

29 February 2016

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Mr Donald Speagle
Deputy Secretary
Department of Justice and Regulation
GPO Box 4356
MELBOURNE VIC 3000

Dear Mr Speagle

Access to Justice Review

Thank you for your letter dated 24 November 2015 about your department's review into access to justice in Victoria.

Within the context of public administration, the Victorian justice system describes the relationship between the individual and the state as it affects the rule of law. It is easy to identify courts and tribunals, correctional services and legal aid as key components of this system. In its broadest sense, however, the 'justice system' also incorporates a range of complaint handling bodies including a number of Commissioners, Consumer Affairs Victoria and the Ombudsman.¹

In your background paper on Alternative Dispute Resolution (ADR) you refer to my office as resolving disputes through investigating complaints. While this is true, as explained below, most matters considered by my office are dealt with using enquiry powers as a means of informal resolution. This is also true for other ombudsmen, both parliamentary and industry.

In addressing the terms of the review, I have focussed on an accessible and effective complaint handling system as a model of ADR, broadly exploring the availability of easily accessible information, options for diverting people into alternative services, and expanding those services so that more Victorians can make use of them. In doing so, I have consolidated my response to the Productivity Commission's draft report into access to justice arrangements.¹

¹ Online at: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr176-access-justice.pdf>.

About the Victorian Ombudsman

1. 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.
2. My jurisdiction encompasses actions taken by or on behalf of government departments, public statutory bodies, officers and employees of municipal councils and actions by private sector entities when delivering services on behalf of government.
3. The majority of matters considered by my office are dealt with using my enquiry powers² as a means of informal resolution. Following my enquiry, a matter may be resolved where an authority offers an appropriate solution to address the concerns in question or the accepts my proposals to resolve the matter. 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.³ 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.⁴ Accordingly I can make recommendations to remedy the error.⁵ I can also request to be notified of any steps taken (or proposed to be taken) to give effect to my recommendations⁶ and report to the Parliament on any matter relevant to my investigation or recommendations that I think fit.⁷ To ensure accountability, my office also reports on authorities' implementation of recommendations.⁸
4. In 2014-15 my office received 38,980 approaches, completed 3,256 formal enquiries and investigations and tabled 8 reports in Parliament.

Complaint handling as a model of ADR

5. As you would be aware, Productivity Commission's report into access to justice arrangements (the Commission's report) makes a compelling case that the Ombudsman model is a highly effective yet underutilised approach to dispute resolution.

² See *Ombudsman Act 1973*, section 13A.

³ *Ibid*, sections 15B, 15C, 16, 16A.

⁴ *Ibid*, section 23(1).

⁵ *Ibid*, section 23(2).

⁶ *Ibid*, section 23(4).

⁷ *Ibid*, section 23(6).

⁸ 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>.

6. Evidence in the Commission's report demonstrates how difficult it is for members of the public to find the correct service to assist them. As a result many people do not receive the help they need while others are frustrated at being passed between services, often having to explain their complaint many times to different agencies.
7. This experience is inevitable when large numbers of complaint handling bodies operate to idiosyncratic standards in jurisdictions that might overlap or otherwise be complex or difficult to understand.
8. In Victoria there is an extensive network of complaint handling bodies. While collaboration can and does occur, we do not have anything resembling a true overarching complaint handling system.
9. A robust complaint handling system would ensure members of the public can find the service best placed to handle their complaint without needing to understand the complexity of the system. In short, the responsibility to navigate a complaint to the correct destination should largely lie with the complaint handling system and not with the individual seeking assistance.
10. An effective overarching complaint handling system in Victoria would consist of agencies with a shared commitment to:
 - simplicity and ease of access
 - leveraging technology to link users to the correct agency
 - protocols for the direct transfer of misdirected complaints between agencies
 - agreed common standards and processes to facilitate the above.
11. A coalition of agencies who share a commitment to the above could establish a single complaints portal using dynamic search functionality that would enable users to access the correct service for their problem and geographic location. Centralising this function would mean providing the hosting agency(ies) with the resources to properly promote and resource the portal.
12. Any complaints that are misdirected despite this improved portal would be the responsibility of the receiving agency to refer on to the correct body. If participating agencies work toward complementary on-line complaint forms, with standardised questions and syntax, these referrals could be processed with minimal delay or inconvenience to the complainant and lower administrative overheads for complaint handling bodies.
13. These protocols should address:
 - privacy / consent requirements
 - consistent approach to information sought from complainants

