ECCV SUBMISSION

to the

SCRUTINY of ACTS and REGULATIONS COMMITTEE

Review of the 2006 Charter of Human Rights
and Responsibilities Act

Ethnic Communities' Council of Victoria (ECCV) welcomes the opportunity to provide input to the Scrutiny of Acts and Regulations Committee review of the 2006 Charter of Human Rights and Responsibilities Act.

Established in 1974 as a voluntary, non-partisan, community-based organisation, ECCV advocates and lobbies all levels of government on behalf of multicultural communities in a range of areas. For over 35 years ECCV has remained the principal liaison point between ethnic communities, government and the wider community in Victoria. Our role includes supporting, consulting, liaising with and providing information to Victoria’s ethnic communities.

At the time of its introduction, ECCV understood that the Charter’s primary intent which was to provide individuals with a formal instrument for

- identifying instances of perceived discrimination,
- defining the specific nature of a complaint, and
- if necessary determining the basis for redress.

With migrants and multicultural Victorians among the groups likely to benefit most from the protections afforded by the Charter, ECCV is primarily concerned about its:

- practicality
- clarity
- certainty
- simplicity

Furthermore, ECCV believes that as both a legal document and a symbolic document, the Charter must be robust and beyond reproach in terms of ambiguity, conflict with, or unnecessary duplication of, other legislation so as to avoid the potential for costly and vexatious misuse outside its original intent. In this respect, every effort must be made to ensure the language of the Charter is itself free from accusations of bias, real or perceived.

Moreover, ECCV is equally concerned with how complaints made in relation to the Charter are actioned, resolved, and held accountable by investigating authorities. While not included as a topic for comment within the scope of this review, ECCV believes it is an area worthy of urgent attention.

The following submission highlights particular points of confusion as well as addressing specific topics and questions canvassed in the review discussion paper.
I. Charter Rights and Responsibilities

1.1.1 In the first instance, ECCV notes that language used in the Charter has the potential to create confusion about what human rights the Charter does and does not cover, either implicitly and explicitly. For example, ECCV notes that the Terms of Reference for the Review states ...

The Charter does not protect all human rights. Rather, it only protects the rights specifically listed in Part 2 of the Charter.

1.1.2 Yet, in Part 1, Section 5 of the 2006 Charter of Human Rights and Responsibilities Act, it states that ...

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

(Part 1, Section 5, CHRR Act 2006)

1.1.3 With this apparent discrepancy between implicit and explicit coverage of rights in mind, ECCV seeks greater clarity as to whether ...

- the Charter already does or does not recognise rights and freedoms made legal elsewhere; and
- if so, whether it is necessary to make specific rights and freedoms more explicit within the Act.

**Recommendation:**
- That there be greater clarity about what rights are explicitly or implicitly covered by the Charter.

1.1.4 With respect to further matters for review, ECCV offers the following comments.
2. Matters for Review [as per section 44(2) of the Charter]

Social Rights

2.1.1 In terms of Social Rights, ECCV notes that under Section 16 of the 2006 Charter of Human Rights and Responsibilities Act ...

(1) Every person has the right of peaceful assembly.
(2) Every person has the right to freedom of association with others ...

(Part 2, Section 16, CHRR Act 2006)

2.1.2 With this in mind, ECCV seeks clarification on how:

- "association with" differs in definition from "socialise with",
  and
- If there is no difference, whether it is necessary to add a specific reference to "social rights" within the Charter.

Recommendation :

- If it is deemed that "association with" differs in definition from "socialise with" then explicit definitions of each term be included within the Preliminary section of the Charter along with explanations of what they do and do not encompass.

Cultural Rights

2.1.3 ECCV notes that that under Section 19 of the 2006 Charter of Human Rights and Responsibilities Act ...

(1) All persons with a particular CULTURAL [emphasis added], religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her CULTURE [emphasis added], to declare and practise his or her religion and to use his or her language.

(Part 2, Section 19, CHRR Act 2006)

2.1.4 With this in mind, ECCV questions whether:

- The Charter does not already sufficiently recognises cultural rights, and
- If so, whether it is necessary to add a further specific reference to "cultural rights" within the Charter.
Recommendation:
- If it is deemed that a further specific reference to "cultural rights" be added to the Charter, then a explicit definition of the term and what it does and does not encompass be included within the Preliminary section of the Charter.

