

Scrutiny and the Charter of Rights and Responsibilities

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The development of the human rights dialogue within the Victorian Parliament through the role of the Scrutiny of Acts and Regulations Committee has continued to mature and evolve over the last 2.5 years.

The key feature of the ‘dialogue model’ is that it creates a public dialogue between the judiciary, the executive and the legislature about human rights protection by:

- Requiring Parliament to consider whether new laws are compatible with human rights;
- Requiring public authorities to take into account human rights in their decision-making;
- Giving the Superior Courts the power to identify laws that are incompatible or inconsistent with human rights; Requiring Parliament to consider whether laws identified by the Courts as incompatible with human rights should be changed.

SARC provides Parliament with the scrutiny of legislation and regulations. SARC comments on bills and their compatibility with the human rights charter. In brief the duties and functions of Parliament under the Human Rights Charter Parliament are –

- Section 28, Statements of compatibility – A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of

compatibility to be prepared in respect of that Bill and presented before delivering his or her second reading speech on that Bill.

- *Section 30, Scrutiny of Acts and Regulations Committee* – The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.
- A footnote to section 30 of the Charter provides that there is a corresponding function on the Committee to report on statutory rules that are considered incompatible with human rights. This additional reporting function is found in a separate amendment to the *Subordinate Legislation Act 1994*.
- *Section 31, Override by Parliament* – This section of the Charter invests an override declaration power in the Parliament to pass legislation notwithstanding an Acts incompatibility with one or more of the Charter rights. Such an override declaration then extends to any subordinate instrument made under that Act. A member introducing a Bill containing an override must make a statement in the House in which the Bill is introduced explaining the exceptional circumstances that justify the inclusion of the override declaration. If an override declaration is made the Charter has no application to that Act. The override declaration expires after 5 years of the provision coming into force. However Parliament may re-enact an override declaration at any time.

In our experience SARC has had little influence over the content of legislation once the bill has been presented to Parliament. However there is evidence that the Committee's functions and reports influence the drafting of bills. Generally the Committee's experience is that there is reluctance by the executive to amend bills once introduced.

The Executive response to SARC is largely based on correspondence with Ministers. Rarely do Ministers consider charter issues or SARC comments in the parliamentary debate. Our experience is that Ministers and their advisers tend to be very defensive.

The Committee expects that Ministerial correspondence may at a later time come into play as an aide to interpretation in circumstances where legislation is challenged in the courts. Courts will then be able to refer to SARC comments and the Minister's response. The Committee therefore plays a useful role in recording the reasoning for the inclusion of for certain provisions in Acts as just one part in the human rights dialogue.

The compatibility statements that must accompany new bills for the consideration of the Parliament do inform Parliament, the Committee and its advisers. SARC has adopted the policy of considering statements of compatibility as having the same status and function as an explanatory memorandum and will therefore, where necessary comment on the quality of their content and draw deficiencies to the attention of the relevant Minister or Member. It has been interesting to note the gradual improvement of the content and analysis of these

statements since the Charter commenced operation in January 2007.

SARC's role as defined by section 30 of the Victorian Charter is to test bills and examine the compatibility statement and report to Parliament about any concerns regarding incompatibility with the Charter. In 2 and a half years only four bills were amended based on SARC's Alert Digest. These changes have largely been technical amendments.

Our engagement with the legislative process is first to inform the Parliament in a form that is digestible and usable in parliamentary debates. Sometime the issues are complex and so too is the analysis provided by the Committee in its Alert Digests. SARC has criticised compatibility statement for too little detail, for too much detail, for failing to address certain rights or for trivialising rights. As I have mentioned the statements are improving and the anecdotal evidence appears overwhelming that the Committee has played a significant role in that cultural shift of considering proposed legislation against a human rights set of principles.

In the last 3 years the Committee has prepared two practice notes for the guidance of departments and government agencies and we are considering further notes to inform the Executive of the Committee's expectations concerning the content and sufficiency of compatibility statements.

Understanding and assessing the compatibility statement is made easier in Victoria because section 7(2) of the Charter

provides legislative guidance as to the critical steps or arguments that must be considered where human rights are sought to be abridged or limited. This ensures human rights issues are considered in the legislative process and ultimately requires the proponents of legislation to consider whether there may be a less intrusive or restrictive means to achieve the desired purpose that the legislation seeks to achieve.

