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Dear Dale

Proposed Charter of Human Rights for Tasmania

The Environmental Defenders Office (**EDO**) is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the proposed Charter of Human Rights and Responsibilities for Tasmania (the **Charter**).

We commend the Tasmanian government for its initiative in proposing what promises to be a substantial, progressive and effective model for the protection of human rights. We have largely confined our submission to issues which directly affect our service, including the proposed inclusion of a right to environmental sustainability, opportunities for community engagement, resources and issues relating to enforcement.

However, our views on many operational aspects of the proposed Charter are influenced by the reported experiences in the ACT and Victoria. We have spoken with the EDO offices in these jurisdictions and have read the submissions made by the Public Interest Advocacy Centre, Human Rights Law Resource Centre and Dr Hanna Jaireth and endorse many of their comments. In particular:

- The EDO agrees that the Charter should extend to all rights outlined in international treaties to which Australia is a party, particularly the ICCPR and ICESCR. We note the interrelationships between many of these rights, and believe that the "categories" approach adopted in the proposed Charter is unhelpful (**Consultation Points 1, 2 and 18**).

We support the view of the Tenants Union of Tasmania in relation to a right to an adequate standard of living. As outlined in greater detail below, we also strongly support the inclusion of rights in relation to environmental sustainability (**Consultation Points 19 and 20**).

- We support reference to responsibilities in the preamble to the Charter only, to set the context of the need to balance competing rights in the community. However, we do not believe that responsibilities should be explicitly outlined or expressed in a way that makes exercise of rights contingent on performance of any responsibilities. We would support removal of the term 'responsibilities' from the title of the Charter (**Consultation Point 3**).

We also recommend that any preamble include a reference to intergenerational equity, and the responsibility to ensure that future generations are equally able to exercise their rights.

- A general limitation clause similar to s.7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is appropriate (**Consultation Point 4**).
- We do not believe that it is necessary to allow parliament to override a declaration made by the Supreme Court that legislation is incompatible with the Charter. However, if a right to override is adopted in Tasmania, we believe that it should be subject to the strict limitations recommended by the Tasmanian Law Reform Institute.

We agree with Dr Jaireth that *all* parliamentary committees ought be required to report on human rights issues addressed by the Committee (rather than only legislative committees). This will assist with a whole-of-government adoption of a human rights framework for decision-making (**Consultation Points 5 and 6**).

We also agree with the recommendations made by the HRLRC that parliamentarians introducing bills should provide a comprehensive statement of compatibility, and responsible Ministers should be required to respond to a declaration of incompatibility within a specified time frame, either by amending the legislation or tabling a report indicating why amendments have not been made (see HRLRC submission at p7).

- The Charter should require Courts and Tribunals to take a purposive approach to interpretation of laws in a manner that is consistent with human rights. We would support a clear direction in the Charter that courts and tribunals may have regard to human rights jurisprudence in other Australian and international jurisdictions (**Consultation Points 7 and 8**).
- We support the establishment of an independent (and adequately resourced) Human Rights Commission with broad powers to investigate complaints, refer potentially incompatible legislation to the Supreme Court, inquire into public services and make recommendations in relation to improving the human rights objectives of government activities. We support PIAC's recommendation that public authorities should be required to respond to any findings or recommendations made by the Commission (**Consultation Point 14**).
- We believe that the Charter should adopt a broad definition of 'public authority', imposing obligations on all agencies and public officials, Ministers, police officers, councils, government owned corporations and organisations performing public functions (for example, contracted / funded to perform government work). The Charter legislation should also allow additional entities to be declared by regulation to be 'public authorities' and allow other organisations to elect to be subject to the Charter obligations (**Consultation Points 15 – 17**).

Our detailed comments in relation to issues within our practice areas are set out below.

Support for a Charter of Human Rights

The protection of human rights, and improving people's capacity to exercise those rights, is central to the work of all community legal centres. We strongly believe that adopting a Charter of Human Rights which articulates the range of rights that are valued in society will establish a better framework for public participation. Discussions regarding the appropriate balance to be struck between competing rights will inform public debate and lead to better outcomes. For example, if the *Pulp Mill Assessment Act 2007* had been debated in a human rights framework, the removal of rights of appeal may not have been so readily agreed to.

