

Scrutiny of bills under bills of rights: is Victoria's model the way forward?

Jeremy Gans*

INTRODUCTION: SCRUTINISING CHARTER S. 30

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) is a short but very contentious statute consisting of 49 terse sections. This article is concerned with probably the least controversial (and one of the shortest) of those:

30 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.

Less controversy doesn't mean no controversy. Without detracting from the significant issues that have arisen about the rest of Victoria's Charter,¹ this paper sets out some of the reasons why the Charter's legislative scrutiny provision needs some scrutiny of its own.

The discussion will first examine the purpose and operation of Charter s. 30. It will then consider the difficulties of reporting under that section. Finally, it will detail further scrutiny functions under the Charter.

BILLS OF RIGHTS: A PARLIAMENTARY DIALOGUE?

The Charter is the latest (for now) in a trend in Commonwealth countries of protecting human rights through a 'parliamentary' (or 'weak-form') model. Rejecting the 'constitutional' (or 'strong-form') approach – which allows courts to overturn laws breaching human rights – the parliamentary model consists of a bundle of rules requiring various wings of government to consider human rights, without necessarily having to comply with them, hence preserving parliamentary sovereignty. Some of those new rules apply to Parliament itself, including provisions for: statements of compatibility by parliamentarians; override statements by Parliament; Parliamentary responses to statements of incompatibility by courts; and parliamentary committee scrutiny of new laws. Charter s. 30 is an instance of the latter.

While there is considerable disagreement about human rights protection in general and the parliamentary model in particular, there's a lot of agreement about human rights scrutiny by parliamentary committees. Even the most vehement opponents of human rights laws champion committee scrutiny as an alternative to scrutiny by judges. And those who dismiss the parliamentary model as insufficiently protective of human rights concede that one of the flaws of more judge-focussed systems in Canada, South Africa, the United States and elsewhere is a lack of committee scrutiny provisions and practices like Charter s. 30.

However, the historical roots of a parliamentary human rights scrutiny aren't particularly deep. Parliamentary committees didn't feature in the text or practice of the earliest Charter-like laws in Canada, Hong Kong or New Zealand. Even the statute that has had

* Associate Professor, Melbourne Law School. I also advise SARC on human rights. This speech is given in my former capacity.

¹ See, e.g. the author's former blog at charterblog.wordpress.com.

the greatest influence in Australia – the *Human Rights Act 1998* (UK) – doesn't require scrutiny by a parliamentary committee. Rather, the institution that is routinely held up as both the origin and the exemplar of modern practice– the UK Parliament's Joint Committee on Human Rights – was only established after the passage of that Act. The JCHR is a creature of standing orders and has a mandate that is much more flexible than those of scrutiny committees.²

It was not until 2004 that a human rights law was enacted that required human rights reporting by a parliamentary committee. Section 38 of Australia's first human rights law, the *Human Rights Act 2004* (ACT), was the result of a recommendation in the Territory's community consultation report, which cited the positive example of the UK and the negative one of New Zealand.³ However, while the report's draft bill expressly referred to 'standing committee scrutiny', the eventual statute instead used the term 'consideration of bills'. The choice of which committee would fulfil this function was left to the Legislative Assembly's Speaker. The ACT's current practice is similar to Victoria's – the designated committee is the Assembly's scrutiny committee – but a shift to the UK's approach of a specialist human rights committee performing more than traditional scrutiny would require only a change of mind by the Speaker.

So, Charter s. 30, the second statutory provision in a human rights law to mandate parliamentary committee reporting, breaks new ground by expressly giving this function to a scrutiny committee and, in particular, to a pre-existing one: the Scrutiny of Acts and Regulations Committee (SARC). This part discusses the purpose and incidence of this marriage of a pre-existing, traditional scrutiny regime to a new and (somewhat) groundbreaking human rights law. Subsequent parts address the contents of the resulting scrutiny reports.

Why to report

The major analysis to date of why the Charter gives a human rights role to SARC appears in the report of the Charter's community Consultation Committee, an ad hoc law reform body formally tasked with seeking the community's views on human rights protection (and an apparently indispensable precursor to Charter-style statutes in Australia.) The Victorian government's Statement of Intent – which prejudged most of the consultation – was silent on parliamentary scrutiny.

Reflecting its relative lack of political controversy, every submission cited by the Consultation Committee favoured giving a parliamentary committee a human rights scrutiny role.⁴ But there was a debate over which committee should be given this new function.⁵ While a majority favoured SARC, a minority urged the creation of a new committee specialising in human rights (similar to the JCHR.) According to the Consultation Committee, the minority was primarily concerned about SARC's workload, a matter also emphasised in SARC's own submission to the consultation. Without

² *House of Commons Standing Orders – Public Business*, s152B, sub-section (1) providing that there 'shall be a select committee... as the Joint Committee on Human Rights, and sub-section (2) providing that 'The committee shall consider... matters relating to human rights in the United Kingdom' (as well as various orders made by the European Court of Human Rights.) These provisions first appeared in the 2001 version of the Standing Orders.

³ ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, 2003, [4.20]

⁴ Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, 2005, [4.4.3]

⁵ A similar debate in Western Australia was complicated by the lack of an existing committee with an automatic scrutiny function for bills. The WA consultation committee instead recommended that the new function be given to the Delegated Legislation Committee: Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, 2007 at [6.4.1].

explanation, the Consultation Committee wrote that it was persuaded by the majority view, subject to adequate resourcing for SARC.

The Consultation Committee’s discussion was relentlessly upbeat about the potential contribution that SARC could make to the promotion of human rights in Victoria. Its report featured a diagram placing parliamentary scrutiny at the centre of a parliamentary human rights dialogue:



The Committee cited submissions stating that SARC reports would ‘facilitate a more robust debate’ and ‘contribute to a deeper and more considered form of deliberation on the rights implications of all Bills’. Apparent criticisms the Consultation Committee noted, but did not follow-up, were suggestions of reforms to SARC itself, including majority non-government membership and a non-politician chair (either an expert or a Victorian Human Rights Commissioner), reflecting a fear (arguably, since disproven) that a government-majority committee might be a soft touch on government bills. The Consultation Committee itself recommended that SARC be renamed the ‘Human Rights Scrutiny Committee’, to better reflect its new function.⁶ That suggestion, which sidelines SARC’s traditional scrutiny functions, was not followed in the actual legislation.

Seven months after the Consultation Committee’s report – and the day before the Charter itself received Royal Assent – the world’s showcase of parliamentary human rights scrutiny, the UK’s Joint Committee on Human Rights (JCHR), issued a damning verdict on its own scrutiny record in its first four years.⁷ The JCHR observed that its scrutiny reports had resulted in very few amendments to bills (about 18 out of 600 bills considered to that date), parliamentary mentions (about 100) or court references. Its consultant’s report cited research suggesting that scrutiny reports came too late to significantly influence government policy and that the contents of its reports provided parliamentarians with little more than legal advice on potential court challenges.

Assessed by the same criteria, SARC’s performance in its first two-and-a-half years is even bleaker. At most, its reports have prompted amendments to just four bills – all in

⁶ Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, 2005,, Recommendation 18.

⁷ Joint Committee on Human Rights, 23rd Report of Session 2005-06: *The Committee’s Future Working Practices*.

relatively minor ways⁸ – out of over two hundred that were scrutinised (and about a third of which attracted commentary on Charter matters.) SARC’s Charter reports have been cited in Parliament occasionally, but rarely at length or to any apparent effect, mainly by Committee members and by the cross-bench minor parties in the upper house. Government ministers have rarely mentioned, much less responded, to SARC reports on the floor of the house. Key opposition members have used them as political fodder, commiserating with the Committee on having to participate in a specious human rights dialogue.⁹ Factors (beyond those cited by the JCHR’s consultant) that might explain SARC’s lack of influence on parliamentary debates and outcomes include Victoria’s much more rigid party system; SARC’s narrower statutory remit; the embryonic and tepid Charter jurisprudence to date; and the continuing question marks about the Charter’s political legitimacy and longevity.

These developments indicate that the Victorian Consultation Committee’s core vision of a parliamentary human rights dialogue was wrong (or, more charitably, well ahead of its time.) In the UK, the JCHR’s reaction to its own review was to deliberately shift away from an *intra*-parliamentary human rights dialogue to a broader human rights dialogue involving all wings of the government and the wider community. To achieve this, it resolved to scrutinise fewer bills, hold more ‘thematic’ inquiries and seek to report on proposed laws prior to their introduction into Parliament. Charter s. 30 does not permit SARC to choose a similar course. Its Charter mandate is specific to introduced bills and demands scrutiny and potential reporting on all of them. Unlike the JCHR, it is unable to launch inquiries on broader human rights issues on its own initiative. In short, SARC is locked into the very approach the JCHR has now rejected.

There are some options for SARC to provide more than a comprehensive scrutiny service, including:

- **writing letters to Ministers** (which SARC does, but the responses rarely appear before the bill in question has been dealt with)
- **seeking public submissions on bills** (which SARC encourages. At best, though, this just adds a further legal opinion to that of SARC’s external consultant; at worst, it sows confusion and exhausts resources because stakeholders don’t restrict themselves to SARC’s scrutiny grounds or the Charter’s protected rights.)¹⁰
- **holding public inquiries on bills** (which SARC has sometimes done, after securing a ruling that it can issue further reports on bills, possibly including enacted bills. But it rarely has time to do so and, anyway, such inquiries sow even

⁸ *Alert Digest No 12 of 2007* prompted amendments to the Crimes Amendment (Rape) Bill 2007; *Alert Digest 16 of 2007* arguably prompted a sunset provision to the sentence indication provisions of the Criminal Procedure Legislation Amendment Bill 2007; *Alert Digest no 13 of 2008* eventually prompted a promise by the government to amend the heading to s116 of the *Fisheries Act 1995*; and *Alert Digest No 6 of 2009* prompted a promise by a member sponsoring the private member Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009. The same member cited *Alert Digest No 3 of 2009* as a reason to move amendments to the Major Sports Events Bill 2009, but those amendments were defeated.

⁹ For recent examples, see *Hansard*, Legislative Assembly, 56th Parliament, 1st session, 1454 & 1716-1717.

