

Victorian Government Submission
to the
Senate Legal and Constitutional Affairs Committee
Inquiry into the
Human Rights (Parliamentary Scrutiny) Bill 2010

July 2010

Introduction:

1. The Victorian Government welcomes the introduction of a system of parliamentary scrutiny of proposed Commonwealth legislation for compatibility with human rights through the Human Rights (Parliamentary Scrutiny) Bill 2010.
2. In July 2006, the Victorian Government enacted the *Charter of Human Rights and Responsibilities Act 2006* (“the Victorian Charter”). The Victorian Charter recognises and protects a range of human rights, most of which are drawn from the International Covenant on Civil and Political Rights (ICCPR). The Charter obliges public authorities to act compatibly with human rights, and to give consideration to human rights in decision-making. It requires that, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. Most relevantly for this inquiry, the Charter includes a system of parliamentary scrutiny of proposed legislation for compatibility with human rights which is comparable to the one proposed in the Human Rights (Parliamentary Scrutiny) Bill 2010.
3. Victoria has had the benefit of more than three years’ experience of the impact of the parliamentary scrutiny process on policy development and parliamentary debate. The Victorian Government is therefore in a unique position to inform discussion about the Human Rights (Parliamentary Scrutiny) Bill 2010.
4. Victoria’s experience is that the system of parliamentary scrutiny of proposed legislation for compatibility with human rights adopted in the Victorian Charter has strengthened our parliamentary democracy. It has ensured that careful consideration of human rights is an important factor in debates about new policy and legislation, while recognising and reinforcing the cardinal democratic principle of parliamentary sovereignty. Our experience is that the Victorian Charter has increased accountability and transparency in government decision-making and action.
5. The Victorian Government believes that there is a strong interest in having, to the greatest extent possible, a uniform national approach to parliamentary scrutiny of legislation for compatibility with human rights. This is particularly important in considering what limitations to human rights are appropriate.
6. The Victorian Government’s submission focuses upon two areas of the Human Rights (Parliamentary Scrutiny) Bill 2010 relating to the process for the development and tabling of statements of compatibility where we believe there would be a benefit from considering the Victorian experience and from the adoption of an approach with greater uniformity to that taken in the Victorian Charter. These areas are:
 - whether a “general limitations” clause should be included; and
 - the need for clear reasons to be included in statements of compatibility.

The need for a “general limitations” clause

7. The definition of human rights in s 7 of the Victorian Charter sets out when rights may be limited. The section states that:

“(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and

- (c) the nature and extent of the limitation; and
 (d) the relationship between the limitation and its purpose; and
 (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”
8. This is widely known as a “general limitations” section. The section sets up a proportionality test for considering whether limitations to rights are demonstrably justified.¹
 9. Almost identical general limitations clauses exist in human rights legislation in the ACT² and South Africa.³ Human Rights legislation in New Zealand⁴ and Canada⁵ also includes a general limitations clause, setting out that human rights may be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, without listing the factors to be taken into account.
 10. Victoria’s experience is that the general limitations section in s 7(2) plays a very important role in our system of human rights protection. In our experience, a significant amount of proposed legislation will limit human rights, but will do so in a way that is compatible with human rights, or that is capable of being made compatible with human rights when the reasonable limitations section is applied in the policy or legislative development process.
 11. The general limitations provision assists policy-makers in developing legislation that is compatible with human rights. In particular, it requires consideration by policy makers of the following questions:
 - Does the legislation place any limits on human rights? Does it interfere with any human right?
 - If so, what is the nature and scope of the rights in question?
 - What is the purpose of the limitation or interference with human rights?
 - What is the importance of the purpose of the limitation?
 - Is the limitation proportionate to its purpose?
 - Are there any less restrictive means to achieve the purpose? and
 - What evidence is there to “demonstrably justify” the proposed limitation?
 12. As the Victorian Equal Opportunity and Human Rights Commission noted in its 2009 report on the operation of the Charter, *Making Progress*, citing the response to the Commission’s questions from Victorian Department of Justice:

The changes to the legislative process have had an impact, often unseen by the general public, in bringing about numerous amendments to reduce adverse human rights impacts even before a policy or Bill is considered by Cabinet.⁶
 13. The general limitations section also plays a role in the effective scrutiny of bills by Parliament. The purpose of the parliamentary scrutiny process is to inform Parliament about the human rights impacts of bills and to contribute to debate about bills. The general limitations section gives structure and content to that discussion. It provides a proper test for determining whether legislation is compatible with human rights (and avoids reliance on what may otherwise be a

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General, Second Reading Speech of the Charter of Human Rights and Responsibilities Bill). See also *R v Momcilovic* [2010] VSCA 50 at [147]; *R v Oakes* [1986] 1 SCR 103, 139.