The EDO sees the principal benefits of the Charter as building a stronger culture of rights in Tasmania, leading to a better understanding of human rights issues throughout the public sector. This broader understanding will lead to a more holistic consideration of human rights across a range of public decision-making, including development of legislation and policies, service delivery, funding allocations and decisions regarding enforcement actions.

The entrenchment of a human rights framework within government will also necessarily have 'trickle-down' effects on the rest of society. For example, private sector proponents will be encouraged to develop their projects in a way that is most compatible with human rights in order to facilitate obtaining any necessary permits from government to carry out their activities (such as planning permits).

While a Charter of Human Rights should introduce a separate right of action where there is a breach of human rights, the most important objective of the Charter will be to ensure that human rights are routinely considered and violations are prevented from the outset. Anecdotally, the introduction of similar charters in Victoria and the ACT has already resulted in systemic improvements in government decision-making and program delivery.

For these reasons, a Charter will provide an invaluable advocacy tool for dealing with government agencies and encouraging the resolution of disputes before they arise. Such a framework will build on the exemplary work already being done in Tasmania in terms of community engagement and strategic collaborations, such as Tasmania Together and the NRM regional strategy consultations.

From an environmental perspective, a human rights context will add to the debate about the appropriate and strategic allocation and use of natural resources. The benefits of strategic sustainability assessments and early consultation with stakeholders have been demonstrated in a range of projects throughout Australia.

Is a Charter of Human Rights necessary?

While many of the human rights to be recognised in the Charter are currently protected (though not always adequately) in other pieces of legislation, we believe there is considerable benefit in articulating all human rights in one document to ensure that there is a clear basis for debate regarding how to best balance and protect those rights.

As discussed, the principal benefit of the proposed Charter will be ensuring that government decisions are made within a human rights framework, and associated cultural shift. This can be likened to the recent introduction of the *Right to Information Act 2009*, which is designed to set the framework for more open and transparent government and to bring about a cultural shift within public authorities in relation to the release of information.

Right to Environmental Sustainability (Consultation Points 19 - 21)

Should we have a right to environmental sustainability?

[There is] increasing recognition that environmental harms adversely affect various individual and community rights such as the right to life, health, water, food, work, culture, development and information and participation, and that a human rights-based approach to environmental protection (e.g right to a clean and healthy environment, right to water, right to nature protection, and other basic procedural and democratic rights) can provide an effective framework for addressing these issues.¹

There has been inaction on the issues of environmental rights at a national level for some time and we commend the Tasmanian government for taking a progressive stance by addressing this issue. As discussed below, we believe that the interdependence of 'traditional' human rights and sustainability and the level of international precedent provide sufficient justification to immediately recognise a right to environmental sustainability in the Charter.

We strongly support the inclusion in the Charter of all civil and political rights ('first generation rights') and economic, social and cultural rights ('second generation rights') recognised at international law. The EDO believes that a healthy environment is essential for the enjoyment of many of these first and second generation human rights, a view that is consistent with the growing understanding of 'sustainability' and the interdependence of natural resources and human activities. For example, a right to life or a right to health cannot be effectively maintained where the environment is heavily polluted and essential resources such as clean water are not readily available. Issues associated with climate change will also necessarily raise human rights issues, as the impacts of both rising sea levels and the costs of adaptation strategies will frequently be disproportionately borne by the most disadvantaged members of society.

For these reasons, the Australian Network of Environmental Defenders Offices has long advocated for the recognition of a right to a clean and healthy environment as a fundamental human right.² While the binding international treaties to which Australia is currently a party do not explicitly recognise such a right, the indivisible link between environmental and human rights has been recognised in a range of international documents, such as:

- Principles 1 and 2 of the *Declaration of the United Nations Conference on the Human Environment 1972* ('Stockholm Declaration') outline the need to safeguard natural resources for the benefit of present and future generations;
- Principle 1 of the *Declaration on Environment and Development 1992* ('Rio Declaration') provides that "humans are entitled to a healthy and productive life in harmony with nature"; and
- The *Draft Principles on Human Rights and the Environment 1994* includes the following:
 - **Article 1:** Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible

¹ Earthjustice. 2008. *Environmental Rights Report on human Rights and the Environment*. Available at www.earthjustice.org/our_work/issues/international/human_rights/. The statement above was made following a review of a range of judicial decisions, reports of commissions and parliamentary committees around the world.