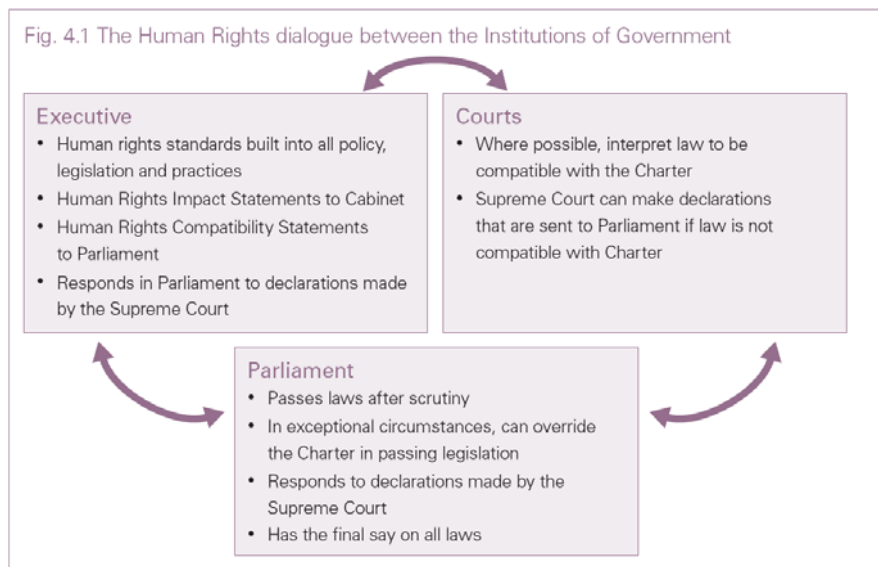
¹⁰ SARC has received public submissions on a handful of bills, notably: the Corrections Amendment Bill 2008 (see *Alert Digest No 10 of 2008*) and the Abortion Law Reform Bill 2008 (see *Alert Digest No 11 of 2008*.) It also advertised in local newspapers seeking public submissions on the Police Integrity Bill 2008 and the Public Health and Wellbeing Bill 2008.

more confusion and chew up even more resources than seeking submissions, typically without any significant new findings by the Committee.)¹¹

- **holding public inquires on Acts or broader topics** (which SARC is presently doing into exceptions and exemptions in the *Equal Opportunity Act*, as the result of a referral by the executive. But, as that inquiry – with its extraordinarily short timeline – demonstrates, this option isn’t one SARC can control and it’s hard to manage alongside the demands of regular scrutiny.)¹²

In varying degrees, all of these extra options face two significant barriers: they are hard to squeeze within the resource and timeline constraints posed by SARC’s regular scrutiny work; and they are too ad hoc to represent a significant contribution to the human rights dialogue.

How, then, can SARC make an effective contribution to Victorians’ human rights within its constraints? A speculative answer is that SARC’s *intra*-parliamentary function can have *extra*-parliamentary outcomes. The Consultation Committee – in another part of its report – set out the following model of a governmental human rights dialogue:



No role for SARC appears expressly in this model; ‘scrutiny’ is listed only as internal to Parliament and the only interface the other two wings have with the legislature is via statements of compatibility and declarations of inconsistent interpretation. It is nevertheless possible that SARC’s reports could influence the executive or the courts.

In the case of the executive, the prospect of human rights scrutiny of all bills by a body with a degree of independence from the government and direct access to Parliament might have a deterrent effect on politicians and public servants responsible for devising bills in the first place. This assumes that there is a cost to the executive – or at least components of it – if SARC reports to Parliament about a human rights consideration that a government bill limits or ignores. In turn, this depends on the political significance of SARC, not to mention Parliament. More importantly, it depends on the internal operations of the executive and, in particular, whether or not Ministers or public servants

¹¹ SARC held public hearings at its own initiative on the *Infertility Treatment Amendment Bill 2007* and at the request of the Legislative Council on the *Police Integrity Bill 2008*.

¹² SARC was asked to inquire into the exceptions and exemptions to the *Equal Opportunity Act 1995* via a motion of the governor-in-council in late December, for reporting by the following April. It issued an options paper in April and has called for public submissions in preparation for a final report in October.

regard an adverse SARC report as worth avoiding, either because of the political fodder they give to opponents (including opponents of the Charter itself) or because of the extra work they generate. Anecdote indicates that some public servants responsible for the carriage of bills refer to the experience of receiving some of SARC's lengthier reports as being 'SARced'. Whether this amounts to a criticism of the Committee's work or an acknowledgement that its adverse reports are costly is unclear. In contrast to the dialogue championed by the Consultation Committee, this version of a human rights dialogue mostly occurs out of the public eye and its effects are basically impossible to assess.

In the case of the courts, the extra-parliamentary influence of SARC is more transparent but of less plausible significance. In Victoria (unlike the UK), there is no doubt that courts can refer to committee reports (including SARC's) when interpreting legislation.¹³ What is less clear is what those reports contribute. It is one thing if legislation is seen as prompted by those reports (as occurs, for instance, when legislation reflects the recommendations of a law reform committee). But it is another when reports are made after a bill is introduced and without prompting any changes (as is the norm for SARC reports.) A SARC Charter report has been cited in one Victorian Supreme Court case to date, but the Court held that that report (which disagreed with the analysis of both a Minister and the government parties to the litigation) merely revealed that views can differ.¹⁴ It's hard to disagree with that mild assessment of the relevance of the report in that particular case. Still, in other circumstances, SARC's reports might allow a court to infer that Parliament was aware of that disagreement when it passed a bill. It is also possible that a court will be less dismissive of a litigant's arguments if SARC's view was similar. Finally, by prompting Ministerial or parliamentary responses that place the executive's views on the public record, the government's hands may be tied if litigation on those issues occurs down the track.

