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Mr Michael Brett Young  
Charter Review Secretariat  
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MELBOURNE VIC 3000

Dear Mr Brett Young

**Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006***

Thank you for meeting with me on 31 March 2015 to discuss your review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter). I am pleased to provide you with my submissions, as set out below.

In addressing the terms of the review, I explore those matters most salient to the role of an Ombudsman. I also make several recommendations for improving the operation of the Charter.

**The evolution of the Ombudsman**

1. The evolution of Parliamentary Ombudsman offices highlights that human rights principles have always been central to Ombudsman work.
2. Since its Swedish origins over 200 years ago, the role of an Ombudsman has been to independently enquire into or investigate complaints about the actions of government agencies and make recommendations for improvement. In doing this, an Ombudsman investigates issues of an overtly human rights nature, including the denial of public housing or education, the treatment of people in closed environments, and access to essential services.
3. The development of international human rights principles and the global spread of the Ombudsman model occurred at the same time, after the Second World War. Both movements were generated from the same social impulse to redress the imbalance of power between the individual and the state.

4. Parliamentary Ombudsman models now operate in an array of jurisdictions with significant political, historical and cultural differences, such as the Colombian *Defensoría del Pueblo* (People's Defender) or the Portuguese *Provedor de Justiça* (Justice Provider). A natural development has been to extend Ombudsman jurisdiction beyond the investigation of maladministration, to the investigation of human rights breaches committed by public authorities.
5. The evolution of the Ombudsman's role in the human rights context is highlighted by the UN General Assembly adoption in March 2009 of a resolution affirming the role of the Ombudsman in the promotion and protection of human rights.<sup>1</sup> Further, in March 2015, the International Ombudsman Institute, of which my office is a member, signed a Memorandum of Understanding with the International Coordinating Committee of human rights institutions. The two bodies maintain a close relationship, based on a shared goal of raising awareness about the social role of Ombudsman institutions, and the importance of their everyday work in a human rights context.
6. Emerging models indicate a contemporary trend which emphasises the human rights dimension of Ombudsman work. For example, one of the newest Ombudsman offices is the *Provedoria dos Direitos Humanos e Justiça* (Provider for Human Rights and Justice) of Timor-Leste. Like my office, the Ombudsman of Timor-Leste has the express mandate to receive complaints about breaches of human rights in addition to promoting good governance and administrative improvement in government.
7. The success of the Ombudsman model has seen it become an integral element of a modern government. In Victoria, the independence of the Ombudsman is constitutionally entrenched, enabling the promotion of administrative excellence and respect for human rights.

### **The Ombudsman's complaint handling and investigative function**

8. As an independent officer of the Victorian Parliament I have the principal function of enquiring into or investigating administrative actions taken by or in an authority and making recommendations for administrative or legislative change. The introduction of the Charter amended the Ombudsman Act to provide me with the express function to enquire into or investigate whether an administrative action is incompatible with a human right set out in the Charter.

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<sup>1</sup> *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights*, GA Res 63 169, 3<sup>rd</sup> Comm, 63<sup>rd</sup> sess, 70<sup>th</sup> plen mtg, Agenda Item 64(b), UN Doc A/RES/63/169 (20 March 2009).

9. When the Charter Bill was being debated in 2006 in relation to clause 38, then Attorney-General, the Hon Rob Hulls MP said:

This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts.

The experience of other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies.<sup>2</sup>

10. The conferral of a specific human rights complaint-handling function utilises my office's independence, accessibility, royal commission style investigation powers and ability to make (and follow up on) remedial recommendations for administrative improvement. My reports may be tabled in the Parliament; and those reports have a strong track record of being the catalyst for meaningful change.
11. The Ombudsman investigating Charter complaints about the administrative actions of authorities sits well within the 'dialogue model' of human rights protection in Victoria. Since my appointment I have focused on the express articulation of Charter language and ideas in the work that I do, making explicit what has always been implicit. By looking at public administration through the lens of human rights, my office is able to encourage a culture of human rights compliance across the public sector. Given this, it is appropriate that my office's complaint handling function under the Charter be retained in its current form.
12. This function is, however, not widely known or understood. In the interest of achieving greater public awareness of the role of the Ombudsman in human rights complaints, I recommend that the Charter should be amended to expressly refer to the Ombudsman's function<sup>3</sup> of enquiring into or investigating whether an administrative action is incompatible with a human right set out in the Charter.

### **Access to dispute resolution and remedies under the Charter**

13. The importance of human rights to good public administration highlights that a full range of remedies should be available to individuals who have been subject to human rights breaches. Under the Ombudsman Act, my office offers dispute resolution in the form of enquiries and investigations.

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<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (the Hon Rob Hulls, Attorney-General).

<sup>3</sup> Or the role of IBAC in the case of police conduct.