² *Human Rights Act 2004* (ACT) s 28(2).

³ *Constitution of the Republic of South Africa 1986* s 36(1).

⁴ *Bill of Rights Act 1990* (New Zealand) s 5.

⁵ *Canadian Charter of Rights and Freedoms 1982* s 1.

⁶ Victorian Equal Opportunity and Human Rights Commission, *Making Progress: The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010).

simple instinctive response). It identifies key features of the legislation to consider while still allowing for any other relevant considerations to be taken into account. The test is not exclusive.

14. Since 2007, more than 300 statements of compatibility have been tabled in the Victorian Parliament in accordance with the Victorian Charter. According to these statements of compatibility, the overwhelming majority of bills have engaged one or more Charter rights. A significant proportion have limited one or more Charter rights, but did so in a way that is demonstrably justified in a free and democratic society. Two statements of compatibility so far have noted that the provisions of the bill to which they relate are partially incompatible with Charter rights. The general limitations section is therefore at the heart of the process of effective scrutiny of legislation.
15. The general limitations section assists the Scrutiny of Acts and Regulations Committee (SARC), the Victorian Parliamentary Committee charged with scrutinising legislation for compatibility with Charter rights, in fulfilling its role under the Victorian Charter.⁷ The section provides the Committee with clear and concrete criteria to consider in coming to a view on whether limitations on rights are justifiable.
16. The Human Rights (Parliamentary Scrutiny) Bill 2010 does not include a general limitations clause. Clause 3 defines “human rights” as “the rights and freedoms recognised or declared” by the seven core international human rights treaties to which Australia is a party,⁸ as the rights in these treaties apply to Australia.
17. The seven core international human rights treaties do not include general limitations clauses of the kind referred to above, nor do they provide a consistent approach on how to assess whether limitations of rights are demonstrably justified.⁹ Courts in other jurisdictions and UN Committees have increasingly applied a form of proportionality or reasonableness test in considering whether an act, policy or piece of legislation is human rights compliant across a range of instruments and rights, notwithstanding some variation in the different sources of rights.¹⁰
18. The Victorian experience is that it has been useful to set out a simple and explicit test regarding general limitations on rights to provide guidance to public servants and to promote a consistent approach. This is especially important given that consideration of human rights compatibility will occur in all departments across government in the development of policy and legislation and in the preparation of statements of compatibility.¹¹

⁷ Victorian Charter, s 30.

⁸ *The International Convention on the Elimination of all Forms of Racial Discrimination*, done at New York on 21 December 1965 ([1975] ATS 40); *the International Covenant on Economic, Social and Cultural Rights*, done at New York on 16 December 1966 ([1976] ATS 5); *the International Covenant on Civil and Political Rights*, done at New York on 16 December 1966 ([1980] ATS 23); *the Convention on the Elimination of All Forms of Discrimination Against Women*, done at New York on 18 December 1979 ([1983] ATS 9); *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, done at New York on 10 December 1984 ([1989] ATS 21); *the Convention on the Rights of the Child*, done at New York on 20 November 1989 ([1991] ATS 4); *the Convention on the Rights of Persons with Disabilities*, done at New York on 13 December 2006 ([2008] ATS 12).

⁹ For example, while a number of rights in the *International Covenant of Civil and Political Rights* (ICCPR) do include internal limitations, parties to the treaty are required to “respect and to ensure to all individuals within its territory” the rights in the Covenant, but there is no guidance on how to apply this requirement by way of a general limitations clause or proportionality test: ICCPR Article 2(1). By contrast, the rights in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are subject to progressive realization to the maximum of available resources, subject only to limitations “for the purpose of promoting the general welfare in a democratic society”: ICESCR Article 2(1), 4.

¹⁰ Evans and Evans, *Australian Bills of Rights* (2008), 161.

¹¹ The Human Rights (Parliamentary Scrutiny) Bill 2010, like the Victorian Charter, requires that statements of compatibility be tabled by the Member of Parliament introducing the piece of legislation. By contrast, the *Human Rights Act 2004* (ACT) gives this responsibility to the Attorney-General in all cases.

