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Inquiry into the Charter of Human Rights and Responsibilities

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Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria

Introduction
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 skeptics there has not been an avalanche of legal challenges 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.

SARC has an important role in the dialogue model of human rights, which was established in Victoria by the Charter of Human Rights and Responsibilities Act. The brief submission is to suggest possible improvements on the role of the Scrutiny of Acts and Regulations Committee (SARC) and therefore enhance the dialogue between Parliament and the Executive.

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. The override
declaration expires after 5 years of the provision coming into force. However
Parliament may re-enact an override declaration at any time.

The dialogue working
There is evidence that the Committee’s functions and reports influence the drafting of
bills prior to be presented to Parliament.

My experience as Chair in dealing with departments and their legal staff that the
Committee’s scrutiny work does influence the legislative drafting process. Departmental
legislation officers on occasion refer to an unfavorable SARC report and correspondence
with the Minister as being SAR Cec. 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 has also criticized compatibility statement for too little detail, for too much detail,
for failing to address certain rights or for trivializing rights. I believe the statements have
improved over time 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.

**SARC**
In my experience, as the former chair of SARC, SARC’s scrutiny has had little influence
over the content of legislation once the bill has been presented to Parliament. This occurs
even in situations when legislation was passed, only to have at a later date Government
make subsequent amendments, which deal with SARC’s initial concerns. In 2010 for
example we saw two occasions when Parliament amended legislative provisions that the
Committee had previously reported might be incompatible with human rights. Parliament
reversed rules:
• Making same-sex partners of long-term pensioners ineligible for reversionary pensions, which the Committee had reported in 2008 may be incompatible with the Charter’s equality rights.

• Permitting finally dealt with charges to be considered in ‘working with children’ assessments, which the Committee had reported in 2007 may be incompatible with the Charter’s right to the presumption of innocence.

My experience as SARC Chair 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. My observation is that Ministers tend to be very defensive in responding to issues raised by SARC in correspondence. In Parliamentary debates rarely do Ministers consider charter issues or SARC comments.

SARC does however expect 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.

I think this dialogue would be further improved by SARC having a role in pre-legislative scrutiny. This would mean SARC could report and examine the human rights implications of Government policy after the release of discussion papers and draft bills, before it is set out in the text of primary legislation. SARC has a potential role in drawing the attention of Parliament and the Government at an early stage to potential human rights pitfalls in relation to a proposed policy course. Such pre-legislative scrutiny work should see a reduction in the number of human rights compatibility problems in any ensuing primary legislation. This pre-legislative scrutiny would essentially cover discussion papers and draft bills.

Ongoing concerns
In assisting the work of Parliament SARC should have a clearer role in establishing guidelines for compatibility statements and guidelines for Departmental officers.

In part this has been happening through SARC’s issuing of Practice Notes. SARC has prepared three Practice Notes for the guidance of departments and government agencies. While Practice Notes are useful to Departmental officers, they do not deal systematically with re-occurring issues or areas where SARC receives conflicting advise.

For example in the previous Parliament there were a number of areas in which different Ministers had given very divergent advise to SARC. This included National Schemes legislation, self-incrimination and the presumption of innocence. The Committee was also concerned at the lack of scrutiny of amendments and wrote to the former Premier inquiring about arrangements to ensure that Parliament is informed about human rights issues raised by amendments to a Bill.

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 I have had is that in a number of compatibility statements, international decisions are cherry picked to justify the desired legislative provision. The failure to consider and evaluate inconvenient judicial decisions has been criticized by SARC and has lead to the SARC itself presenting contrary decided cases to enliven the debate and seek further advice from Minister’s and their departmental advisers why those decisions are less favored or not relevant. I believe a reasonable assessment of divergent international decisions can add value to the assessment of legislative proposals.

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. Unfortunately in many compatibility statements there is a reluctance to examine whether there may be a less intrusive or restrictive means to achieve the result.

Reoccurring issues
A number of re-occurring issues have arisen which I believe need to be addressed.

National Scheme legislation undermines the Victorian Charter so what is SARC’s role given our role to scrutinize all Victorian bills for Charter issues? This is a re-occurring issue in which, in the previous Parliament, different Ministers gave contradictory advice on whether SARC has any role in scrutinizing future amendments of such legislation.

I also believe that if a court issues a declaration of inconsistent interpretation that the Committee should have a role to review the legislation in question as a form of automatic referral.

I have some concern 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.

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.
Adequate resources for SARC
As an agency protecting human rights it is important to 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 SARC does occasionally 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.

In the first few years of the Charter we have seen its role in the Parliamentary process evolve. SARC has a critical role in assisting Parliament in its leading role in ensuring we have good and fair laws in Victoria.

I would request an opportunity to present these issues to SARC at a public hearing.

Recommendations
1. SARC to have a role in pre-legislative scrutiny
2. SARC should have a defined role in establishing guidelines for compatibility statements and guidelines for Departmental officers
3. There should be an automatic referral to SARC for declarations of inconsistent interpretation
4. There should be a review of the need for an override provision in the Act

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1. See Alert Digest No 8 of 2010 (reporting on the Superannuation Legislation Amendment Bill 2010).
2. See Alert Digest No 9 of 2010 (reporting on the Working With Children Amendment Bill 2010.)
3. Practice Note No 3.