- technical requirements for data exchange.
14. This degree of collaboration represents, if undertaken progressively in a series of achievable steps, an opportunity to build a truly cohesive and high functioning complaint handling system. In my relatively short period as Victorian Ombudsman I have already encountered enthusiastic support for taking action to provide the public with a simpler and easier to use complaint handling system in Victoria.
 15. While we are exploring digital solutions for an accessible complaints handling system, I recognise that they alone will not address the needs of all who require access to the Ombudsman. It is important to have a range of methods, especially for disadvantaged communities, to access the system. Recently my office engaged student researchers from RMIT University to consider the barriers to making a complaint and assist in developing strategies to raise awareness of our service and make it easier for vulnerable Victorians to complain.

Easily accessible information for users of public services

16. The recommendations in the Commission's report suggest that service providers should provide consumers with information about complaint resolution processes. Developing a more coherent complaint handling system as I have proposed above, would provide opportunities to make dispute resolution options more visible and accessible to the community. General awareness should be complemented by context specific information delivered when it is most relevant to a consumer.
17. As noted in my response to the Commission's draft report, this already occurs in many industry sectors, particularly those that are subject to significant regulatory oversight. For example Victoria's *Energy Retail Code*⁹ requires energy retailers to:
 - handle a customer complaint in accordance with the Australian Standard on Complaint Handling
 - inform customers of their escalation options when responding to complaints
 - include the Energy and Water Ombudsman Victoria's telephone number on any disconnection warning
 - inform a customer in writing of their right to refer complaints about other matters to the Ombudsman if they remain dissatisfied.
18. I see no reason why public services should not be subject to the same requirements and a small number of Victorian public sector agencies do adopt such practices. The absence of mandated minimum complaint

⁹ pp. 35-36 <http://www.esc.vic.gov.au/getattachment/0d91ae04-024f-4fbd-803b-93880419a9d2/Energy-Retail-Code-v10a.pdf>

handling standards across the Victorian public sector results in an inconsistent approach across agencies.

19. Requiring public sector agencies to adopt a similar approach to the *Energy Retail Code* would ensure information is provided to people with grievances when it is most relevant to them.

Proactive public and public sector education

20. In addition to the above, there are lessons to be learnt from industry ombudsmen schemes as to how governance arrangements for public sector ombudsmen can be structured to ensure a focus on educating the community about their services.

21. The Public Transport Ombudsman's Charter includes a responsibility for:

appropriate public information programs on promoting the PTO scheme and its complaint-handling procedures.

22. The Energy and Water Ombudsman Victoria's Charter includes a responsibility to:

...in consultation with the Board, promot[e] the EWOV scheme and its complaint-handling procedures'.

23. The Telecommunications Industry Ombudsman complies with the Commonwealth Government's *Benchmarks for Industry-Based Customer Dispute Resolution Services*. One of six underlying principles included in this document is:

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

24. In each scheme the Ombudsman is mandated to take proactive steps to inform the public about their services.

25. There are also examples of where statutory ombudsmen have been mandated to proactively support the public sector to improve its practices without the requirement for an investigation. For instance section 12(c) of the *Ombudsman Act 2001* (Queensland).

to consider the administrative practices and procedures of agencies generally and to make recommendations or provide information or other help to the agencies for the improvement of the practices and procedures;

26. Victoria's Ombudsman Act includes five statutory functions that I am obliged to undertake. However none require me to educate the community or the public sector about the role of my office.
27. A statutory Ombudsman's enabling legislation establishes his or her mandate from the Parliament for which he or she is then accountable. There are always more complaints and investigations than an office can investigate regardless of the resources available to the Ombudsman. If there is no statutory basis for the Ombudsman to undertake community or public sector education it is only rational that those activities will not receive the same priority as his or her statutory duty to investigate complaints.
28. Incorporating these functions in legislation would promote community engagement as a core responsibility of Ombudsman offices to be balanced with their day-to-day complaint handling responsibilities and resourced accordingly.