19. We note that in 2004, the ACT amended its *Human Rights Act* to make the general limitations clause more explicit about the factors to be taken into account. The Explanatory Statement accompanying the amending Bill notes that “[i]ts intention is to provide guidance in the application of the general limitation clause in section 28(1) and to reduce its uncertainty.”¹² The Statement also notes that the new section is modelled on s 7 of the Victorian Charter *inter alia*.
20. Our experience is that a large number of bills will limit rights, but do so in a way that is demonstrably justified. Without a general limitations clause, the result may be a large number of statements of compatibility noting that bills limit human rights, without a clear, uniform approach to consideration of whether such limitations are demonstrably justified and therefore compatible with human rights. This would result in less effective scrutiny of legislation and less consistency.
21. There is also value in having a uniform national approach on the question of how limitations to human rights may be demonstrably justified. This will enable policy-makers and legislators to draw on the experience of jurisdictions such as Victoria and the ACT in considering whether a bill which limits human rights does so in a way that is demonstrably justified. A uniform approach is particularly desirable and important given the increasing number of uniform national schemes of regulation, many of which involve complementary Commonwealth and State legislation.
22. A uniform approach will also make it easier for the broader community to understand and engage with human rights issues. Conversely, if various schemes of human rights scrutiny provide for different approaches to the often-contentious question of how rights may be limited in a free and democratic society, this is likely to lead to confusion in the community.

The content of statements of compatibility

23. Section 28(3) of the Victorian Charter sets out the usual requirements for the content of statements of compatibility:

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

24. This formulation has been helpful in ensuring that statements of compatibility provide a clear and concise assessment of how a bill is compatible with human rights, without becoming too long or legalistic.
25. Clause 8(3) of the Human Rights (Parliamentary Scrutiny) Bill 2010 formulates the requirement for the content of statements of compatibility under the Commonwealth scheme. It states, less prescriptively, that:

A statement of compatibility must include an assessment of whether the Bill is compatible with human rights.

26. The Explanatory Memorandum explains:

The clause does not prescribe a particular form for statements of compatibility but provides that a statement of compatibility must include an assessment of whether the bill is compatible with human rights as defined in clause 3. Statements are intended to be

¹² Explanatory Statement, Human Rights Amendment Bill (2007) ACT, 3.

succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.

27. Notwithstanding the material in the Explanatory Memorandum, Clause 8(3) leaves open the possibility that one-line statements of compatibility that did not include reasons for the assessment of compatibility given would meet the stated requirement of providing an “assessment”. This would not achieve the goal of increasing scrutiny of proposed legislation for compatibility with human rights.
28. We note that, like the Human Rights (Parliamentary Scrutiny) Bill 2010 Bill, the *Human Rights Act 2004 (ACT)* does not require a reasoned assessment of how proposed legislation is compatible with human rights. We further note that the review of the first five years of the operation of the ACT Act, conducted by the Australian National University, recommended that reasons should be given for statements of compatibility, using the general limitations clause as a framework.¹³
29. The Victorian Charter also provides specific guidance in relation to statements of compatibility where, in the opinion of the member of Parliament introducing the bill, part or all of the bill is incompatible with human rights. Section 28(3)(b) of the Victorian Charter states that:

A statement of compatibility must state— ...
(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
30. Practically, this requires identification of which rights are limited, how they are limited and the policy justification for proceeding with the legislation despite its incompatibility with human rights.
31. The Victorian scheme for parliamentary scrutiny of proposed legislation for compatibility with human rights maintains the principle of parliamentary sovereignty. It does not prevent Parliament from passing legislation which is incompatible with human rights. It does, however, ensure accountability and transparency on the rare occasions that this is done. The specific guidance given to members of Parliament in s 28(3)(b) strengthens this mechanism.
32. Without any specific guidance in the Human Rights (Parliamentary Scrutiny) Bill 2010, there is the prospect of one-line statements of compatibility noting that a bill is incompatible with human rights without any detail regarding the human rights that are limited and why the legislation needs to be passed notwithstanding its incompatibility with human rights. This would not achieve the goal of increased transparency and accountability where proposed legislation is incompatible with human rights.
33. We submit that there is an interest in having a uniform approach in this area as well. Legislation that is incompatible with human rights is likely to be the subject of considerable community debate. Having a consistent national approach will enhance this debate and increase public confidence in and understanding of human rights.

Other matters

34. When the Victorian Charter was enacted, the Victorian Government established a Human Rights Unit within the Department of Justice to coordinate a consistent approach to the implementation of the Charter and to act as a resource for other Departments in areas including

¹³ ACT Human Rights Research Project, Australian National University, *The Human Rights Act 2004 (ACT): the First Five Years of Operation. A Report to the ACT Department of Justice and Community Safety* (May 2009), pp 36-37.

training and preparation of statements of compatibility. We note that providing sufficient resourcing and training within Government has been essential in ensuring that the process of scrutiny of proposed legislation for compatibility with human rights is effective. We consider that adequate resourcing and training will be similarly crucial in ensuring successful implementation of the Commonwealth scrutiny scheme.