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Submission to the

Tasmanian Law Reform Institute

*A Charter of Rights for Tasmania?*

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For further information about this submission please contact:

Rev. Dr. Chris Jones

Anglicare Tasmania  
GPO Box 1620  
HOBART TAS 7001

Phone: (03) 6231 9602

Fax: (03) 6231 9589

Email: [c.jones@anglicare-tas.org.au](mailto:c.jones@anglicare-tas.org.au)

## About Anglicare Tasmania

Anglicare Tasmania works for social justice through the provision of prevention and early, crisis, transitional and long term intervention services. In operation since 1983, Anglicare employs over 630 staff and is the largest state-wide community service organisation in Tasmania. It has offices in Hobart, Glenorchy, Moonah, Launceston, St Helens, Devonport and Burnie and provides a range of community services including emergency relief, accommodation, counselling, employment and mental health services, acquired injury support services, alcohol and other drug services, parenting support programmes and outreach services to rural areas.

## Our submission

Our submission is a response to the Tasmania Law Reform Institute's 2006 Issues Paper No 11, *A Charter of Rights for Tasmania?*. The Issues Paper poses a number of 'Key Questions' and Anglicare has similarly structured its submission as answers to these questions. We have not attempted to answer all the questions, as time did not permit the research and further consultation that this would have required. For ease of reference, we have referred to the original question numbers in brackets.

## A Charter of Human Rights for Tasmania? (Questions 1-4)

Anglicare supports greater protection for human rights in Tasmania. The idea that human rights attach to all human beings, and support the dignity of each person, resonates with our own belief that:

All human beings together share the dignity and the glory of being God's image on this earth. It is not restricted to particular races or cultural groups, to women or men only, or to those who are young, healthy, and well-fed. All human beings of all races and cultures, women and men together, those who are aged or disabled or suffering as well as those who are young and fit and happy – all of us in our personal individuality and all of us united as social beings are God's image and likeness in this world (Rodgers & Thomas 1992:6).

In considering whether human rights are currently protected adequately, Anglicare believes 'that we should judge societies, institutions, laws and policies not on whether they work for those who are already well but whether they work for the poor, the marginalised and the dispossessed', to quote Professor Larissa Behrendt giving the Dorothy Pearce Memorial Lecture in Hobart this year (Behrendt 2006:3). Tasmania has seen great progress but there is still much we can do to improve outcomes for our most disadvantaged. Adopting human rights standards is a means to assist us in that task, while promoting values that will benefit all Tasmanians.

Anglicare supports the adoption of a legislative Charter of Human Rights in Tasmania. While human rights in Tasmania receive a measure of protection through the operation of our democratic institutions and via the Commonwealth and Tasmanian Constitutions, legislation and the common law, these safeguards are piecemeal and therefore inadequate.

In Anglicare's view human rights in Tasmania would appropriately be protected in ordinary legislation, particularly as Tasmania's Constitution itself was enacted in this way.

**If a Charter of Human Rights were to be enacted in Tasmania, what rights should it include? (Question 5)**

**Economic, Social and Cultural Rights**

It is Anglicare's submission that protection should be given to economic, social and cultural rights as well as civil and political rights. This is based on the view that rights are universal, inter-dependent, inter-related and indivisible, which was accepted as the correct approach by the Vienna World Conference on Human Rights in 1993 (ACT Bill of Rights Committee 2003:95).

Anglicare agrees with the conclusion of the ACT Bill of Rights Consultative Committee that the distinction drawn between civil and political rights on one hand and economic, social and cultural rights on the other 'is in many ways an artificial one' and endorses their finding that,

if human rights are concerned with the conditions of worthwhile human life, rights to health, to housing and to education are as integral to human dignity as the right to vote (ACT Bill of Rights Consultative Committee 2003:95).

