

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

Tasmania Law Reform Institute's

Inquiry into

A Charter of Rights for Tasmania

EXECUTIVE SUMMARY	2
<i>important lessons to be learned from Canada</i>	<i>2</i>
<i>Parliament, the courts and the Canadian Charter.....</i>	<i>2</i>
<i>a Charter belongs in the Constitution.....</i>	<i>3</i>
5. WHAT RIGHTS SHOULD A CHARTER INCLUDE?	4
<i>civil right of access to information.....</i>	<i>4</i>
<i>civil right of just administration.....</i>	<i>5</i>
9. WHAT ROLE IS THERE FOR RESPONSIBILITIES IN THE CHARTER?	6
11. SHOULD CHARTER RIGHTS BE LIMITED?	7
13. SHOULD THERE BE A PARLIAMENTARY HUMAN RIGHTS COMMITTEE?	8
16 & 17. WHAT SHOULD BE THE ROLE OF THE COURTS IN PROTECTING HUMAN RIGHTS?	9
<i>summary.....</i>	<i>9</i>
<i>a dialogue between Parliament and the courts</i>	<i>9</i>
<i>Canadian dialogue model.....</i>	<i>9</i>
<i>UK dialogue model</i>	<i>11</i>
<i>why the Canadian model is more democratic</i>	<i>11</i>
<i>conclusion</i>	<i>12</i>
20. SHOULD CITIZENS BE ABLE TO ENFORCE THEIR RIGHTS?.....	13

4 December 2006

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Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') commends the Tasmanian government for inquiring into the benefits of a Charter of Rights for Tasmania. The federal Constitution, existing Tasmanian legislation and the common law offer only limited protection of rights.
2. CCL has chosen to address only some of the questions posed by the Inquiry in its Discussion Paper.¹ Specifically, this submission:
 - a) encourages Tasmania to enshrine the civil and political rights of the ICCPR and its Second Optional Protocol relating to the abolition of the death penalty;²
 - b) recommends that a Tasmanian Charter also guarantee the right to access information and the right to just administration;
 - c) recommends that a Tasmanian Charter institute a parliamentary committee to scrutinise draft legislation for compliance with human rights standards;
 - d) recommends that a Tasmanian Charter should provide individuals with an action to enforce their Charter rights.

important lessons to be learned from Canada

3. CCL's submission also encourages the Inquiry to examine closely the example of Canada. There are two important lessons to be drawn from the Canadian experience:
 - (i) Parliament *can* maintain its sovereignty if the courts have the power to strike down legislation that violates the Charter; and,
 - (ii) Parliament *can* maintain its sovereignty if a Charter is entrenched in the Constitution.

Parliament, the courts and the Canadian Charter

4. One of the great myths perpetuated in Bills of Rights literature is that granting courts the power to strike down legislation *invariably* undermines the sovereignty of Parliament. This is simply not true.
5. In Canada, judicial review of legislation is subject to Parliament's 'trump card' – the notwithstanding clause. The Canadian Parliament can assert its sovereignty over the courts by inserting into legislation a provision stating that the legislation is valid *notwithstanding* the fact that it violates the Canadian Charter of Rights and Freedoms. The courts cannot overturn legislation containing a notwithstanding clause.

¹ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania?* (August 2006).

² *International Covenant on Civil and Political Rights* [1980] ATS 23 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* [1991] ATS 19 (entered into force 11 July 1991).

6. Furthermore, the Canadians have developed a clever democratic check and balance: notwithstanding clauses are subject to a sunset clause. Parliament can use a notwithstanding clause to override the rights of the individual, but it must positively revisit the issue every five years. Parliament can choose to re-enact the notwithstanding clause, if it so desires. However, if Parliament chooses not to re-enact the notwithstanding clause, then the clause lapses and the rights of the individual are restored *by default*. This sunset clause ensures that laws infringing the rights and freedoms of citizens do not remain on the books forever in a free and democratic society.
7. Recognising the democratic credentials of this approach, the Victorian Charter's notwithstanding clause is also subject to a sunset clause.