For all its uncertainty, SARC's extra-parliamentary influence is the most persuasive justification for Charter s. 30. However, its presence alongside an official, if impotent, intra-Parliamentary dialogue means that SARC's Charter role has a dual, or multiple, nature. As the remainder of this paper will suggest, how SARC should perform its function – and, in particular, the content of its reports – very much depends on what purpose those reports are supposed to serve.

When to report

The most obvious sign of the Charter's marriage of the old and the new is that Charter s.30 has a non-Charter doppelgänger in the more-prosaic *Parliamentary Committees Act 2003*. Section 17 of that Act lists '[t]he functions of the Scrutiny of Acts and Regulations Committee', including to 'consider any Bill... and to report to the Parliament as to whether the Bill directly or indirectly' does a number of things (i.e. grounds of scrutiny.) While s17 does not specify how or when this function is to be performed, SARC has always done so through 'Alert Digests', tabled typically on the first of every new sitting week and covering bills second-read in the previous sitting week. One of the Charter's 'consequential amendments' was to add a new scrutiny ground – whether a bill is 'incompatible with the human rights set out in the Charter' – to the existing list in s17.¹⁵ This amendment obviously would have sufficed to extend SARC's rights reporting role to include human rights scrutiny under the Charter. So, what exactly does Charter s. 30 add?

¹³ *Interpretation of Legislation Act 1984*, s35(b)(4)

¹⁴ *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [147]-[150]

¹⁵ Charter s. 47.

The apparent answer is that Charter s. 30 –like the ACT statute, but unlike the UK one – augments a discretionary scrutiny ‘function’ with mandatory ‘responsibilities’: SARC ‘must’ consider every bill and ‘must’ report on any incompatibility.¹⁶ This sort of hardening of previously discretionary rules is actually the Charter’s signature feature. The other operational provisions set out in Part 3 of the Charter similarly replace soft legal requirements – rights-friendly interpretation, rights-friendly executive conduct and decision-making – with less friendly (or more, depending on your viewpoint) legal obligations. In the case of Charter s. 30, the effect of the hardening is to ensure that SARC always considers each bill’s compatibility with human rights, regardless of the interests of its membership or the other demands on its time, and that it always reports on any incompatibility with human rights, regardless of its members’ opinions on the merits of either the bill or the Charter. Possibly, it also gives SARC’s human rights scrutiny ground precedence over its other traditional grounds and, perhaps, signals to Parliament that its reports on that ground demand special attention.

What exactly ‘must’ the committee consider and report on? Charter s. 30 falls within a division titled ‘Scrutiny of new laws’. However, its command only extends to ‘any Bill introduced into Parliament’. There’s doubt (to say the least) about whether the command covers the following ‘new laws’:

First, **Bills introduced before the Charter commenced.** The Charter’s scrutiny provisions commenced on 1st January 2007. The statute’s transitional provision doesn’t address scrutiny, but a variety of courts have suggested that the Charter in general does not apply retrospectively. It is clear enough that SARC cannot elect to scrutinise laws enacted in 2006 or earlier, but the situation is less clear for bills that were introduced in 2006 or earlier, but were not debated or enacted until 2007 or later. In its first report of 2007, SARC reported on Charter aspects of two bills introduced in the final sitting week of 2006.¹⁷ This debatable legal call was a good one from a scrutiny perspective, as Parliament continued to debate one bill for well over a year (before it was withdrawn) and is *still* debating the other one!

Second, **amendments.** Amendments to introduced bills are always a problem for scrutiny committees and parliamentary dialogue models alike, especially where they make rights-limiting changes (something that hasn’t occurred to date in Victoria.) SARC’s authority to report on amendments is unclear, though arguably it could do so in a further report on a bill that has already been reported on. It certainly seems unlikely that Charter s. 30 mandates any such reporting.

Third, **Acts.** A still more difficult problem for scrutiny committees is bills that become Acts before they are reported on. Another consequential change introduced by the Charter was an amendment to the *Parliamentary Committees Act* that gives SARC a new function of reporting on Acts (at last making the Committee’s name accurate.)¹⁸ However, the only Acts that can be reported on are ones that ‘were not considered’ as bills. There have been four such Acts since the Charter commenced, in each case passing in a single sitting and therefore outside of SARC’s ordinary timelines.¹⁹ Tellingly, SARC

¹⁶ The requirement is oddly downplayed in the Charter’s purpose clause (Charter s. 1) which refers to the Charter merely ‘enabling’ SARC to report.

¹⁷ *Alert Digest No 1 of 2007*, commenting on the Senate Elections Amendment Bill 2006 and the Water Amendment (Critical Water Infrastructure Projects) Bill 2006

¹⁸ Section 17(1)(c).

