30 June 2011

Mr Edward O’Donohue MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
MELBOURNE VIC 3002

Via email charter.review@parliament.vic.gov.au

Dear Mr O’Donohue,

INQUIRY AND REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)

The Law Council of Australia is pleased to make this short submission to the inquiry and review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Victorian Charter) by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee.

The protection and promotion of human rights within Australia and the maintenance of the rule of law both at home and abroad is a major strategic priority for the Law Council, which is the peak national representative body of legal practitioners in Australia.

Since 2008, the Law Council has had a Policy Statement in favour of a federal Charter of Human Rights as the most comprehensive means of protecting and promoting human rights at the federal level.¹ This Policy was in part informed by the experience of Australian jurisdictions that already have such legislative models in place, such as the Australian Capital Territory and Victoria, and the federal Charter the Law Council supports has many features in common with the Victorian Charter as currently enacted.

In line with this Policy Statement, the Law Council considers the Victorian Charter to be a critical component of Victoria’s legislative framework to protect and promote human rights and strongly supports the detailed written submissions prepared for this inquiry by the Law Institute of Victoria (LIV) and the Victorian Bar Association (Victorian Bar), two of the Law Council’s Constituent Bodies.

The Law Council is of the view that both the LIV and the Victorian Bar are particularly well placed to comment on the first four years of the Victorian Charter’s operation.

The LIV’s membership includes legal practitioners with direct experience with interacting with the provisions of the Victorian Charter, as well as those with particular expertise in administrative review, constitutional law and general human rights issues, as well as experience specific to Indigenous, refugee, migration, health, disability and discrimination law.

The LIV has also been actively engaged in the development, implementation and monitoring of the Victorian Charter, for example by providing written submissions to Parliament, and more recently by undertaking a research project on the impact of the Victorian Charter on legal practice. The Law Council understands that the outcome of this research, including a survey of the LIV membership, will be available by August 2011. The Law Council commends the LIV's detailed written submission to this inquiry, noting in particular the extensive review of relevant case law that is included to provide the Committee with an overview of the level of judicial engagement with the Victorian Charter, as well as an insight into how the legal profession has interacted with this important piece of legislation over the previous four years.

The Law Council also commends the written submission prepared by the Victorian Bar, which has members with extensive experience engaging with the provisions of the Victorian Charter from a range of perspectives. As is reflected in the Victorian Bar's detailed written submission, the members of the Bar have a particular insight into terms of reference 4 and 5, which relate directly to past and future litigation under the Victorian Charter and the roles of courts and tribunals. The Law Council considers the case summaries included in the Victorian Bar's submission to be particularly useful to gaining an insight into this aspect of the Charter's operation and impact. The Victorian Bar's submission also outlines the practical experience of the Victorian Charter as it has affected behaviour of public authorities outside of the context of litigation.

In addition to these general comments, the Law Council also particularly supports the following observations made in the two submissions:

- The Victorian Charter has fostered a greater awareness of human rights within public bodies and the general community and has facilitated the making of laws and decisions that are more sensitive and responsive to human rights concerns. The Victorian Charter has also led to improvements in the delivery, transparency and accessibility of public services and has enhanced the accountability of the government and public service providers.

- On the basis of publicly available information, it can be concluded that the Victorian Charter has had a significant impact on the development and drafting of statutory provisions. For example, the requirement to introduce Bills with statements of human rights compatibility has led to a steady increase in the number of Bills being identified as having an effect on human rights, suggesting an increased awareness and understanding of human rights impacts within government. Detailed reports prepared by this Committee on a large number of the bills deemed by statements of compatibility to engage human rights has also contributed to a greater level of human rights awareness within Parliament and for those engaged in drafting statutory provisions.

- From reports collated by VEOHRC and others, it can also be concluded that the Victorian Charter has had a positive impact on the provision of services by public authorities, with many documented examples including improved access to disability assistance for families with children with autism and the inclusion of human rights in

planning by local government. Like the LIV and the Victorian Bar, the Law Council considers the obligation for public authorities to comply with the Victorian Charter when making decisions to be one of the most successful and important features of the Charter. It also positively encourages a dialogue between public authorities and individuals, which in turn may result in the resolution of potential disputes and the avoidance of litigation.