Children's Rights

2.1.5 As highlighted previously, ECCV notes that under Section 5 of the 2006 Charter of Human Rights and Responsibilities Act...

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

(Part 1, Section 5, CHRR Act 2006)

2.1.6 Furthermore, ECCV notes that Section 8 of the Charter already explicitly states...

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(Part 2, Section 8, CHRR Act 2006)

2.1.7 Furthermore, ECCV also notes that the Victorian Equal Opportunity and Human Rights Commission (VEOHR) states in its own position paper (19 May 2011) that...

Currently, the Charter protects 20 rights and freedoms, including ... protection of children and protection of the family.

(VEOHR, 19 May 2011 : 3)
2.1.8 With this in mind, ECCV seeks greater clarity as to whether this means that:

- in effect the Charter already recognises children’s rights and freedoms made legal elsewhere;
- if so, whether it is necessary to make specific rights and freedoms more explicit within the Act; and
- why children’s rights are not already covered under the rights of “every person”.

**Recommendation:**

- That there be greater clarity about whether children’s rights are explicitly or implicitly covered by the Charter, including a definition of the term within the Preliminary section of the Charter along with explanations why children’s rights are not already covered under the rights of “every person”.

**Women’s rights**

2.1.9 Similarly, ECCV seeks great clarity as to whether

- in effect the Charter already recognises women’s rights and freedoms made legal elsewhere;
- if so, whether it is necessary to make specific rights and freedoms more explicit within the Act; and
- why women’s rights are not already covered under the rights of “every person”.

**Recommendation:**

- That there be greater clarity about whether women’s rights are explicitly or implicitly covered by the Charter, along with explanations why women’s rights are not already covered under the rights of “every person”.

2.1.10 In light of the above, ECCV is concerned about the connotation created if ‘women’ and ‘children’ are not already included within the category of ‘every person’ and the imputation that they therefore occupy a secondary, separate, and diminished sub-category of society.

2.1.11 ECCV is also concerned that if, for instance, it is deemed necessary to specify additional rights to outlaw discrimination based on an individual’s gender or age, then such non-discriminatory terms should be used.
This will help avoid...

- the aforementioned imputation that 'women' or 'children' are not already included within the category of 'every person' and therefore occupy a secondary, separate, and diminished sub-category of society
- accusations that the Charter is dismissive of the concerns of other genders and ages, and thereby a discriminatory document itself

**Recommendation:**

- That due care be taken to ensure the language of the Charter include non-discriminatory there be greater clarity about whether women's rights are explicitly or implicitly covered by the Charter, including a definition of the term within the Preliminary section of the Charter along with explanations why women's rights are not already covered under the rights of "every person''.

**Self-determination rights**

2.2.12 ECCV notes that under Section 5 of the UNHCR's General Recommendation No. 21 on the right to self-determination, it states ...

5) Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens.

Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

(Office of the United Nations High Commissioner for Human Rights, 23 August 1996)

2.2.13 This is in response to notes made under Section 1 that ...

1) The Committee notes that ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession.

(Office of the United Nations High Commissioner for Human Rights, 23 August 1996)
2.2.14 ECCV recognises that governments have a difficult balance to manage the need to govern equally for all, regardless of cultural, linguistic or religious background, while allowing individual groups the right to engage in activities which are important to their identity.

2.2.15 ECCV is particularly mindful of the possibility that such explicit rights may be invoked by individuals or groups and exercised in a manner outside the Charter's original intent.

2.2.16 With this in mind, ECCV believes that any decision to include a specific reference to self-determination rights within the Charter must include the caveat that any and all practises remain consistent with the rule of law and generally accepted community standards and social mores.

**Recommendation:**

- That any decision to include a specific reference to self-determination rights within the Charter must include the explicit caveat that any and all practises exercised under this clause remain consistent with the rule of law and generally accepted community standards and social mores.