¹⁹ *Salaries Legislation Amendment (Salary Sacrifice) Act 2008* *Transport Legislation Amendment (Driver and Industry Standards) Act 2008*; *Serious Sex Offenders Monitoring Amendment Act 2009*; *Fair Work (Commonwealth Powers) Act*

made adverse Charter reports about every one of them.²⁰ However, this new function isn't mentioned in Charter s. 30, meaning such reports aren't mandatory.

Fourth, **subordinate legislation.** At its creation, SARC was a regulations review committee, with 'Act' scrutiny only added later. However, Charter s. 30 is limited to bills, rather than proposed subordinate laws. Instead, the Charter provided for committee human rights scrutiny of regulations via changes to the *Subordinate Legislation Act 1994*.²¹ Neither scrutiny nor reports are mandatory under the latter scheme, which also lacks the transparency of SARC's bill scrutiny processes. Indeed, whereas SARC has made numerous Charter reports on bills, it is yet to make any Charter reports on regulations.²²

Fifth, **non-Victorian laws in force in Victoria.** Parliamentary scrutiny, like the Charter in general, does not apply to non-Victorian laws, such as the common law or federal statutes. A problematic category is bills that only apply in Victoria by virtue of a Victorian statute, such as one picking up a national cooperative scheme or referring state power to the Commonwealth.²³ Victorian bills authorising the application of those laws or making consequential changes to accommodate them are, of course, subject to scrutiny, and that scrutiny extends to the text of those non-Victorian laws as they exist (and, in practice, as they are proposed to exist) at the time of the Victorian enactment. But there is no requirement (and, perhaps, no capacity) for SARC scrutiny of further laws that become applicable in Victoria at a later date, either pursuant to amendments to national cooperative laws agreed between governments, or empowered by an amendment power referred to the Commonwealth.

Finally, **Abortion laws.** The last and most contentious problem category is bills about abortion or child destruction, courtesy of Charter s. 48, a savings clause providing that '[n]othing' in the Charter 'affects any law applicable' to these topics. There have been two such bills since the Charter commenced.²⁴ In relation to the second, the Minister for Women's Affairs told Parliament that Charter s. 48 forecloses the Charter's parliamentary process provisions (notably the requirement for a statement of compatibility.) However, SARC issued reports on both bills, arguing that a bill was not a 'law', that parliamentary scrutiny does not 'affect' anything and that some of the second bill's provisions extended beyond abortion or child destruction.²⁵ Even if Charter s. 30 wasn't applicable, SARC arguably was permitted (but not required) to report on these bills under s. 17 of the *Parliamentary Committees Act*. The controversy here is less about Charter s. 30 than about Charter s. 48: was the latter's purpose only to prevent the human rights aspects of abortion laws from being litigated in court, or was it an attempt to stop the human rights dialogue completely. The latter view is consistent with the Minister for Women's Affairs' position, except that it clearly wouldn't (and didn't) stop the Charter's application to abortion from being debated both within Parliament and in public (including through conflicting legal opinions.) Indeed, the Abortion Law Reform Bill 2008 attracted more

2009. A further bill, the Primary Industries Legislation Further Amendment Bill 2009, is likely to join this club by the time this speech is delivered.

²⁰ *Alert Digests No 1, 2 and 7 of 2009*.

²¹ *Subordinate Legislation Act 1994*, s21(1)(ha)

²² Annual reports published by SARC show that the Regulations Subcommittee has occasionally written to ministers about Charter issues raised by regulations and their Human Rights Certificates.

²³ E.g. National Gas (Victoria) Bill 2009; Fair Work (Commonwealth Powers) Bill 2009.

²⁴ Crimes (Decriminalisation of Abortion) Bill 2007; Abortion Law Reform Bill 2008

²⁵ *Alert Digests No 10 of 2007 and 11 of 2008*. SARC's view was later endorsed by the Victorian Equal Opportunity and Human Rights Commission in VEOHRC, *Emerging Change*, 2009, p73.

human rights discussion than any other Victorian bill to date by a country mile, and SARC's report on the bill is its most publicly discussed report to date.²⁶

The above list demonstrates both that there is some significant uncertainty about SARC's Charter mandate and some oddities in the boundaries of its mandatory reporting function (especially when it is juxtaposed with its discretionary reporting function.) If the purpose of Charter s. 30 is narrowly conceived as only concerned with the dialogue within the Victorian Parliament, then there would be no need for SARC to report on matters that were not before the Parliament at the time of its report. However, if SARC's reporting function is wider – something that is arguably a corollary of the new Charter-given function of reporting on Acts – then the lack of a mandate to report on other 'new laws' that will apply in Victoria is problematic.