14. The majority of matters are dealt with using my enquiry powers,<sup>4</sup> a purpose of which is to determine whether a matter may be resolved informally. Following my enquiry, a matter may be resolved where an authority offers an appropriate solution to address the concerns in question. I can conduct a formal investigation on a complaint; on my own motion; on a referral by Parliament; or following a protected disclosure complaint referred from the Independent Broad-based Anti-corruption Commission.<sup>5</sup> At the completion of an investigation I may form an opinion that the administrative action under investigation was, amongst other things, contrary to law, unreasonable or wrong.<sup>6</sup> Accordingly I can make recommendations to remedy the error.<sup>7</sup> I can also request to be notified of any steps taken (or proposed to be taken) to give effect to my recommendations<sup>8</sup> and report to the Parliament on any matter relevant to my investigation or recommendations that I think fit.<sup>9</sup> To ensure accountability, my office also reports on authorities' implementation of recommendations.<sup>10</sup>
15. The Victorian Equal Opportunity and Human Rights Commission (the Commission) has expertise in both the operation of the Charter and offering dispute resolution services under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*. I consider that the Charter should provide for a similar initial dispute resolution process, notably conciliation, for breaches which directly affect individuals. The Commission is well placed to provide this service.
16. Conferring such a function on the Commission could complement the role of my office, which focuses on enquiries and investigations and improving public administration through the resolution of complaints and the investigation of systemic issues.
17. In some circumstances, it will be appropriate for the Commission and my office to refer Charter matters to each other. For example, a complaint may not be suitable for conciliation if it raises systemic issues in public administration, for which there is no readily identifiable individual remedy. In such a case, it may be preferable for the complaint to be dealt with by my enquiry or formal investigation powers. Equally, conciliation may be more appropriate to assist parties reach a mutually acceptable outcome orientated at addressing an individual interest or loss. In light of the above,

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<sup>4</sup> See *Ombudsman Act 1973*, section 13A.

<sup>5</sup> Ibid, sections 15B, 15C, 16, 16A.

<sup>6</sup> Ibid, section 23(1).

<sup>7</sup> Ibid, section 23(2).

<sup>8</sup> Ibid, section 23(4).

<sup>9</sup> Ibid, section 23(6).

<sup>10</sup> See 'Ombudsman's recommendations – Third report on their implementation' tabled in Parliament 20 February 2014, available online at: <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Ombudsmans-recommendations-Third-report-on-their>.

the Commission should have a discretion to refer appropriate matters to my office.<sup>11</sup>

18. The power of the Ombudsman to enquire into or investigate an administrative action, including those relevant to Charter breaches, must, however, not be fettered by a confidential settlement as part of the Commission's conciliation process.
19. The Charter should also provide for enforceable remedies following a breach. For this to work effectively, it will be necessary for the Charter to include an independent cause of action and a full range of remedies, including damages. An independent cause of action would demonstrate a commitment to human rights protection in Victoria and recognise human rights as equal to other rights.

### **Research and review function under the Charter**

20. The Commission's expertise on the operation of the Charter could be better utilised if it was given the function to conduct research for the purpose of advancing the objectives of the Charter. This could mirror the Commission's research function under the Equal Opportunity Act and would support the development of a human rights culture in Victoria.
21. Similarly, promoting the purpose of the Charter could be achieved by strengthening the Commission's review function under section 41(c) of the Charter. It would be desirable for the Commission to have the function (and necessary powers) to compulsorily review a public authority's human rights programmes and practices.
22. Much like a conciliation function, I think that the Commission's ability to conduct research and compulsory reviews could complement the role of my office. Collectively, my office and the Commission could provide a comprehensive framework for protecting human rights in Victoria.

### **Information sharing and reporting**

23. To effectively work in this common ground, it would be essential for my office and the Commission to be able to share information about our respective functions under the Charter. Presently the confidentiality provisions in the Ombudsman Act and the Equal Opportunity Act are so restrictive as to prevent this.<sup>12</sup> The confidentiality provisions in the Ombudsman Act and the Equal Opportunity Act should be amended to

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<sup>11</sup> I note that section 16I of the Ombudsman Act already provides me with the discretion to refer complaints to the Commission.

<sup>12</sup> Also, the Commission is excluded from the list of agencies which I can share information under section 16L(2) of the Ombudsman Act.

facilitate information sharing about the human rights functions of the Commission and my office.

24. A less restrictive confidentiality provision in the Ombudsman Act would allow my office to do other very useful work to assist authorities in demonstrating best practice in public administration, including in relation to human rights. For example, I am seeking to develop the digital capability to provide authorities with de-identified data on themes and trends, based on the complaints my office has received, to assist them to improve administrative practices.
25. Subject to the funding needed to improve my ability to analyse and report on the information from complaints, I also intend to include statistics on Charter rights complaints in my annual report. In conjunction with data collected by the Commission, this will provide a valuable and consistent public record of human rights complaints in Victoria.
26. To increase accessibility to and knowledge of complaints handling bodies, my office has begun scoping a pilot project to develop a complaints handling portal for the Victorian public sector. The portal would allow complainants to go to a central website to lodge their complaint with the most appropriate body. This will be particularly useful in this part of my jurisdiction given the shared role of my office and the Commission under the Charter.

