28 June 2011

Mr Edward O’Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House,
Spring Street, Melbourne 3000

Dear Mr O’Donohue, MLC

Please find below a submission of The ALSO Foundation regarding the review of the Charter of Human Rights and Responsibilities Act 2006.

About the ALSO Foundation

Established in 1980, the ALSO Foundation works to enhance the lives of Victoria's diverse gay, lesbian, bisexual, transgender, intersex and queer (GLBTIQ) communities. The Foundation’s vision is the creation and celebration of a diverse, strong, safe and inclusive GLBTIQ community that contributes to and is respected by broader communities.

We aim to realise this vision and improve the lives of GLBTIQ people by celebrating and acknowledging our communities’ strengths and those of our supporters; advocating to secure equitable access to rights, entitlements and services; leading through building relationships and partnerships within and beyond our community; and investing in growing and developing individuals and groups within our diverse community.

As a peak body that advocates for the rights of GLBTIQ people in Victoria, the ALSO Foundation is in a unique position to offer a GLBTIQ perspective to this consultation regarding the possible inclusion of protections against discrimination and vilification on the basis of sexual orientation and sex and/or gender identity in the Victorian Charter.

Background to Submission

The ALSO Foundation believes that the Victorian Charter of Human Rights and Responsibilities 2006 reflects the values of the broader Victorian community, and are in line with international and interstate laws and conventions that represent fair and appropriate treatment of its citizens. There are, however, aspects of the Charter are either unclear or do not cover some situations that affect the lives of gay, lesbian, bisexual, transgender, intersex or queer (GLBTIQ) Victorians.

Definitions in the Charter

Objects
Self-determination is a guiding principle of the Charter. This is currently not adequately defined or addressed, or part of the Objects of the Charter, for women or people with disabilities.
Attributes:
The Equal Opportunity Act 1995 lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

Gender identity, though covered in the Gender Identity and Sexual Orientation Act 2000, is not referred to in the Definitions of the Charter. The ALSO Foundation believes it should be. It is vital that any new legislation provides protection from discrimination across the full spectrum of gender possibilities, without reverting to labels of a particular kind, and should apply to those known to have, or are assumed to have a particular gender identity or intersex status.

Likewise, we believe that sexuality is a preferred term than ‘sexual orientation’ as it covers sexuality, sexual preference and sexual orientation. Sexuality is also the term used in anti-discrimination legislation in Queensland, South Australia, the Australian Capital Territory and the Northern Territory to prohibit discrimination on the basis of a person’s sexual orientation. The ALSO Foundation suggests that any definition of this term should not be restricted to gay, lesbian and bisexual orientations but rather, it should seek to encompass all kinds of (lawful) sexualities and the ways in which they are experienced and expressed – including for example, heterosexuality, polyamory, etc.

Victorian:
The Charter does not define a Victorian person, and is silent on whether a Victorian might include the overseas partner of a Victorian person, or a visitor for a short period of time. Do the Charter’s protection apply to all those lawfully in Victoria for any period of time?

Public Authority:
Many agencies, both religious and secular, are funded through the State Government to enact services on their behalf. These include charities and community organisations. The Charter currently provides religious exemptions, further expanded through recent State legislation, but the delivery of these services are often left to the discretion of the agencies. It has been shown through the recent Way Out v. Christian Brethren Youth Camps case, that the religious group in question applied its religious dogma when it came to refusing the use of the camp by a group of same sex attracted and gender questioning youth (religious objection to homosexuality and transsexualism), but had never been stringent in applying this dogma to others in the community who broke the tenets of their faith (unmarried sexually active people, etc), and had in fact mostly acted in accordance with commercial interests rather than ‘moral’ or religious ones. The fear that religious exemptions will allow discrimination on a selective basis needs to be addressed within the Charter. No agency should be funded by the Government unless it conforms to the tenets of the Charter and should be expected to apply its exemptions with consistency.

Regarding UN Convention on The Rights of the Child
Under Section 17 of the Charter of Human Rights and Responsibility it states:

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

However, ‘family’ is not defined in the Charter, and has in Victorian law precluded some instances of same sex and gender diverse relationships, including on such issues as adoption and surrogacy. Not all families are biological or sexual in formation; they can include long term interdependent relationships that form ‘family’ over time. ‘Family’ could more realistically be defined to mean ‘perpetual relationships’, so that same-sex and gender diverse couples are afforded the same rights and responsibilities as other families.

The UN Convention on the Rights of the Child stipulates that “the best interests of the child shall be a primary consideration”. Currently adopted children of gay, lesbian, bisexual and transgender parents suffer discrimination due to both partners being unable to adopt their children. Similarly, surrogacy laws in Victoria force a situation of permanent guardianship rather than
acknowledgement of parenthood, thereby discriminating against the children of these relationships.

The United Nations Human Rights Committee has been very clear that the principle of non-discrimination and equality before the law protects GLBTIQ people under international law.\(^1\)\(^2\) The ALSO Foundation further draws the Commission’s attention to the UN General Assembly Declaration on Sexual Orientation and Gender Identity,\(^3\) which Australia signed in December 2008. This obviously should apply and be extended to the children of sexuality, sex and gender diverse people.

In signing this Declaration, Australia expressed its deep concern regarding violations of human rights and fundamental freedoms based on sexual orientation and gender identity; committed to promoting and protecting the human rights of all persons, regardless of sexual orientation and gender identity.

Furthermore, the Charter does not specifically refer to other children’s rights including the right to health, the right to social security, the right to an adequate standard of living, the right to education, and the right to rest and leisure, as set out in the Convention on the Rights of the Child (CROC), although these are implied in other statutes. Nor does the Charter state how the principle of ‘best interests’ should be applied. Determination of best interests requires considering the child’s perspective and is usually determined on a case-by-case basis, requiring effort to ensure that best interest, not simply an adult perspective is considered. It needs to be noted in the Charter that children mature at different times, but that a child’s age should be taken into account when deciding upon actions that will affect their welfare. Children should have comparable input into decisions affecting their future lives based upon their maturity and ability to make decisions. This is not currently explicit in the Charter.

I’m happy to provide further information, research and background material on this opinion should you require it.

Yours sincerely,

Crusader Hillis
CEO, the ALSO Foundation

---


3 UN General Assembly, 70th and 71st Plenary Meeting (18 December 2008).