We do know from our dealing with departments and their legal staff that the Committee's scrutiny work does influence the legislative drafting process. Departmental legislation officers refer to an unfavourable SARC report and correspondence with the Minister as being SARCed. The oversight by SARC on behalf of the Parliament in my view is a critical achievement of the Charter process in improving the consideration of human rights principles in the legislative process. It is also the most difficult outcome to quantify.

SARC reviews compatibility with Charter rights this is additional to the previous SARC role to comment on trespasses against rights and freedoms. The old terms of reference (The Senate terms) is still part of our terms of reference and provides a less prescriptive formulation to look at the traditional common law rights and concepts such as the separation of powers.

Under the Charter SARC does not just look at common law or Victorian law for its human rights jurisprudence. SARC is empowered to consider human rights law and jurisprudence from international jurisdictions. One concern

of SARC is that sometimes in compatibility statements international decisions are cherry picked to justify the desired legislative provision. The failure to consider and evaluate inconvenient judicial decisions has been criticised by SARC and has led to the Committee itself presenting contrary decided cases to enliven the debate and seek further advice from Ministers and their departmental advisers why those decisions are less favoured or not in point. The Committee considers that a reasonable use of this point and counter point technique adds value to the assessment of legislative proposals.

As a result of the Charter human rights issues are now more common in media and public discourse around legislation. This was especially true when the Parliament recently considered legislation involving conscience votes on Abortion and access to Artificial Reproductive Technology.

Contrary to its critics who feared the Charter would limit Parliamentary sovereignty or take on some quasi-constitutional status, the Charter is resulting in fairer laws as human rights become central to the drafting process. Contrary to the doomsters and sceptics there has not been an avalanche of legal challenges and the Charter has not provided a gold mine to criminal lawyers. Making laws that are compatible with rights or clearly justifying any limitations placed on rights, means fairer laws will also work well.

Unfortunately the Parliamentary dialogue is still struggling as it still does not fully attract bipartisan support. However

it does seem to be winning increasing favour across the Parliament.

As an agency protecting human rights SARC does take seriously the international principles for government institutions established to protect or promote human rights – the so-called Paris Principles.

Based on the second heading of the Paris Principles the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and its compliance with international human rights instruments.

Based on these principles SARC has to be adequately resourced, open to the public and has to interface with the public. Currently we do on occasion have public hearings and of course the Alert Digest is publicly available. However SARC deliberations remain in camera and not open to the public. Given the nature of parliamentary committees, the issue of privilege and the committee's political composition it is difficult to create a totally open and transparent forum. SARC does on occasion invite visitors to attend.

As for adequate resources SARC has two executive officers/ lawyers. One for bills and one for regulations but the increased workload and specialization has meant that SARC has engaged an external specialist human rights adviser Dr Jeremy Gans of the University of Melbourne.

One of the major obstacles for the Committee is that often there are only two weeks between the second reading of a

bill and the resumption of the Parliamentary debate. This makes it difficult for SARC to engage the Victorian public even on quite contentious bills. On the other hand however the Committee does have jurisdiction to report on a Bill up to 10 sitting days after Royal Assent in circumstances where the Parliament agrees to expeditious passage of an urgent Bill without the Committee being able to report on it whilst it is still a Bill.

It is my view that the workload of MPs that are members of SARC has increased appreciably since the introduction of the Charter. Meetings are longer and more frequent. At the moment SARC is scrutinizing bills, scrutinizing regulations and secondary legislation and in addition is preparing a substantial review of the exceptions and exemptions provided for in our Equal Opportunity Act with the overall view of harmonizing permissible discrimination in the Equal Opportunity act with the Charter.

A number of re-occurring issues have arisen which SARC believes need to be resolved. National scheme legislation undermines the Victorian Charter so what is SARC's role given our role to scrutinize all Victorian bills for Charter issues.

Further SARC believes that if a court were to issue a declaration of inconsistent interpretation that the Committee should have a role to review the legislation in question as a form of automatic referral.

SARC has also had an ongoing disagreement about the function of the override provision in the Act. It has been argued that the override provision should only be used in

legislation in periods of emergency. The Charter perhaps understandably has not made an attempt to define what might constitute “exceptional circumstances” to properly engage the override provision. In any event it seems to me that an obvious or clear case of a State emergency would in my view pass the ordinary tests in section 7(2), that is, circumstances where human rights may be limited.

I hope that my brief overview of the Victorian experience 30 months into the introduction of a human rights Charter may enliven some questions and I and the Scrutiny team will be happy to clarify or add further.