### **Application of the Charter**

27. As well as knowing who to complain to, it is important for the community to know who or what it can complain about, or who is subject to the Charter. The application of the Charter to non-state entities and the definition of a 'public authority' was discussed in your background brief to the terms of reference.
28. Confirming that the Charter must have broad application, in his second reading of the Charter Bill, the then Attorney-General, the Hon Rob Hulls said:

The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.<sup>13</sup>

29. The Charter does not extend my jurisdiction beyond that of the Ombudsman Act. My jurisdiction does, however, cover non-state entities when acting under any powers or functions conferred on or instructions

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<sup>13</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (the Hon Rob Hulls, Attorney-General).

given by an authority.<sup>14</sup> This is similar to the definition of a 'public authority' under section 4(1)(c) of the Charter. The definitions differ slightly, but I am yet to come across an 'authority' within my jurisdiction that is not subject to the Charter. However, the Charter should be amended to clarify that its application extends to the administrative actions of any person or body within the jurisdiction of the Ombudsman under the Ombudsman Act.

30. The definition of a 'public authority' under section 4 in the Charter has been criticised because of its length and complexity. I am not persuaded that an exhaustive list of public authorities should be included in the Charter, as was recommended by the Scrutiny of Acts and Regulations Committee in the previous Charter review. Given the flexible and diverse arrangements between the government and private sector for delivering public services, a definition of 'public authority' that allows for clear interpretation and broad application is preferable.

### **The proportionality test under section 7(2) of the Charter<sup>15</sup>**

31. The lack of clarity around the operation of section 7(2), and the uncertainty that this has created for public authorities in relation to the way that they should interpret legislation, is undesirable.
32. This issue is relevant to my office in the event that I question an authority's application of a piece of legislation on the basis that the interpretation does not comply with the Charter. The fact that the operation of section 7(2) in relation to section 32 is not settled may make it difficult to express clear opinions and recommendations in my reports, and if attempting to resolve a complaint informally under section 13A of the Ombudsman Act. I note that to some extent, the application of section 7(2) to the consideration of a public authority's obligation under section 38(1)<sup>16</sup> is clearer.
33. The operation of section 7(2) of the Charter will continue to be of significant importance to the work of my office, and I recommend that there be clarification about the operation of this provision.

### **Improving the Ombudsman Act**

34. To allow me to better fulfil my various functions, dealing with both Charter and non-Charter complaints, I have written to the Special Minister of State seeking amendments to the Ombudsman Act, including the areas outlined

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<sup>14</sup> *Ombudsman Act 1973*, section 13(4).

<sup>15</sup> The human rights protected by the Charter are not absolute, and section 7 provides a framework for determining when and how a right may be limited.

<sup>16</sup> See *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; and *P J B v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327 (19 July 2011).

above. I will continue to work through the appropriate channels to achieve legislative reform.

35. Undeniably, human rights will continue to be central to Ombudsman work, and I look forward to working to enhance the operation of the Charter and assisting in embedding a human rights culture across the Victorian public sector.

## **Recommendations**

- i. While the Ombudsman retains the function under section 13(2) of the *Ombudsman Act 1973* to enquire into or investigate whether any administrative action is incompatible with a right set out in the *Charter of Human Rights and Responsibilities Act 2006*, the Victorian Equal Opportunity and Human Rights Commission should be given the function to provide conciliation services designed to facilitate individual resolution of human rights disputes.
- ii. The *Charter of Human Rights and Responsibilities Act 2006* should be amended to expressly refer to the Ombudsman's function of enquiring into or investigating whether an administrative action is incompatible with a human right set out in the Charter.
- iii. The *Equal Opportunity Act 2010* should be amended to allow the Victorian Equal Opportunity and Human Rights Commission to refer matters to the Ombudsman.
- iv. The power of the Ombudsman to enquire into or investigate an administrative action, including those relevant to Charter breaches, must not be fettered by a confidential settlement as part of the Victorian Equal Opportunity and Human Rights Commission's conciliation process.
- v. The Victorian Equal Opportunity and Human Rights Commission should be given:
  - a. the function to conduct research for the purpose of advancing the objectives of the *Charter of Human Rights and Responsibilities Act 2006*.
  - b. the function and necessary powers to compulsorily review a public authority's human rights programmes and practices.
- vi. The confidentiality provisions in the *Ombudsman Act 1973* and the *Equal Opportunity Act 2010* should be amended to facilitate

information sharing between the Ombudsman and the Victorian Equal Opportunity and Human Rights Commission.

- vii. The *Charter of Human Rights and Responsibilities Act 2006* should be amended to create an independent cause of action and to allow for the full range of remedies for a breach, including damages.
- viii. The *Charter of Human Rights and Responsibilities Act 2006* should be amended to clarify that its application extends to the administrative actions of any person or body within the jurisdiction of the Ombudsman under the *Ombudsman Act 1973*.
- ix. The scope and application of section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* should be clarified.

Thank you for the opportunity to respond to your review of the Charter. If you would like to discuss my submission further, or have any queries, please contact my Investigation Officer, Mr Andrew Adams on 9613 6222 or [Andrew.Adams@ombudsman.vic.gov.au](mailto:Andrew.Adams@ombudsman.vic.gov.au). I would also be happy to meet again if that would be helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Deborah Glass', written in a cursive style.

Deborah Glass  
**Ombudsman**