**Public Authorities Compliance**

2.2.1 ECCV notes that Part 3, Section 4 of the Charter explicitly states that...

> It is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right

*(Part 3, Section 38, CHRR Act 2006)*

2.2.2 Yet ECCV also notes that in reference to compliance to the Charter by public authorities the Terms of Reference for the Review states...

> Parliament and, except in their administrative capacities, courts and tribunals are specifically excluded.

2.2.2 With these bodies holding such prominent and influential positions in society, ECCV believes greater clarification is needed as to why they should be exempted from compliance with the Charter.
Recommendation:
- That there be greater clarification as to why some public authorities are / should be exempted from compliance with the Charter.

Regular Audits

2.2.3 With regard to the matter of regular audits, ECCV is concerned that utilising the Charter as grounds for audits irrespective of whether a complaint has been lodged may be considered an over-reach of the Charter’s intent and administration, and risk souring general support for the Charter’s founding principles and practical application.

2.2.4 Moreover, ECCV questions the process, practicality and resources required to undertake such audits on a regular basis and whether these resources might be better directed at resolving official complaints made under the Charter.

2.2.5 Furthermore, ECCV also maintains the need to emphasise compliance within other sectors, especially the private sector.

Recommendation:
- That greater focus be put on emphasising compliance with the Charter among other sectors, especially the private sector, rather than institute regular audits on public authorities irrespective of whether a complaint has been lodged.

Provision for remedies

2.2.5 With regard to the provision of remedies, ECCV believes that due care must be taken to ensure that the Charter’s principles and practices remain true to the original intent of the document and any provision for remedies do not exceed what a reasonable citizen would consider appropriate to the particular complaint.

2.2.6 ECCV is particularly concerned to avoid the potential to require the invocation of remedies in cases that reasonable individuals would consider vexatious or outside the Charter’s original intent.

Recommendation:
- That due care be taken to ensure that the provision for remedies under the Charter remain consistent with its founding intent and do not exceed what a reasonable citizen would consider appropriate to the particular complaint.
3. **Benefits and costs of the Charter**

3.1.1 ECCV recognises that opinions differ, legally and philosophically, regarding the best means for governing the balance between satisfactory freedoms and satisfactory protections. Indeed, opinions can differ greatly from one faith or cultural group to the next, and differ from one circumstance to the next.

3.1.2 As a consequence, it is appropriate that the principles and practise of the Charter be reviewed from time to time to ensure their functionality remains true to the expectations and needs of society.

3.1.3 Overall, ECCV believes that ongoing instances of discrimination, intimidation, and exploitation in the workplace and general society illustrate the need to strengthen existing protections and mechanisms for seeking redress, especially for vulnerable sections of the community.

**Benefits of the Charter**

3.1.4 ECCV believes that the mere presence of the Charter has made more Victorians aware of the rights of others and more considerate of their dignity. More specifically, it has made vulnerable Victorians more aware of their rights and opportunities for redress, which ECCV believes to be a positive.

3.1.5 ECCV notes that the Charter has also helped to form the basis of organisational codes of practise and at local and community level to improve interpersonal and intercommunal engagement.

**Costs of the Charter**

3.1.6 ECCV notes that there have been isolated occasions when the Charter has been invoked as a defence for actions which would be deemed vexatious and outside its original intent. Technically legal or not, such incidents call into question the Charter’s founding principles and practical application.

3.1.7 ECCV also notes recent criticism from some quarters that application of the Charter has been overly ideological at times, i.e. “pursuing a left-wing agenda.” Whilst criticisms, valid and vapid, can be expected, due care must be taken to ensure the Charter is robust and beyond reproach in terms of intention and application.

**Other Options**

3.1.8 As noted previously, ECCV is concerned that promotion and practical incorporation of the Charter into operational environments is not so prominent within the private sector and suggests that approval for a business license in Victoria be dependent on formal confirmation of abidance by the Charter’s principles.
44. Review of Charter after 4 years of operation

(1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.

(2) A review under sub-section (1) must include consideration as to whether—

(a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—

(i) the International Covenant on Economic, Social and Cultural Rights;

and

(ii) the Convention on the Rights of the Child; and

(iii) the Convention on the Elimination of All Forms of Discrimination against Women; and

(b) the right to self-determination should be included in this Charter; and

(c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and

(d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.