the police, local government and any other body falling within the definition of ‘public authority’ under the Charter) should have access to human rights training and education;
- Judges, magistrates and members of tribunals should have access to human rights training and education programs;
- Members of Parliament and their staff should have access to human rights education programs and to programs relating specifically to the operation of the Charter within the legislative sphere;
- Members of the legal profession should have access to human rights education as part of the continuing education programs conducted within the profession;
- Education programs and strategies should be developed for the community, schools, businesses and community based organisations.

Recommendation 22 – Human rights unit

A Department of Justice Human Rights Unit should be created with responsibility for:

- Guiding public authorities in the implementation of the Charter;
- Conducting human rights training programs for public authorities;
- Assisting the design and implementation of protocols within public authorities to facilitate compliance with the Charter in their decision-making and conduct;
- Devising or revising documentation relevant to the provision of advice to Ministers, Parliament and Cabinet on the human rights implications of policy and other proposals;
- Provision of advice and assistance in the preparation of Statements of Compatibility to accompany new legislation;
- Provision of advice in the preparation of documentation for Cabinet relating to the human rights compatibility of proposed policy.

Recommendation 23 – Human Rights Commissioner

The independent office of Tasmanian Human Rights Commissioner should be established under the Tasmanian Charter of Human Rights. The Commissioner should have the following powers and functions:

- To provide education about human rights;
- To monitor human rights protection under the Charter and advise the government on the operation of the Charter;
- To promote public awareness and understanding of and compliance with the Charter;
- To intervene as amicus curiae or be joined as a party in any proceedings, (court or tribunal), involving interpretation of the Charter;
- To promote awareness and understanding of the Charter across all arms of government;

- To present an annual report to the Attorney General (which should then be tabled in Parliament) which examines the operation of the Charter, all declarations of incompatibility made by the courts and all override declarations made by Parliament;
- To assist the Attorney General in reviews of the Charter;
- To examine the effect of statutory provisions and the common law on human rights and report to the Attorney General on the results of that examination;
- To review the programs and practices of public authorities to determine their compatibility with human rights;
- To make submissions to the Parliamentary Human Rights Scrutiny Committee about the human rights implications of new Bills;

To undertake research that promotes the objectives of the Charter.

Appendix B

Rights protected in each jurisdiction with a human rights enactment

Rights	ACT	Vic	Qld	TLRI Recommendations
<i>International Covenant on Civil and Political Rights ('ICCPR') rights</i>				
The right to life	s 9	s 9	s 16	✓
The protection of the family and children	s 11	s 17	s 26	✓
The right to liberty and security	s 18	s 21	s 29	✓
The right to humane treatment when detained	s 19	s 22	s 30	✓
The right to a fair hearing	s 21	s 24	s 31	✓
The rights of children in the criminal justice process	s 20	s 23	s 33	✓
The right to compensation for wrongful conviction	ss 22-23	s 25 (not compensation)	s 32 (not compensation)	✓
Freedom from retrospective criminal punishment	s 25	s 27	s 35	✓
The right not to be punished more than once	s 24	s 26	s 34	✓
The right to privacy and reputation	s 12	s 13	s 25	✓
Freedom of movement	s 13	s 12	s 19	✓

Rights	ACT	Vic	Qld	TLRI Recommendations
Freedom of conscience, thought, religion and belief	s 14	s 14	s 20	✓
Freedom of expression	s 16	s 15	s 21	✓
Freedom of association and peaceful assembly	s 15	s 16	s 22	✓
The right to vote and to participate in public life	s 17	s 18	s 23	✓
The right to self-determination	x	x	x	✓
The right to recognition and equality before the law	s 8	s 8	s 15	✓
Freedom from discrimination	s 8	s 8	s 15	✓
Cultural rights – general	s 27	s 19	s 27	✓
Cultural rights – Aboriginal and Torres Strait Islander	s 27	s 19	s 28	✓ ‘The right of Indigenous Tasmanians to maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land’
The right not to be subject to torture or cruel, inhuman or degrading treatment or punishment	s 10	s 10	s 17	✓
Freedom from slavery and forced work	s 26	s 11	s 18	✓

Rights	ACT	Vic	Qld	TLRI Recommendations
The right not to be deprived of property except on just terms	x	s 20	s 24	✓
Freedom from genocide	x	x	x	✓
<i>International Covenant on Economic, Social and Cultural Rights ('ICESCR') rights</i>				
The right to the highest attainable standard of physical and mental health	x	x	Right to health services s 37	✓
The right to adequate food, clothing and housing	x	x	x	✓
The right to education	s 27A	x	s 36	✓
The right to work and just conditions of work	s 27B	x	x	✓
Right to form and join trade unions	s 27B	s 16	s 22	✓
The right of children not to be exploited economically or socially	x	x	x	✓
Other rights				
The right to a safe environment and protection of the environment from pollution and ecological degradation	x	x	x	✓

Appendix C

Organisations/individuals who provided advice to the TLRI during this Review

Name	Position	Organisation/Individuals	Privacy Preference
Dunn	Education Policy Officer	Tasmanian Council for Social Service ('TasCOSS')	Public
Griggs	Spokesperson	Tasmanian Human Rights Act Campaign Committee ('THRACC')	Public
Ventkataraman	Vice-President	Civil Liberties Australia Tasmanian Division	Public
Webb	MLC	Independent Member for Nelson	Public
Bartl	Acting Principal Solicitor	Tenants' Union Tasmania	Public
Bartl	Policy Officer	Community Legal Centres Tasmania	Public
Croome	President	Equality Tasmania	Public