**Which of the rights in the International Covenants annexed to the Issues Paper are most relevant to Tasmania? Do they need to be adapted to the Tasmanian situation? Should any be excluded? Are there any other rights that should be included? (Question 6)**

Anglicare supports the inclusion in a Tasmanian Charter of Human Rights of the rights set out in the two major United Nations human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR), with any necessary modification of language and with reference to the scope of Tasmanian legislative power. In brief, this would include:

- The right to self-determination;

- The right to work and just conditions of work;
- The protection of the family;
- The right to adequate food, clothing and housing;
- The right to health;
- The right to education;
- The right to life;
- The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;
- The right to liberty and security of the person;
- The right to a fair trial;
- The right to privacy;
- The right to freedom of movement;
- The right to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of choice;
- The right to freedom of expression, peaceful assembly and association;
- The right to vote;
- The right to equality before the law and non-discrimination; and
- The right of ethnic, religious or linguistic minorities to enjoy their own culture.

**Should some rights be included first with other rights being considered for inclusion subsequently after review of the Charter? (Question 7)**

Anglicare is in favour of periodic review of any human rights legislation introduced (discussed further in this submission). These reviews would be a suitable time to consider whether it would benefit Tasmania for the rights contained in other human rights instruments (in addition to ICCPR and ICESCR) to be protected in Tasmania, for example the rights contained in the Convention on the Rights of the Child, or in emerging instruments such as the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

As Anglicare supports the inclusion of economic, social and cultural rights in a Charter of Human Rights, it also follows that we would like to see them reconsidered for inclusion in any subsequent review of the legislation, in the event they are initially excluded.

As discussed later in this submission, (see the section 'Human Rights Commissioner') Anglicare firmly supports the establishment of an office to advise the Tasmanian Government on human rights policy. We suggest that this office would play an important role supporting the periodic reviews by undertaking consultation, research and formulating recommendations. This could include the task of researching hitherto unrecognised human rights for possible inclusion in the Charter of Human Rights.

### **What role is there for responsibilities in the Charter? (Question 9)**

In Anglicare's view, the idea of responsibility is inherent in the notion of rights:

If human rights are the conditions necessary for people to live lives of dignity and value, there is a responsibility to support those conditions. The responsibility does not fall on government and public authorities alone and is shared by the (ACT) community. (ACT Bill of Rights Consultative Committee 2003:108).

It follows from this view that 'responsibilities' do not need to be specified in a Charter of Human Rights. However, it may be useful, as in the ACT, for the preamble to the human rights legislation to acknowledge the notion of responsibility as inherent in the concept of human rights.

### **If Tasmania were to enact a Charter of Human Rights, whose rights should it protect? (Question 10)**

Anglicare strongly believes that human rights are for the protection of humans rather than corporations, and therefore that any human rights legislation should apply to individuals rather than 'legal persons'. We note this approach is firmly established in the common law world and internationally, with Canada the well-known exception.

### **If Tasmania were to enact a Charter of Human Rights, should the rights it contains be limited in some way? (Questions 11-12)**

Yes. As is well recognised by international human rights law, human rights will regularly need to be qualified or limited to protect the rights of others or to advance the common good. The commonly cited example is freedom of speech which is of the utmost importance to protect in a democratic society, and yet limitations are justifiable for the protection of national security, public order, public health, morals, personal reputations and to disallow racial vilification.

To facilitate this balancing process Anglicare believes that a reasonable limiting clause should be included in a Tasmanian Charter of Human Rights as in the ACT,

Victorian, South African and Canadian legislation. Such a clause would justify only such limits as are 'prescribed by law and can be justified in a free and democratic society'. Adopting this phrasing would give Tasmania the benefit of relevant international case law interpreting the meaning and scope of this important clause.

### **What role should Parliament, the Executive and the Judiciary play in relation to a Charter of Rights? (Questions 13-18)**

Anglicare agrees with the Tasmanian Government that any human rights model developed for Tasmania should not negatively impact on the separation of powers, nor should it encroach on the sovereignty of Parliament. It is not advisable for the maintenance of either democracy or the rule of law to empower the courts to override legislation.

