

Victorian Equal Opportunity and Human Rights Commission

**Submission to the Inquiry into the Human Rights
(Parliamentary Scrutiny) Bill 2010 and the Human
Rights (Parliamentary Scrutiny) (Consequential
Provisions) Bill 2010**

October 2010



Victorian Equal Opportunity
& Human Rights Commission

ABOUT THE COMMISSION

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory body with responsibilities under three laws:

- *Equal Opportunity Act 1995*
- *Racial and Religious Tolerance Act 2001*
- *The Charter of Human Rights and Responsibilities 2006*

The Equal Opportunity Act makes it against the law to discriminate against people on the basis of a number of different personal characteristics.

The Racial and Religious Tolerance Act makes it against the law to vilify people because of their race or religion.

Under the Equal Opportunity Act and the Racial and Religious Tolerance Act, the Commission helps people resolve complaints of discrimination, sexual harassment and racial or religious vilification through a free and impartial complaint resolution service with the aim of reaching a mutual agreement.

The Charter of Human Rights and Responsibilities means that government and public bodies must consider human rights when making laws and providing services. The Commission's role is to educate people about the rights and responsibilities contained in the Charter and to report annually to the Victorian Government about the operation of the Charter. The Commission does not handle complaints related to the Charter.

Services provided by the Commission include:

- a free telephone advice line
- a free and impartial complaint resolution service
- information and education about equal opportunity, racial and religious vilification and the Charter of Human Rights and Responsibilities
- education, training and consultancy services.

Introduction

The Victorian Equal Opportunity and Human Rights Commission welcomes the opportunity to contribute to the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010.

The Australian Parliament plays an important role in protecting human rights and ensuring that Australia meets its international legal obligations to respect, protect and fulfil human rights.

The Commission supports the proposed parliamentary scrutiny process that is set out in the Bills and sees this as an important step towards developing a national human rights framework. We make this submission with the hope that a new federal committee will be an effective tool to support human rights in Australia and the important work of the Parliament in this area.

Victorian context

For Victoria, the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) was a response to community concerns and aspirations about human rights in our State. The Charter asserts the central importance of human rights considerations within the activities of government and creates a framework for the practical integration of human rights analysis within the processes that lead to the creation of laws, the development of public policy and the delivery of public services.

The Victorian Equal Opportunity and Human Rights Commission has a number of specific functions designed to help ensure that the commitment of the Charter is realised:

- reporting annually to the Attorney-General on the operation of the Charter
- providing education about human rights and the Charter
- intervening in court and tribunal proceedings involving questions related to the Charter
- providing ad-hoc advice and conducting human rights reviews upon request, and
- assisting the Attorney-General with the review of the Charter in 2011.

We are still at the start of our journey in developing a human rights culture in Victoria. However, already we can say with confidence that there are significant benefits in working towards a system of government that makes human rights a central consideration, alongside economic, social and environmental considerations. We can demonstrate that a human rights framework delivers real and lasting improvements in public policy, decisions and services. We can show that focusing on human rights principles improves the development of our laws.

Parliamentary scrutiny has been an important part of this process because legislation is a powerful tool: it reflects the standards we adhere to as a community; and it sends a message about the appropriate exercise of government authority.

Since 1 January 2007 the process for developing new legislation in Victoria has incorporated scrutiny for compliance with human rights. This has involved two requirements:

- Any member (usually the relevant Minister) presenting a bill to parliament must provide a detailed statement addressing the compatibility or incompatibility of the bill with the rights contained in the Charter.¹ In other words, the executive arm of government is compelled to not only consider human rights in the course of developing legislation; it must also place its thinking on the public record.
- In the course of reviewing proposed legislation, the Scrutiny of Acts and Regulations Committee (SARC) must report to the parliament on whether a bill is incompatible with the rights contained in the Charter.² SARC is an all-party committee drawing membership from both Houses; as such, it provides a mechanism for the legislature to add its perspective on the human rights aspects of a particular bill. Alongside this function, the Regulation Review Subcommittee of SARC has responsibility for considering whether statutory rules are developed in a way that is compatible with the rights contained in the Charter.³

These parliamentary processes have had a positive impact in Victoria.

Parliamentary scrutiny from a human rights perspective facilitates parliament's consideration of issues by drawing attention to human rights. In this way, it helps to enhance the role of Parliament by providing an opportunity to identify and articulate the rights that Parliament should be acting to safeguard. It also plays an important role in informing the broader public debate by alerting people to the extent to which proposed legislation is in accordance with human rights law.

Drawing on our experience of working with these tools, the Commission would like to offer some observations and recommendations for the Committee's consideration.

Statements of compatibility

As the Victorian Scrutiny of Acts and Regulations Committee has stated:

The requirement [in Victoria] that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.⁴

¹ Section 28 of the Charter.

² Section 30 of the Charter.

³ Section 21(1)(ha), *Subordinate Legislation Act 1994* (Vic).

⁴ Scrutiny of Acts and Regulations Committee, *Alert Digest 11*, 14 September 2009, p 3.

We support the proposed requirement for statements of compatibility in the Human Rights (Parliamentary Scrutiny) Bill 2010. However, as currently framed, the Bill does not give any guidance about what a statement of compatibility must contain. The Bill currently states at clause 8(3) that '[a] statement of compatibility must include an assessment of whether the Bill is compatible with human rights'.