a Charter belongs in the Constitution

8. Ideally, a Charter of Rights should be constitutionally-entrenched.
9. CCL notes the limitation in the Inquiry's terms of reference – the preservation of parliamentary sovereignty and the existing constitutional framework. However, CCL submits to the Inquiry that a constitutionally-entrenched Bill of Rights is *not* inconsistent with parliamentary sovereignty if it is drafted appropriately. Canada, which is a Westminster-style democracy, has a constitutionally entrenched Charter where Parliament maintains its sovereignty over the courts. The notwithstanding clause (mentioned above) achieves this goal.
10. CCL notes that, in Australia, the only comprehensive national survey on this topic has found that the vast majority of Australians want a Bill of Rights – and they want it constitutionally-entrenched.³
11. CCL notes the recent trend for statutory Bills of Rights. A statutory Charter is better than no Charter. If the Inquiry is concerned about a perception that a constitutional Charter will have adverse consequences, then it may be that enacting a statutory Charter first is an appropriate way to demonstrate that these fears are unfounded.
12. This is what happened in Canada. The Canadians had a statutory Bill of Rights for twenty years before they constitutionally entrenched the Charter. During that time the concept of a Charter of Rights received wide acceptance.

³ Research School of Social Sciences, Rights in Australia 1991-1992 (1992) <<http://assda.anu.edu.au/codebooks/ria92/title.html>>. See also: NSWCCCL, "A Bill of Rights for Australia", <http://www.nswccl.org.au/issues/bill_of_rights/australia.php>.

5. What rights should a Charter include?

13. With a few alterations, CCL commends the list of rights from the *Human Rights Act 2004* (ACT). The ACT *Human Rights Act* enshrines most of the fundamental human rights from the *International Covenant on Civil and Political Rights*. The rights are expressed in plain English.
14. CCL believes that human rights attach only to natural persons, not corporations. In the interests of clarity, CCL recommends that the Tasmanian Parliament replicate the following important provisions from the *Human Rights Act*:
 - a. the right to life only “applies to a person from the time of birth”;⁴ and
 - b. “only individuals have human rights”.⁵
15. CCL also recommends that a Tasmanian Charter enshrine an explicit guarantee that no one will be executed. This prohibition on capital punishment implements Australia’s international obligations under article 6(2) of the Second Optional Protocol.⁶ Specifically it respects the right to life and acknowledges the individual right not to be executed. It also reflects current Tasmanian law.⁷
16. CCL notes that contemporary Bills of Rights have recognised a range of rights that do not appear in the ICCPR. CCL brings two important civil and political rights to the attention of the Inquiry: the right of access to information; and the right of just administration. In each case, CCL encourages the Inquiry to adopt the South African approach.

civil right of access to information

17. The *Charter of Fundamental Rights of the European Union* (‘European Charter’) was proclaimed in December 2000.⁸ It recognises a right of access to government documents:

Article 42

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

18. The South African *Bill of Rights*, which came into force in 1997, also recognises this right, but in addition recognises a right to access information in the possession of *anyone* where that information is ‘required for the exercise or protection of any rights’. The right is also balanced by a recognition of public resource constraints:

⁴ *Human Rights Act 2004* (ACT) s 9(2).

⁵ *Human Rights Act 2004* (ACT) s 6.

⁶ *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* [1991] ATS 19 (entered into force 11 July 1991).

⁷ *Criminal Code Act 1968* (Tas) s.453.

⁸ see <http://www.europarl.eu.int/charter/default_en.htm>.

Article 32

1. Everyone has the right of access to-
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

 2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
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19. CCL submits that this right is already recognised in Tasmania in the form of the *Freedom of Information Act 1991* (Tas). This important civil right ensures that electors can engage in *informed* public debate, which is an essential prerequisite for the healthy functioning of a representative democracy. It also ensures that people have a right to view and correct personal information held by others.

civil right of just administration

20. Article 41 of the European Charter recognises a right to just administration. It is expressed in terms of the rights Australians expect from administrative law.
21. The South African *Bill of Rights* recognises this right to just administration in these terms:

Article 33

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

 2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
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22. CCL submits that this right is already recognised in the body of Australian administrative law. This important civil right protects everyone from the excesses of government. Its significance should be acknowledged by including it in any contemporary Charter of Rights.

9. What role is there for responsibilities in the Charter?

23. In a free and democratic society it is the duty of every citizen to respect the rights of others. A Tasmanian Charter could enshrine this duty, if it wished expressly to recognise responsibilities.
24. CCL notes Article 29 of the *Universal Declaration of Human Rights* and commends it as a template:

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
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11. should Charter rights be limited?