Tasmanian human rights legislation would ideally include the following features:

#### **Parliament:**

- A Parliamentary Committee (with membership from both Houses) with responsibility for scrutinising draft legislation for compliance with human rights standards.
- A provision, as in the Victorian *Charter of Human Rights and Responsibilities*, covering the situation where a Member of Parliament wishes to introduce legislation that encroaches on human rights standards. The MP would be required to explain why the legislation is reasonable and justifiable in a democratic society. Furthermore, the legislation would be subject to a 'sunset clause' so Parliament could re-visit the justification after a fixed period.

#### **Judiciary:**

- The Courts would interpret laws as far as possible in a manner that is consistent with the Charter of Rights.
- The Courts would be able to make non-binding declarations of inconsistency in relation to legislation. Such a declaration would initiate a 'dialogue' between the arms of government, as the relevant Minister would then furnish a report to Parliament in relation to the offending legislation, and Parliament would consider whether amendment was necessary and/or desirable.

#### **Executive:**

- The Executive arm would methodically review existing Tasmanian law and policy in order to identify any inconsistency with human rights legislation and report to the legislature annually on the results of the review.

- As discussed above, the Minister responsible for legislation that is the subject of a declaration of inconsistency would be required to furnish Parliament with a report responding to the declaration.
- **Auditing executive activity:** Anglicare strongly supports the establishment of an independent office to monitor and report on the implementation of any Charter (see the section below entitled 'Human Rights Commissioner'). As part of that role it would be very effective if the office were able to conduct audits of public authorities, in the way that, for example, the ACT human rights office has audited the ACT youth detention facility for human rights compliance.

**Should a special body be created with responsibility for reviewing legislation, advising the government on human rights policy and conducting education programs on human rights? Should such a body have any other functions? (Question 19)**

### **Human Rights Commissioner**

Anglicare would like to see the office of a Tasmanian Human Rights Commissioner created. A Human Rights Commission could conduct public education campaigns to build community awareness of human rights and also have a 'watchdog' role of monitoring and reporting. It is important to have a body with statutory independence to ensure the effective operation of human rights legislation.

The role of the Human Rights Commission would be:

- To promote understanding and acceptance of, and compliance with, Tasmanian human rights legislation;
- To undertake research and develop educational and other programs, for the purpose of promoting the objects of the Tasmanian human rights legislation;
- To report annually to the legislature about any matter relevant to the operation of Tasmania's human rights legislation, including the extent of compliance with the legislation (adapted from ACT Bill of Rights Consultative Committee 2003:84).

Anglicare is concerned that, without sufficient funding for a Tasmania Human Rights Commission or similar, human rights protection will be inadequate. The mere adoption of a human rights instrument will be hollow without a statutory office promoting understanding and compliance.

**If Tasmania were to enact a Charter of Rights should citizens be able to enforce their rights under the Charter directly in the Courts? Should the Charter contain**



**an express remedies clause? Should it confine the availability of compensation in any way? (Questions 20-21)**

Yes. Anglicare believes that there should be provision for individuals to enforce their rights in court in the event of a breach, and that the Charter should make express provision for remedies in the event of any breach. The majority of human rights instruments in other jurisdictions contain these provisions. We believe that including rights of action will be the most effective way to engage the community with protecting human rights standards. In our view, compensation should be available in certain cases, however we believe the correct balance would be struck here by adopting the United Kingdom provision of confining compensation to those cases where no other remedies are appropriate.

**If a Tasmanian Charter of Human Rights is enacted should it be reviewed at fixed intervals to see if any amendment is necessary? (Question 23)**

Yes. It would be sensible to plan to review any human rights legislation we introduce as its impact could be expected to be broad ranging. Living in a democracy, it is important that our three arms of government work in effective balance and we may wish to adjust this legislation to ensure an appropriate balance is maintained. Furthermore, the field of human rights is dynamic and therefore our legislation should be re-examined periodically.

Anglicare has no fixed view on the timing of periodic reviews, but suggests that planning reviews after 5 years and 10 years operation of the legislation seems reasonable.

**References**

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