An unresolved question is what consequences follow if SARC fails to report as required by Charter s. 30. It is arguable that this has already happened in relation to the four bills that became Acts before SARC reported. The terms of Charter s. 30 speak about bills in the present tense, implying that SARC must report while the bills are still bills. A counter-argument is that SARC can – and perhaps must – fulfil its Charter mandate on such bills after they have become Acts by using its new Charter-granted Act reporting function. While, as pointed out above, that function is discretionary, SARC has in fact exercised that discretion in every instance it has been available to date, including specific Charter reports in each instance. In its *Alert Digest No 1 of 2009*, SARC wrote to the Attorney-General asking about the requirements of Charter s. 30 in these circumstances (and the consequences of non-compliance), but is yet to receive a response.²⁷

The question of the consequences for non-compliance with Charter s. 30 has come up indirectly. When the Abortion Law Reform Bill 2008 (which was subject to a conscience vote) was introduced into the Legislative Council, a member raised a point of order that there was no statement of compatibility, in breach of a mandatory requirement in Charter s. 28 that is similar to the one in Charter s. 30. Instead of addressing the substantive question of the interaction between Charter ss. 28 and 48, the Speaker rejected the point of order on the ground that it raised no issue under the Legislative Council's standing orders.²⁸ If correct, this ruling points to a lacuna in the speaker's powers, in terms of enforcing a statutory provision that speaks directly to parliamentary processes. (A subsequent point of order raising the statutory requirement was rejected as an attempt to re-open a finalised ruling.)

If Parliament's officers and rules cannot enforce Charter s. 30, then maybe a court can. This surprising possibility was recently tested in New Zealand, where interest groups opposed to a new election bill sought an injunction to prevent Parliament debating or enacted a bill because the Attorney-General had not reported on the bill's incompatibility with the *New Zealand Bill of Rights Act 1990*. New Zealand's courts rejected the challenge, citing a variety of concerns about curial interference with parliamentary processes.²⁹ It is likely that a similar fate would meet such a challenge here.

A final, even more surprising, possibility is that non-compliance with Charter s. 30 may have consequences for the validity of the bill *after* it is enacted. This possibility arises because of a curious gap in the Charter suite of provisions preserving the validity of

²⁶ See, e.g. F Brenna, 'Euthanasia: doctors' conscience vs patient rights' at <<http://www.eurekastreet.com.au/article.aspx?acid=12089>>

²⁷ The query was recently renewed in *Alert Digest No 7 of 2009*.

²⁸ *Hansard*, Legislative Council, 56th Parliament, 1st session, p3906-3907 (7th October 2008)

²⁹ *Boscaven and others v Attorney-General* [2009] NZCA 12

statutes in the face of non-compliance with a variety of Charter-mandated processes: statements of compatibility, interpretation, responses to declarations of inconsistent interpretation, but *not* SARC scrutiny.³⁰ Against this possibility is not only the Charter's *raison d'être* of preserving parliamentary sovereignty, but also the lack of any plausible reason why the mere absence of a SARC report should have such a dramatic consequence.

SCRUTINY OF BILLS: A RIGHTS DIALOGUE?

Whenever they are given, and whatever their purpose, what exactly is a 'report to the Parliament as to whether [a] Bill is incompatible with human rights'?

Charter s. 30 doesn't specify what should go in an incompatibility report and, indeed, there is a view that the actual contents of SARC reports aren't the point. According to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *any* parliamentary discussion of human rights is a significant outcome:³¹

When reflecting on the Charter's overall impact on the legislative process during 2007, the Commission believes it is informative to ask one very simple question: if it was not for the Charter, would the human rights dimensions of these 93 Bills have been identified, analysed and debated? In all but a very few cases, the answer is clearly 'no'. For this reason alone, the initial impact of the Charter is significant: it has already comprehensively expanded the parameters of public policy analysis to include the transparent assessment of new laws against a human rights framework. This is a substantial achievement.

If quantity is the test, then SARC has certainly contributed to the word count of parliamentary rights talk (though it pales in comparison to the often-mammoth statements of compatibility.) It is plausible that more was said about human rights within Parliament House in Melbourne than was said in totality in the rest of the state (and perhaps the nation) in the last two years.

In a subsequent report, VEOHRC was positively glowing about SARC's reports, lauding its diligence, comprehensiveness, independence and the like, and how it 'present[s] a very different view or interpretation of the scope of particular rights'.³² But VEOHRC (perhaps like Parliament itself) lacks the resources to read SARC's reports critically; the Commission is flat out just tabulating all these 'very different view[s]'. A scattering of SARC's reports have received closer attention, from both VEOHRC and especially the pro bono Human Rights Law Resources Centre. The assessments are mostly positive – both bodies are unabashed cheerleaders for the Charter – but there was some criticism (e.g. for being too harsh on a voluntary euthanasia bill and too soft on a bill quarantining prisoners' damages derived from civil suits.³³)

While the quality of SARC's reports is clearly not for me to judge, this part addresses some complications and difficulties inherent in the reporting task mandated by Charter s. 30.

Reporting on rights

SARC's new Charter scrutiny ground has an obvious similarity to pre-existing scrutiny grounds applied not only by SARC but by other Australian scrutiny committees. SARC

³⁰ See Charter ss. 29, 32(3), 36(5).

³¹ VEOHRC, *First Steps Forward*, 2008, p42.

³² VEOHRC, *Emerging Change*, 2009, p71

³³ Id 72-73. Human Rights Law Resource Centre, Bulletin Number 28 – August 2008, pp 6-9.

has long reported on, and continues to report on, bills and regulations that ‘trespass unduly on rights or freedoms’ or make such rights, freedoms ‘or obligations’ subject to poorly defined or non-reviewable administrative powers or decisions. How is Charter s. 30’s new ground of whether or not a bill is ‘incompatible with human rights’ any different?

