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Date: 13 August 2015

Mr Michael Brett Young

Independent Reviewer
Charter Review 2015
Level 24, 121 Exhibition Street
Melbourne Victoria 3000

By email: charter.review@justice.vic.gov.au

Dear Mr Brett-Young,

Supplementary submission for 2015 Charter Review

The LIV thanks you again for the opportunity to provide comment on the review of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). I am writing to you to add to the LIV's previous submission by raising an important issue for consideration in the Charter Review.

As noted in the LIV's earlier submission, there is a current trend in Australia towards uniform and cooperative statutory schemes, with the associated increase in state responsibilities being taken up by the Commonwealth. The Victorian Ombudsman noted in her recent report, *Reporting and investigation of allegations of abuse in the disability sector*, that the National Disability Insurance Scheme will introduce a framework that will, eventually, replace existing state-based safeguards.¹ As the obligation to act compatibly with the Charter does not extend to Commonwealth authorities, this transfer will effectively result in a loss of Charter protections for those administered under the new scheme.

This raises the important issue of the extent to which the Charter can provide rights protections to Victorians when other government priorities, such as cooperative federalism, can mean that the Charter is excluded in the interests of uniform legislation between states. For example, the Victorian Parliament employed the s 31 override provision in the Charter for the *Legal Profession Uniform Law* to prevent the Charter's interpretive obligations jeopardising a uniform interpretation of the legislation across jurisdictions. If this approach to uniform and co-operative schemes is followed in the future,² this will severely limit the protection of rights in Victoria, as more and more areas of law become subject to national or cooperative schemes.

¹ Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight* (June 2015), available online: < <https://www.ombudsman.vic.gov.au/getattachment/c6499f78-0eec-4e4a-8e94-e4cd716a64f8> >.

² The LIV notes that this is not the only approach that has been taken regarding the application of the Charter to cooperative national laws. See, e.g. *Education and Care Services National Law Act 2010*, *National Gas (Victoria) Act 2008*, *Marine (Domestic Commercial Vessel National Law Application) Act 2013*.

It is unclear how best to resolve these problems. The Victorian Equal Opportunity and Human Rights Commission suggests two options to maintain the Victorian Charter protections in its submission on the *National Disability Insurance Scheme Quality and Safeguarding Framework*:

- incorporation of Charter rights into the specific Federal scheme (extending those rights to all Australians); or
- including specific provisions in the legislative scheme to safeguard Charter protections for Victorians.³

Another possibility would be the enactment of a Federal Charter protecting the human rights of all Australians (the LIV has long advocated for a National Human Rights Act).⁴

The trend towards cooperative federalism is likely to continue in the future. The LIV recommends that the Review consider how best to protect the Charter rights of Victorians under these national schemes. Ultimately, these issues may not be able to be resolved in a review of the Victorian Charter alone, and will necessitate engagement with Federal and other State Parliaments in the development of federalised or cooperative schemes to ensure Victorians retain the protections we have achieved under the Charter.

If you have any questions about this letter please contact me or Kate Browne (kbrowne@liv.asn.au or (03) 9607 9489).

Yours sincerely,



Katie Miller

President

Law Institute of Victoria

³ Victorian Equal opportunity and Human Rights Commission, *Submission to National Disability Insurance Scheme Quality and Safeguarding Framework* (April 2015), 3, available online: < <http://www.humanrightscommission.vic.gov.au/index.php/2012-10-18-01-21-18/submissions/item/1224-submission-to-the-ndis-national-consultation-department-of-social-services-april-2015>>.

⁴ See, e.g. Law Institute of Victoria, *Letter to the Prime Minister: A National Human Rights Act for Australia (2009)* available online: < <http://www.liv.asn.au/getattachment/54fd50da-760b-47a5-a62f-181b5a41a0a4/A-National-Human-Rights-Act-for-Australia.aspx>>.