25. The rights and freedoms in any Tasmanian Charter of Rights should only be subject to such reasonable limits as 'can be demonstrably justified in a free and democratic society'.⁹
26. The formulation, a Canadian innovation, is the subject of considerable and impressive Canadian caselaw.¹⁰ The limitation clause has been adopted by many common law jurisdictions, including the ACT and Victoria.¹¹

⁹ *Canadian Charter of Rights and Freedoms* Article 1.

¹⁰ see *R v Oakes* [1986] 1 SCR 103; *Dagenais v CBC* [1994] 3 SCR 835; and, *Thomson Newspapers v Canada (AG)* [1998] 1 SCR 877.

¹¹ *Charter of Rights and Responsibilities Act 2006* (Vic) s.7(2); *Human Rights Act 2004* (ACT) s.28.

13. Should there be a Parliamentary Human Rights Committee?

27. A parliamentary committee with responsibility for scrutinising draft legislation for compliance with human rights standards is a good idea, but it must not be considered an *alternative* to a Charter of Rights. The two complement each other. The experience of New South Wales highlights this point.
28. The institution of a parliamentary legislative review committee responsible for determining whether a Bill complies with the Charter of Rights would help to reduce litigation. It does this by ensuring that non-complying legislation will be identified before it is enacted. It will also help to foster a human rights culture in policy makers and the bureaucracy.
29. This approach is preferable to requiring the Attorney-General or a parliamentarian to issue a certificate of compliance with the Charter, because the process is more transparent, consultative and democratic.
30. Every Bill should require a report from the committee *before* it can be introduced into Parliament. The committee should be required to consult with the community, at the very least by inviting written submissions. These simple rules are very important, if Tasmania is to avoid the disastrous experience of New South Wales.
31. In 2001, after abandoning the idea of a Bill of Rights for New South Wales, the Carr government declared that rights would be best protected by Parliament, overseen only by a parliamentary legislative review committee. In New South Wales the Legislation Review Committee scrutinises every Bill brought before Parliament and reports on whether the legislation 'trespasses unduly on personal rights and liberties'.¹² The experiment has been an abysmal failure. Not only is the community completely excluded from the process, because there is no provision for public submissions to the committee, but Parliament simply ignores adverse decisions of the committee (often without comment). The process is farcical when one considers that legislation can receive Royal Assent even before the committee has published its report on a Bill.¹³ Once a Bill is passed there is no way for a citizen to seek redress if the legislation breaches their fundamental rights, which is why judicial review of legislation is important. **Tasmania should not demean its democratic institutions by following the undemocratic example of New South Wales.**

¹² *Legislation Review Act 1987* (NSW) s 8A.

¹³ *Legislation Review Act 1987* (NSW) s 8A(2).

16 & 17. What should be the role of the courts in protecting human rights?

summary

32. One of the great myths perpetuated in the Bills of Rights debate is that granting courts the power to strike down legislation *invariably* undermines the sovereignty of Parliament. This is simply not true.
33. Judicial review of legislation, against the standard of a Charter of Rights, can coexist with parliamentary sovereignty. **Courts can be granted a power of review and Parliament can maintain its sovereignty by adopting the Canadian approach.**
34. Canada is a Westminster-style democracy, like Tasmania, and permits judicial review of legislation subject to Parliament's 'trump card' – the notwithstanding clause. The Canadian Parliament can assert its sovereignty over the court by inserting into legislation a provision that the legislation is valid *notwithstanding* the fact that it violates the Charter of Rights and Freedoms.

a dialogue between Parliament and the courts

35. When a court finds that legislation unjustifiably violates a right guaranteed by a Charter of Rights, then it is up to Parliament to respond as it sees fit. This 'dialogue' between the judicial and legislative arms of government is a feature of the Bills of Rights of Westminster-style democracies.
36. There are two main dialogue models. The first, oldest and most democratic is the Canadian model. The second model, known as 'the UK model', has been adopted by the British Parliament,¹⁴ the New Zealand courts,¹⁵ the Australian Capital Territory and Victoria.
37. Both dialogue models respect parliamentary sovereignty, but the Canadian model more successfully protects the individual. Despite the ACT and Victoria choosing the weaker UK model, a Tasmanian Charter should adopt the stronger, more democratic and egalitarian Canadian model.