In some jurisdictions, this type of provision has led to a one-line statement of compatibility. This approach has not been useful in informing parliament about the human rights issues raised by a bill and can severely limit the capacity of statements of compatibility to contribute to public oversight of legislation.

The Victorian Charter addresses this issue in more detail and provides at section 28(3) that:

A statement of compatibility must state –

(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

This provision has provided a useful framework in the Victorian context for developing statements of compatibility and we would encourage the Australian Parliament to set out similar requirements in the establishing legislation itself.

In practice, Ministers have had to find a balance between providing enough detail and not being overly legalistic and technical. In Victoria, work has been done since the Charter came into force to find this balance and statements have improved in recent years. One of the ways this improvement has been achieved has been by focusing on the rights that may be limited, rather than every right that is potentially engaged by a bill. Public sector staff, particularly those directly involved in preparing statements of compatibility, are also becoming more adept at identifying and evaluating the human rights implications of legislative proposals. These developments have been accompanied by increasing use of public consultations when developing legislation (before it is tabled in Parliament).

Recommendation 1: The legislation should set out as a minimum requirement that statements of compatibility explain the nature and extent of any incompatibility with human rights.

Systems needed to support the parliamentary scrutiny process

(a) Use of international jurisprudence

Section 32(2) of the Victorian Charter makes provision for reference to international jurisprudence when considering the scope and content of human rights. Given the origin and development of human rights, we have found this to be a necessary tool in considering the Charter in Victoria and would recommend this to the Australian Parliament. This will be even more relevant to the Australian Parliament where it is proposed to directly reference the treaties. Decisions and actions must be assessed against standards and benchmarks that are accepted by the international community as universal and are the source of Australia's international legal obligations.

Recommendation 2: The Parliamentary Committee be given the power to refer to international jurisprudence when considering the scope and content of human rights.

(b) Time to consult

To operate effectively, there needs to be time for community consultations during the scrutiny of legislation. For a human rights dialogue to generate meaningful compliance, the broader community's human rights concerns and aspirations must be known and understood. For this to occur, community input and a community perspective must feature prominently as part of a rigorous and informed dialogue.

This has not always occurred in Victoria. The Summary Offences and Control of Weapons Acts Amendment Bill 2009 is an example of a bill that was the subject of considerable community concern, yet was moved through the Parliament quickly with little time for even the experienced players in the community sector to consider its operation before being passed. More recently, the Sentencing Amendment Act 2010 was introduced and passed in both houses of Parliament in two days.

A genuine dialogue facilitates a vital exchange of ideas, enabling human rights impacts to be robustly debated, rather than the hasty passage of bills through Parliament. Consultation should involve vulnerable groups most likely to be affected by the measures, exposure drafts and time for meaningful reflection. This is especially crucial when a bill contains provisions acknowledged by the government to be incompatible with human rights.

Recommendation 3: The Parliamentary Committee should be given sufficient time to consider bills and on significant issues, consult with the Australian public, unless there is a time of public emergency.

(c) A legal advisor

The Victorian experience has demonstrated the utility of having dedicated legal expertise to support the work of the Scrutiny of Acts and Regulations Committee with Associate Professor Jeremy Gans from Melbourne University Law School acting as the Human Rights Advisor to the Committee since 2007. This role has provided vital assistance to committee members in tackling the technical aspects of their human rights considerations.

Recommendation 4: That the Committee appoint an international human rights law advisor.

(d) Input from the Australian Human Rights Commission

As Australia's national human rights institution, the Australian Human Rights Commission is uniquely placed to offer advice to assist the proposed Parliamentary Joint Committee on Human Rights in its work. The Australian Commission comes to its work with significant expertise and experience working with the international human rights instruments and provides a vital independent source of advice.

Recommendation 5: In addition to other sources of advice and public consultation, a formal mechanism be established for the Joint Parliamentary Committee to notify and give the Australian Human Rights Commission the opportunity to comment on bills that raise significant human rights issues. As part of its own functions, the Commission should be given the option of considering the same range of international human rights instruments as the Committee if it chooses to make comments in this area.

(e) Human rights based approach to government

Parliamentary scrutiny is a useful process and contributes to the broader human rights dialogue, but it must be supported by a human rights based approach to the work of the executive government before bills reach Parliament. As the Attorney-General, the Hon Robert McClelland MP, stated when he introduced the Human Rights (Parliamentary Scrutiny) Bill, the purpose of the measures are to ‘improve parliamentary scrutiny of new laws for consistency with Australia’s human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development’.⁵ Parliamentary scrutiny is one arm of this. Government policy and legislative development processes are the other.

Recommendation 6: Public authorities should integrate the consideration of human rights issues and the pursuit of human rights compliance into their planning and operational processes.

- **Human rights education and training programs for all staff, with a particular focus on the human rights dimension of day-to-day operations and the integration of human rights in all aspects of decision-making and conduct.**
- **Communication and general awareness raising about human rights to ensure a broad, baseline awareness of human rights among public service providers and users.**
- **Audit mechanisms.**
- **Incorporation of human rights considerations, values, aims and objectives in business and strategic plans and annual reporting mechanisms.**
- **Appointment of human rights officers to raise awareness in their departments and agencies.**
- **Human rights based reviews of public service policies and practices.**
- **The inclusion of human rights considerations in cabinet and legislation processes. For examples, the Legislation Handbook should be amended to include the seven international human rights instruments that will be considered by the Parliamentary Joint Committee.**

⁵ The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010.