- Although the LIV estimates that there have been around 180 matters in which the Victorian Charter has been raised in the four years since its introduction, the number of instances where the outcome of the case has turned on the Charter have been relatively small, suggesting that the introduction of the Victorian Charter has not led to a 'flood' of litigation as some commentators had feared. As noted by the Victorian Bar, those on whose behalf the Victorian Charter has been raised include the most vulnerable members of the community, such as those at risk of homelessness; mental health patients; and criminal accused. The Bar further notes that consideration of Victorian Charter issues has been supported in large measure by the assistance of pro bono counsel.

- Experience to date suggests that the courts have assumed a conventional judicial role when engaging with the Victorian Charter and have not, as some critics feared, sought to threaten or undermine the law making role of Parliament. The LIV and Victorian Bar’s submissions outline a number of case examples of the courts applying conventional judicial methods to interpret and apply the Victorian Charter, noting for example, that the courts have consistently recognised the Charter as affirming existing fundamental common law concepts and have been strongly governed by the particular facts and terms of the statutory provisions under consideration.

- Although jurisprudence is still developing in relation to a number of key provisions under the Charter, including the interpretive provision in section 32 and the obligations on public authorities in section 38, this type of incremental interpretation of such a significant piece of legislation is to be expected and offers opportunities to further clarify the legal impact of these provisions in the future.

The Law Council also supports a number of the recommendations made in the LIV and Victorian Bar submissions to enhance the future operation of the Victorian Charter, such as:

- giving consideration to expanding the rights and responsibilities protected in the Victorian Charter to include economic, social and cultural rights. Not only would this ensure that the Victorian Charter more comprehensively reflects Australia’s international human rights obligations, but it would also provide protection for rights such as the rights to education, housing and health that are highly valued by the Australian community but are currently not subject to comprehensive legislative protection;

- giving consideration to ensuring any limitations on rights prescribed under the Charter (such as the general limitation clause in section 7(2)) are consistent with international law. Under international law, certain rights – such as the right to life, freedom from torture and freedom from slavery - are non-derogable and may not be subject to limitation or restriction. Other rights – such as freedom of movement and

freedom of expression – can be subject to limitation under international law and thus should remain subject to some limitation or restriction under the Victorian Charter;

- providing entities, including private entities, with the option of assuming the obligations under the Victorian Charter, such as the option provided for in section 40D of the ACT Human Rights Act;

- ensuring that statements of compatibility are sufficiently detailed and focus on the key human rights issue, for example by providing further guidance in regulations or other guidance instruments on matters to be addressed;

- promoting further training and education of public authorities in relation to the Charter, to continue to: promote a greater understanding of the human rights of individuals with whom public authorities engage and interact; encourage better decision making processes; and prevent public authorities from successful challenges under the Charter in the future;

- encouraging the courts and tribunals to develop a process whereby cases in which Victorian Charter issues are raised or addressed are notified to a central register and, unless restricted, are reported or otherwise made available to the public, so that such cases can be readily identified;

- ensuring that VEOHRC has adequate resources to fulfil its functions under section 41 of the Victorian Charter, particularly its function to provide education about human rights and the Charter; and

- giving consideration to funding mechanisms to ensure that access to pro bono counsel is not the primary way in which people are represented in litigation where there is a serious Victorian Charter issue to be heard and determined. The Victorian Bar’s submission outlines in detail a number of issues relevant to resource allocation in relation to Charter litigation, on the basis of feedback received directly from its members. The Law Council shares the Bar’s view that while lawyers offering their services on a pro bono basis are likely to continue to play a significant role in Charter litigation, the provision of such services should not be relied upon in order to ensure all Victorians have access to appropriate legal advice regarding Charter issues.

Like the LIV and the Victorian Bar, the Law Council supports the continued and strengthened operation of the Victorian Charter as a vital measure to better protect and promote human rights in Victoria. While the Victorian Charter could never aim to provide a solution to every human rights concern, it does provide an important framework for encouraging a culture of human rights understanding and compliance, both within the three branches of government and the general community. It also serves as an important model to be considered by other Australian jurisdictions when developing and implementing their own legislative frameworks to improve human rights protection.

The Law Council again commends the submissions of the LIV and the Victorian Bar to this Committee for its careful consideration.

Yours sincerely,

[Signature]

Alexander Ward