² EDO NSW and EDO Vic. 2009. *Protection of Human Rights and Environmental Rights in Australia: Discussion Paper*. See also ANEDO submission to the National Human Rights Consultation in 2009, available at www.edo.org.au/policy/090615humanrights.pdf and EDO ACT submission, *The Case for Environment Related Human Rights* available at www.edo.org.au/edoact

- o **Article 2:** All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.
- o **Article 4:** All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.
- The *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters* ('Aarhus Convention') provides comprehensive protection of procedural environmental rights. This is a regional convention focused on the European Union, but is an excellent guide to the types of procedural rights that underpin a healthy environment.

Articulating a right to “environmental sustainability”

In Tasmania, the overarching objectives of the Resource Management and Planning System include:

- (a) *to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and*
- (b) *to provide for the fair, orderly and sustainable use and development of air, land and water; and*
- (c) *to encourage public involvement in resource management and planning.*

Many of the relevant resource management Acts, such as the *Land Use Planning and Approvals Act 1993* and the *Environmental Management and Pollution Control Act 1994*, explicitly require decision makers to have regard to, and to further, those objectives. We believe that including the right to environmental sustainability in the Charter will complement these objectives and provide a more comprehensive approach to protecting such a right for a number of reasons:

- Several significant resource management issues are **not** currently subject to the RMPS objectives. In particular, decisions in relation to forestry and mining activities are not required to have regard to those objectives, and there are very limited opportunities for public participation in relation to forestry matters.
- Options for taking action under the RMPS legislation are often limited. For example, offences in relation to environmental nuisance only relate to “emissions” and not to pollution generally and no civil enforcement options exist in relation to unlawful activities in national parks and reserves.

As outlined in the ANEDO submission, a right to a healthy environment has been formally recognised in over 60 countries, including South Africa, France, Finland and East Timor. For example, s.24 of the South African Constitution provides:

Everyone has the right:

- (a) *to an environment that is not harmful to their health or well being; and*
- (b) *to have the environment protected, for the benefit of present and future generations, through reasonable and other legislative measures that*
 - (i) *prevent pollution and degradation;*
 - (ii) *promote conservation; and*

(ii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This provision has been considered in a number of court cases, resulting in a useful series of judgments regarding the nature and scope of the obligation of environmental authorities when they make decisions that may have a detrimental impact on the environment and the extent to which socio-economic considerations must be taken into account (see, for example, *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga, and Others* [2007 \(2\) SA 163](#)).

We recommend adopting a right to sustainability in the Charter similar to that articulated in the South African constitution. The inclusion of such a right would:

- set a clearer framework for higher level strategic discussions and assessments, including reaching a balanced position in relation to resource management decisions such as water allocations and conversion of agricultural land;
- place the right alongside other rights and encourage broader consideration of all competing rights in relation to policies designed to address environmental issues. For example, climate change adaptation strategies will need to consider whether the costs will be disproportionately borne by low-income earners (e.g increased power bills). The need for everyone to achieve an adequate standard of living should also influence planning strategies and the design of public transport and infrastructure networks (e.g ensuring through appropriate zoning that residential areas will be protected from encroachment by polluting industries).

For example, arguments in relation to compensation to farmers for restrictions on land use or water entitlements should be had in the context of achieving a balance of rights – that is, balancing rural interests in the land with interests in adequate environmental flows and restrictions on the use of agricultural chemicals;

- influence departmental decisions in relation to enforcement actions;
- provide an excellent advocacy tool to encourage greater, and earlier, consultation with stakeholders in the design and siting of projects. Allowing stakeholders to be involved in the design, rather than restricting public involvement to making reactive submissions in respect of a proposed development, can improve development outcomes and significantly reduce litigation.