The most obvious contrast is that the term ‘human rights’ in SARC’s Charter ground, unlike the term ‘right or freedoms’ in its traditional ground, is expressly defined.³⁴ In theory, that’s a restrictive feature. The traditional ‘rights and freedoms’ ground potentially covers any right or freedom there is, and in practice covers rights or freedoms set out in Australian law (or, at least in constitutional and common law.) Moreover, the undefined ‘human rights’ terms of reference for the other two committees scrutinising bills pursuant to human rights statutes – the JCHR and the ACT’s committee – has been held by both to extend beyond the terms of those statutes, covering not only domestic, but also domestic human rights law. By contrast, Charter s. 30 is limited to ‘human rights’ under the Charter, which is defined to mean *only* the human rights listed in Part 2 of the statute.

In practice, of course, the definition dramatically extends SARC’s scrutiny function, for several reasons. First, unlike the undefined grounds, there is no requirement that any of the human rights be somehow linked to an established source of law, be it common law, constitutional or statutory; simply appearing in Part 2 is enough. Second, likewise there is no need to confine any scrutiny to established applications of those lists (such as in court judgments); to the contrary, the usual approach to human rights documents invites broad and novel applications of the terms of the rights themselves, so as better to meet the broad and novel rights limitations that new laws threaten. Third, if the broad words of Part 2 *aren’t* enough, further development is invited by Charter s. 32(2), which allows the interpretation of all Victorian statutes, including the Charter itself, to be influenced by the entire global jurisprudence on human rights ‘where relevant’. This potential set of precedents is not limited to either the traditional systems of influence on Australian law or to decisions reached prior to the enactment of the Charter. In short, Charter s. 30 adds some twenty new scrutiny grounds each of which is capable of extending as far as their words, their purposes or any of the planet’s several hundred court systems takes it.

Such an enhanced scrutiny function is problematic for a traditional scrutiny committee in at least three ways:

First, **breadth of subject matter**. Compared to the usual grounds typically considered by scrutiny committees, Part 2 covers a much broader set of topics. The problem is not so much for the procedural rights (the last six sections of Part 2), which are typically triggered only by changes to procedural rules. Rather, the difficulty arises from substantive rights to things like life, privacy, movement, expression and so forth, which are routinely ‘engaged’ by new laws. Not only the majority of bills, but sometimes the majority of provisions of bills, will attract scrutiny under at least one new ground and often many more. This has consequences for both the Committee’s resources and its reports. The resource burden is partly managed by hiring an additional legal adviser but still sounds in considerably longer meetings and much longer reports. The latter is a continuing concern, especially in light of the demands on the time of SARC’s parliamentary audience, although SARC has adjusted its practices in the last year to meet this challenge. SARC now only reports on bills that are potentially incompatible with human rights (rather than bills that engage a Charter right but are judged to be

³⁴ Charter s. 3.

compatible with those rights).³⁵ More limited reporting can be justified by both the terms of Charter s. 30 and the pointlessness of duplicating statements of compatibility. That being said, it has significantly reduced the quantity of the human rights talk in Parliament previously lauded by VEOHRC.

Second, **legal uncertainty**. Due to their lack of ties to traditional legal authority, their use of broad and often flexible language, and their political contentiousness, the meaning of the Part 2 rights is a good deal less certain than the other scrutiny grounds. Two particular problems are: the application of rights to novel areas, often raising difficult questions of construction; and the discretion to look to all relevant decision worldwide, which raises an inevitable problem of selection. Legal uncertainty is troubling for a scrutiny committee for several reasons. First, the committee is not a court, its members don't have to be (and typically aren't) lawyers and (for now) there will often be no conclusive precedents; how then is a committee supposed to go about resolving any uncertainty? Second, whether it is resolved via reasoned analysis or via acknowledging it and describing the consequences, legal uncertainty will have an inevitable effect on the readability of SARC's reports. Solving these two difficulties pushes SARC in opposite directions, as the inclusion of more detailed legal analysis (to resolve the problem of uncertainty) makes reports significantly less accessible to lay parliamentarians. Again, this raises the problem of whether SARC's audience is parliament or a wider (and often legally trained) governmental or public audience. SARC's solution has been to follow the JCHR in using textual tools – summaries, bolded sentences and the like – to allow a casual (i.e. lay, parliamentary) reader to identify key parts of the discussion, while still including sufficient analysis to make its reports legally defensible.³⁶

Third, **policy issues**. Scrutiny committees operate by distinguishing between principle (which is appropriate for reporting) and policy (which isn't and which threatens to undermine the independence of a committee.) The problem is that many human rights are obscure – and perhaps even obliterated – that very distinction. In some instances, policy is inherent in the very definition of a right, notably the various rights against discrimination. In others, the problem is the politicised nature of some rights, such as the right to life or to freedom of conscience.³⁷ But the larger problem is the Charter's test (drawn from ubiquitous modern human rights precedents) for 'reasonable' limits on rights, which requires a 'demonstrable justification' and a consideration of 'less restrictive reasonable alternatives'.³⁸ Reaching firm views on such matters risks turning SARC into a government policy scrutiny committee. In practice, what prevents this is SARC's lack of capacity to assess policy; rather, SARC's response to these sorts of issues is either to ask for further information from Ministers or refer contentious issues to Parliament.

