



Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to the Senate Standing
Committee on Legal and Constitutional
Affairs

on the

***Inquiry into the Human Rights (Parliamentary
Scrutiny) Bill 2010 and the Human Rights
(Parliamentary Scrutiny) (Consequential
Amendments) Bill 2010***

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1. Introduction

1. The Senate Standing Committee on Legal and Constitutional Affairs (“the Committee”) has called for submissions on the Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 (“the Bill”) and the Human Rights (Parliamentary Scrutiny) (Consequential Amendments) Bill 2010 (“the Consequential Amendments Bill”).
2. This submission highlights the role of the Scrutiny of Acts and Regulations Committee (“SARC” and the way in which SARC scrutinises Bills or subordinate legislation with regard to rights established by the *Victorian Charter of Human Rights and Responsibilities* (“Charter”). The Charter includes a right to privacy for all Victorians.
3. One of my functions under the *Information Privacy Act 2000* (Vic) is to provide advice on proposed legislation and the impact it may have on personal privacy.¹ Accordingly, my office regularly makes submissions to SARC as to whether a Bill (or subordinate legislation) might have a potential adverse impact on the privacy rights of Victorians.
4. I urge the Committee to support enactment of the Bill, which would give the proposed Joint Committee on Human Rights a similar role to SARC in scrutinising Bills and other legislative instruments with regard to the Commonwealth’s obligations under international human rights treaties, which include privacy rights.

2. The Victorian Charter, SARC and the Victorian Privacy Commissioner’s Role

5. When passing the *Information Privacy Act*, the Victorian Parliament recognised the importance of establishing a regulator to assess the impact on privacy of proposed legislation. It gave the Privacy Commissioner this function, and extended the functions of SARC to include consideration as to whether a Bill unduly authorises acts or practices that might have an adverse impact on personal privacy within the meaning of the *Information Privacy Act*.²
6. Parliament subsequently passed the Charter in 2006. As a result, all Bills before the Parliament must now include a statement of compatibility which requires assessment of the Bill’s impact on all Charter rights, which include privacy. Section 13(a) of the Charter confers a right on every individual not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. While ‘privacy’ is not defined in the Charter, the rights afforded are broader than the specific information privacy rights protected by the *Information Privacy Act*.
7. One of SARC’s major functions is to analyse legislation to assess its compatibility with the Charter.³ The expansion of SARC’s role in the scrutiny of new legislation and regulations by the Charter has also established a broader legislative basis upon which I, in accordance with my functions under the *Information Privacy Act*, am able to comment on the privacy impact of a particular Bill. My ability to advise on privacy issues where there is a tension between a Bill and privacy rights under the Charter and/or the *Information*

¹ See *Information Privacy Act 2000* (Vic) ss 58(l), (s), (t).

² *Parliamentary Committees Act 2003* (Vic) s 17(a)(iv).

³ *Parliamentary Committees Act 2003* (Vic) s 17(a)(viii).

Privacy Act remains an important function and provides additional ‘checks and balances’ in the legislative process.

8. Accordingly, SARC’s role encourages openness and transparency. SARC explains that ‘non-policy scrutiny within its terms of reference allows [SARC] to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.’⁴
9. My Office has made a number of submissions to SARC which have resulted in an alert being issued on major legislation. For example, my Office recently made a submission to SARC on the Summary Offences and Control of Weapons Acts Amendment Bill 2009 (Vic),⁵ which, in my view, impacted severely on the privacy rights of Victorians.

3. Privacy in Human Rights Instruments

10. While the proposed model will differ from that adopted in Victoria as it does not include the enactment of a Commonwealth Charter of Rights, it will still substantially improve the scrutiny given to the potential impact on the right to privacy of Commonwealth Bills and other legislative instruments. This is due to the proposed role of three international human rights instruments that explicitly include the right to privacy in their protections.
11. The three instruments that explicitly include privacy among their enumerated protections are: the International Covenant on Civil and Political Rights (Article 17); the Convention on the Rights of the Child (Article 16); and the Convention on the Rights of Persons with Disabilities (Article 22). The relevant articles from each instrument are reproduced below.
12. International Covenant on Civil and Political Rights:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

*2. Everyone has the right to the protection of the law against such interference or attacks.*⁶

⁴ Alert Digest No. 1 of 2010, ‘Role of the Committee’, p iv.

⁵ Available at <http://www.privacy.vic.gov.au/privacy/web.nsf/content/submissions>

⁶ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966, entry into force 23 March 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm>, last accessed 7 July 2010

13. Convention on the Rights of the Child:

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

*2. The child has the right to the protection of the law against such interference or attacks.*⁷

14. Convention on the Rights of Persons with Disabilities:

Article 22

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

*2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.*⁸

4. Role of the Australian Privacy Commissioner

15. As outlined above, I am given an explicit function to make submissions to SARC on the privacy impact of Bills, under both the *Information Privacy Act* and the *Parliamentary Committees Act*.

16. While I understand that no equivalent explicit legislative function is given to the Australian Privacy Commissioner, section 27(1)(b) of the *Privacy Act 1988* (Cth) gives the Privacy Commissioner the function:

to examine (with or without a request from a Minister) a proposed enactment that would require or authorise acts or practices of an agency or organisation that might, in the absence of the enactment, be interferences with the privacy of individuals or which may otherwise have any adverse effects on the privacy of individuals and to ensure that any adverse effects of such proposed enactment on the privacy of individuals are minimised

17. While the wording of this provision may well be broad enough to include making submissions to the proposed Joint Committee on Human Rights, to remove doubt the

⁷ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November, 1989, entry into force 2 September, 1990, available at <http://www2.ohchr.org/english/law/crc.htm>, last accessed 7 July 2010;

⁸ Convention on the Rights of Persons with Disabilities, adopted and opened for signature, ratification and accession by General Assembly resolution A/Res/61/106 of 13 December 2006, entry into force 3 May 2008, available at <http://www2.ohchr.org/english/law/disabilities-convention.htm>, last accessed 7 July 2010

Committee may consider recommending an amendment to the Consequential Amendments Bill, to amend the *Privacy Act 1988* to include explicit functions for the Australian Privacy Commissioner in relation to the Joint Committee on Human Rights.

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