Access to environmental justice

A concomitant right associated with environmental sustainability is the right to public participation in resource management decisions. This is “encouraged” under the RMPS objectives, but is explicitly recognised by the ‘three pillars’ of the Aarhus Convention:

- access to information;
- participation in decision-making;
- access to justice in environmental matters.

Easy access to information in relation to environmental impacts, proposed development which may affect environmental values and the results of ongoing monitoring of environmental health is often critical to the public’s ability to participate effectively in environmental decision making.

The Aarhus Convention represents best practice in terms of public participation in environmental decision making, and the Tasmanian government should aim to provide equivalent levels of support for public participation. We would hope that including a

right to environmental sustainability in the Charter would necessarily require the government to consider what more can be done to protect the rights of public participation, including:

- ensuring easy access to planning documents, such as development applications and supporting materials;
- introducing third party rights of appeal in relation to all resource management issues (including forestry, mining and marine farming);
- adequately funding services that provide information and assistance to the public in relation to environmental issues;
- introducing protective costs orders for public interest environmental matters.

Enforcement of Rights (Consultation Points 10-12)

We are strongly of the view that the Charter should include a separate, stand-alone cause of action for violation of human rights, rather than requiring human rights issues to be coupled to another action.

The experience in other jurisdictions is that human rights issues, including breaches of Charter rights, are generally raised along side other causes of action. However, there are situations where no other cause of action exists. A stand-alone cause of action is therefore necessary to ensure that this gap does not lead to human rights being breached without remedy. For example, there are currently extremely limited options to challenge forestry decisions in Tasmania, however there may be a situation where certification of a forest practices plan in a high value conservation area would potentially involve a breach of human rights.

We also believe that the full range of remedies should be available in actions relating to breach of human rights, including damages.

We note that a right to take action is largely meaningless if the costs of taking such an action remain prohibitive. We agree with comments made by PIAC and others that mechanisms should be implemented to secure adequate access to justice in relation to human rights. This could include:

- providing individuals involved in proceedings in a lower court or tribunal where a matter of law is referred to the Supreme Court to determine compatibility with the Charter will not bear the costs associated with the Supreme Court referral;
- introducing protective costs order provisions in relation to public interest human rights litigation;
- adequately funding services such as community legal centres and support agencies involved in human rights issues;
- empowering the Human Rights Commission to investigate services, programs and individual complaints in relation to systemic human rights issues.

Community Engagement

It will be critically important to the protection of human rights that there is adequate understanding of the role of the Charter. In this regard, we strongly support the initiatives outlined in the Directions Paper and recommend that the Charter and all explanatory material be drafted in plain language.

We would also strongly recommend that adequate funding be allocated to provide community engagement, awareness and capacity-building initiatives, ongoing monitoring and support services for agencies making significant changes in response to the Charter. We support the suggestion made by PIAC that a government taskforce be created with responsibility for the whole-of-government integration of the Charter.

The Human Rights Commission should be authorised to conduct community consultation and audits of service / program delivery to determine consistency with the Charter, and should be required to report its findings publicly. Government agencies should be required to respond to all findings.

With transparent government and more effective community engagement, the Charter provides an unprecedented opportunity for securing lasting and systemic cultural changes in Tasmania.

Funding and Resources

The Charter of Human Rights will build on a range of existing programmes in Tasmania which already deal with human rights. However, it is an unavoidable consequence of the introduction of a new human rights framework that there will be significant costs. It is imperative that the Tasmanian government support the Charter by allocating adequate funding to ensure its effective implementation. This includes:

- funding a government taskforce to be responsible for implementation of the Charter, including the development of explanatory resources and community consultation;
- funding services which are likely to have increased demands in meeting Charter obligations (including public authorities, courts and non-government organisations);
- establishing funds to support public interest litigation under the Charter;
- supporting organisations (including resource management and development bodies) who engage in greater community consultation in order to improve their compliance with human rights obligations;
- funding for all existing legislation and policies to be reviewed for compatibility with the Charter within a reasonable period of time.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc

Per:



Jess Feehely
Principal Lawyer

The EDO gratefully acknowledges the assistance of Emma Davis, Caitlin Perkins, Zoe Lippis and Amanda Haigh in preparing this submission.