Make it easier to complain

29. As well as being more visible, complaint handling system should be easier to use. As you would know, an additional barrier remains for Victorians who wish to complain to my office – a legislated requirement to make their complaint in writing.
30. The Ombudsman Act has included this requirement since its enactment in 1973. The Act allows for some exceptions however the requirement is an unnecessary impediment to a member of the public lodging a complaint.
31. I am pleased to report that on 10 December 2015 the *Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015* was introduced in the Victorian Parliament. If passed, the amendments will remove the requirement that a complaint be made in writing and provide me with the discretion to require a complainant to provide a written statement confirming that the complainant wants my office to consider the matter, specifying the details of the complaint. The amendments will also provide me with greater capacity to share information with authorities.

Diverting people from civil litigation into alternative services

32. In my response to the Commission's draft report, I considered how and where alternative dispute resolution processes could be better employed in tribunal settings and how a joined-up system of administrative justice can be developed.

33. I have raised the potential benefits of a streamlined complaint handling system where fewer bodies deal with a wider variety of matters. Complaints in the Local Government sector are a particular example of the opportunity for the Ombudsman to be an effective gatekeeper, resolving a large proportion of matters quickly and efficiently thus preserving the resources of specialist bodies for matters which warrant their intervention.
34. The Commission's report identifies the expense involved in administrative tribunal matters citing average costs of \$2500, \$4700 and \$7200 per case for VCAT, the NSW Administrative Decisions Tribunal and AAT respectively. The report also highlights the divergence between the public's expectation that tribunals will provide a quick and accessible forum for dispute resolution with their actual experience.
35. It is apparent that there is a portion of the large caseloads dealt with by Tribunals that are simply misconceived and have no prospect of success. As well as taking up the time and resources of Tribunals and respondents, the individual applicant in these matters does not benefit from these proceedings. In some cases an applicant can end up worse off. The following cases are examples of a poor outcome for all concerned:

On the one hand we have an applicant who we know has some difficulty functioning in society. He loves his dogs. He has received advice that his chances of success are very low and those chances have been realised in this hearing. On the other hand, Council had been exposed to pound costs of about \$8,000 and legal costs in this proceeding of about \$8,000, according to Mr Halse. Mr Halse submits it is fair that an order be made. He doubts it will ever be collected. However, it would be a disincentive for this owner and other owners in the future of unreasonably pursuing these matters.¹⁰

The applicant has, in my view, had a very weak case. It was abundantly clear from the notes of Dr D'Argent that the applicant's case was difficult at best and it was a case, in my view, that probably should not have been pursued. Given those circumstances, I find it just to make an order for costs which I will make on the County Court scale subsequent to 11 October 2012.¹¹

36. The report's conclusions, regarding both the Tribunal system and the role of ombudsmen, point to the opportunities that could be realised if these two systems complemented each other more effectively. Whether this involves a single complaints portal as discussed above, or another 'triage' model, there needs to be clarity around the distinct function and potential

¹⁰ *Sicluna v Hume CC (Review and Regulation)* [2013] VCAT 1318 (7 February 2013).

¹¹ *Grenade v Transport Accident Commission (General)* [2013] VCAT 67 (25 January 2013).

remedies offered by each system, as this will be a determinative factor for the public in identifying the most appropriate forum to resolve an issue.

If you would like to discuss this matter further, or have any queries, please contact my Executive Officer, Mr Andrew Adams on 9613 6202 or Andrew.Adams@ombudsman.vic.gov.au. I would also be happy to arrange a meeting if that would be helpful.

A handwritten signature in black ink, reading "Deborah Glass". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

Deborah Glass
Ombudsman