Canadian dialogue model

38. The Canadian dialogue model has been working well for almost fifty years. It was introduced in the statutory *Canadian Bill of Rights* (1960) and entrenched in the 1982 Constitution as the *Charter of Rights and Freedoms*. The model permits the courts to invalidate legislation, but only if the court finds that the legislation violates the Charter *and* is demonstrably unjustifiable in a free and democratic society.

¹⁴ *Human Rights Act 1999* (UK).

¹⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

39. Nevertheless, Parliament holds the ultimate 'trump card'. Parliament can override a court decision to strike down legislation by inserting a 'notwithstanding clause' in the statute.¹⁶ This clause declares definitively that the legislation is valid, *notwithstanding* the fact that it violates the Charter. A court cannot override a notwithstanding clause.
40. The Canadian Charter has a further feature, which CCL commends to the Tasmanian Law Reform Institute. When a law explicitly overrides the Charter, it is subject to an automatic 5-year sunset clause. Again, this does not infringe the sovereignty of Parliament, because Parliament can re-enact the statute, including the 'notwithstanding' clause. The Charter forces the Parliament to make it clear that it is overriding individual rights.
41. This 'sunset clause' mechanism is important because it recognises that in a free and democratic society fundamental rights should only be curtailed by an explicit act of Parliament. It also acknowledges that such curtailments of fundamental rights and freedoms should be subject to regular review by Parliament, rather than remaining forever on the statute books. If it is no longer necessary to curtail a right or freedom, then Parliament simply lets the declaration lapse and does not need to expressly repeal the curtailing legislation.
42. Importantly, this approach has the benefit that laws which infringe on the rights of individuals do not remain on the statute books because of a disagreement between two Houses of Parliament, or because a government lacks the courage to remove them.

a short history of the Canadian model

43. As noted above, the Canadian model was introduced in the statutory *Canadian Bill of Rights* (1960).
44. Prior to the constitutional entrenchment of the *Charter* in 1982, the Canadian notwithstanding clause was only used once. The *Public Order (Temporary Measures) Act 1970* (Canada) was introduced in response to a violent uprising in Quebec in October 1970.¹⁷ The Act only remained in force for five months.¹⁸
45. The statutory *Canadian Bill of Rights* did not expressly override other statutes. However, in *R v Drybones*¹⁹ the Canadian Supreme Court ruled that the Bill of Rights did in fact override inconsistent federal Acts.²⁰ This was possible because of a provision in the Bill of Rights stating that all the laws of Canada should be construed by courts in a fashion that did not violate the rights and freedoms listed in the Bill of Rights, unless there was a notwithstanding clause in the legislation.²¹

¹⁶ *Canadian Bill of Rights Act* (1960) s.2.

¹⁷ see <<http://www2.marianopolis.edu/quebechistory/docs/october/regsnov.htm>>.

¹⁸ Tarnopolsky & Beaudoin, *Canadian Charter of Rights and Freedoms* (1982) 72.

¹⁹ [1970] SCR 282.

²⁰ Tarnopolsky & Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (1982) 5.

²¹ *Canadian Bill of Rights Act* (1960) s.2.

46. The pre-Charter *Canadian Bill of Rights* notwithstanding clause was not subject to any time limit. A law with a notwithstanding clause remained on the statute books indefinitely.
47. After working with the Bill of Rights for over two decades, the Canadians decided that there was room for improvement. The Bill of Rights was entrenched in the 1982 Constitution as the *Charter of Rights and Freedoms*. The sunset clause was included in the Charter.

UK dialogue model

48. In the weaker UK model, when a court finds that an Act violates human rights, the court issues a 'declaration of incompatibility'. The only legal response required is that the Attorney-General prepare for, and table a report in, Parliament.²² Parliament can choose to ignore the report and the original finding of the court.
49. It is also extremely important to understand that if a British court issues a declaration of incompatibility and Parliament chooses to do nothing about it, then an aggrieved citizen can take the matter to the European Court of Human Rights. A Tasmanian citizen has no such recourse. The most she or he can do is to take a complaint to the non-binding UN Human Rights Committee.²³
50. Most significantly, the UK model permits laws that violate the rights of unpopular minorities to remain on the statute books. This is because politicians will be loathe to restore rights to unpopular minorities by amending legislation that violates human rights.

why the Canadian model is more democratic

51. The Canadian model is more democratic because it forces Parliament to respond to a violation of human rights. When a court finds that legislation violates individual rights, Parliament can choose to do nothing, in which case the legislation ceases to be law. Alternatively, Parliament can choose to assert its sovereignty by inserting into the legislation a clause stating that the law is valid despite the fact that it violates fundamental rights. The crucial difference is that in the Canadian model, if the Parliament does nothing, the rights of individuals are restored.
52. One commentator explains the importance of this difference as follows:²⁴

In terms of the benefit of legislative inertia, the [Canadian] Charter favours the individual whose rights have been violated over the Parliament, whereas the [UK Human Rights Act] favours the Parliament over the individual. There are many reasons why, in the face of a

²² e.g. HRB s.53.

²³ under the *First Optional Protocol to the ICCPR* [1991] ATS 39 (entry into force 25 December 1991).

²⁴ Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-7.

judicial invalidation or declaration of incompatibility, the Parliament does not respond. There may be no clear mandate [...]; the legislative timetable may not allow; the Parliament may not want to create an election issue out of human rights; and more disturbingly, inertia may be motivated by a mean-spirited refusal to acknowledge the violation of the rights of the unpopular or a minority. Whatever the reason for inertia, a society committed to minimum human rights standards should prefer the individual to benefit from inertia, rather than the Parliament. The power imbalance between the individual and the Parliament alone dictates this. Moreover, preferring the individual does not threaten the underlying themes of the [UK Human Rights Act]. Preferring the individual shows a commitment to the respect of human rights without undermining parliamentary sovereignty, as [the notwithstanding clause] of the Charter ensures. In addition, preferring the individual does not compromise the dialogue model of rights protection, as is illustrated by the differently constituted dialogue model of the Charter.

53. Both dialogue models respect parliamentary sovereignty, but the Canadian model more successfully protects the individual. Despite the ACT and Victoria choosing the weaker UK model, a Tasmanian Charter should adopt the stronger, more democratic and egalitarian Canadian model.

conclusion

54. CCL is very disappointed by the level of debate in Australia about the Canadian dialogue model. Many commentators mistakenly believe that there is only one dialogue model: the UK model. Other commentators state that the UK dialogue model is the only model appropriate for Westminster-style democracies, ignoring the fact that Canada too is a Westminster-style democracy. Still other commentators dismiss the Canadian model as being inappropriate because it is constitutionally entrenched, seemingly oblivious to the fact that this model served Canada well for over two decades in the statutory *Canadian Bill of Rights* (1960).²⁵ So it is factually wrong to state that there is only one dialogue model, and to dismiss the Canadian model as inappropriate for a Charter of Rights or a Westminster-style democracy like Tasmania.

CCL strongly recommends the adoption of the Canadian model of permitting courts to invalidate legislation, while providing Parliament with the ultimate 'trump card' of a time-limited notwithstanding clause. This dialogue model respects parliamentary sovereignty, but importantly strikes a more egalitarian and democratic balance between the individual and Parliament.

²⁵ *Canadian Bill of Rights* (1960). In fact, this Act remains in force: <http://www.canlii.org/ca/sta/c-12.3/>.

20. Should citizens be able to enforce their rights?

55. CCL believes that citizens should be about to enforce their Charter rights against public authorities, against private organisations and against other individuals.
56. In 1973 the Attorney-General Lionel Murphy introduced into federal parliament the Human Rights Bill 1973 ('the Murphy Bill'). The Murphy Bill provided a cause of action that Tasmania should adopt. It addresses both public and private rights violations:

Section 40 (Civil Proceedings)

...

(2) A person aggrieved by an act that he considers to be a contravention of [the rights in this Act] may institute a proceeding against the person who did the act by way of a civil action in the Australian Industrial Court for a declaration that the act is a contravention of [a right in this Act] and for any one or more of the remedies specified in sub-section (3).

57. CCL encourages the Inquiry to adopt this approach. There is little point offering people a list of their rights, but not providing people with a mechanism to enforce those rights.
58. It should also be noted that there are many ways to enforce rights. If a person is not seeking damages, then mediation might be preferable to court action. The Charter could institute a Tasmanian Human Rights Commission which could offer such a mediation process.
59. CCL also encourages the Inquiry to recommend that any Tasmanian Human Rights Commission should have a right to intervene in court proceedings where there is a significant Charter implication. CCL also encourages the Inquiry to recommend that third parties should also be provided with intervention rights, subject to the leave of the court.