These problems sound dire, but SARC has not, to date, collapsed under its workload, descended into partisan anarchy or otherwise lost its ability to function. Rather, it has managed its problems arguably in the way that all scrutiny committees do: by focussing on its institutional context, its statutory mandate and the legal basis for its decisions. This familiar approach is also taken by constitutional courts who find their institutional competence similarly afflicted by the demands of human rights and constitutional law. SARC's version of 'strict and complete legalism'³⁹ involves it:

³⁵ This new approach has been followed since *Alert Digest No 7 of 2008*.

³⁶ This new approach has been followed since *Alert Digest No 15 of 2008*.

³⁷ Charter ss. 9 and 14.

³⁸ Charter s. 7(2).

³⁹ The memorable phrase of Sir Owen Dixon in his swearing in as Chief Justice of the High Court of Australia in 1952: 'Close adherence to legal reasoning is the only way to maintain the confidence of all

- retaining the language of traditional scrutiny, e.g. ‘The Committee is concerned’ and the ubiquitous ‘may’
- at times emphasising the narrowness of the Charter’s protections (when compared to international human rights law or even domestic constitutional law.)⁴⁰
- seeking further information from the Minister when questions of a bill’s extra-bill effects or the demonstrable justification of a rights limitation arise
- referring policy matters, notably some questions of reasonable limits, to Parliament in a similar way that supranational courts defer to member nations’ ‘margin of appreciation’
- reserving its boldest commentary – that a bill ‘may be incompatible with human rights – for issues that attract the clearest legal standards: direct discrimination and breaches of criminal process guarantees.⁴¹

These techniques have allowed SARC to dodge not only self-destruction but also, arguably, some of the requirements of Charter s. 30.

Reporting on bills

A second feature of SARC’s new scrutiny ground is that it *isn’t* unique to SARC. Rather, similar language appears in other Charter mandates and functions:

- **parliamentarians** introducing a bill must table a statement stating ‘whether, in the member’s opinion, the Bill is compatible with human rights’ or, alternatively whether ‘any part of the Bill is incompatible with human rights’⁴²
- **interpreters** of statutory provisions must (where possible) do so in a way that ‘is compatible with human rights’⁴³
- **courts** may make a declaration to the effect that a statutory provision cannot be interpreted ‘consistently with a human right’⁴⁴
- **public authorities** must not act in a way that ‘is incompatible with human rights’⁴⁵
- **VEOHRC** can, on request, review a public authority’s programs and practices to determine their ‘compatibility with human rights’⁴⁶
- **Victoria’s Ombudsman** has a power to examine whether any administrative action ‘is incompatible with a human right’⁴⁷

parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than strict and complete legalism.’

⁴⁰ E.g. *Alert Digest No 14 of 2008*, on the Assisted Reproductive Treatment Bill 2008.

⁴¹ E.g. *Alert Digest No 7 of 2007* on the Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007; *Alert Digest No 13 of 2008*, on the Primary Industries Legislation Amendment Bill 2008.

⁴² Charter s. 28

⁴³ Charter s. 32(1)

⁴⁴ Charter s. 36(2)

⁴⁵ Charter s. 38(1)

⁴⁶ Charter s. 41(a)(i)

It is clear enough that all of these bodies are applying the same test.

But they aren't all applied to the same thing. SARC's test (along with the test for members introducing statements of compatibility) is applied to *bills*, whereas the other tests all apply to things that have actually happened. In particular, courts applying the test will do so in relation to a specific event – an application of a law or executive action to a particular individual – and will therefore be examining the actual impact of human rights on a human. By contrast, what SARC scrutinises are pieces of paper. Although the Charter doesn't say this, SARC is obviously meant to assess compatibility on the assumption that the bill as introduced will actually be enacted. But this doesn't resolve a number of conundrums about whether or not SARC should think outside of a bill's four corners.

First, **re-enactments**. Not all bills (and, in particular, not all parts of bills) actually change the law. Rather, new principal bills often restate existing provisions (although sometimes with changes in form or language.) Moreover, many amendment bills opt, in lieu of cumbersome insertions or deletions of words, to simply replace old provisions with new ones that only differ in some ways. A straightforward reading of Charter s. 30 suggests that these re-enactments should be scrutinised just like provisions that actually change the law. And, indeed, this has been the practice not only of SARC but also (more or less) of members' statements of compatibility. The result is a degree of scrutiny of *old* laws. Given the Victorian government's ambition of renewing all major statutes every decade or so – including monsters like the *Crimes Act 1958* – this approach will eventually ensure that all existing statutes will be subject to the human rights dialogue. But there are downsides, especially from the viewpoint of intra-parliamentary dialogue. Most, if not all, of the political interest in bills comes from what they change, so SARC's scrutiny of re-enactments is of reduced interest to most politicians. That doesn't mean that such scrutiny may not serve the broader, speculative human rights dialogue discussed earlier. However, the executive might be tempted to prevent scrutiny of re-enactments by opting for drafting techniques that avoid the need to restate the provisions in new bills (with a consequent negative impact on the quality of drafting.)

Second, **other affected provisions**. While bills consist of a finite set of provisions, no enacted statutory provision is an island. Rather, a bill is likely to affect not only the provisions whose text it modifies, but other laws too, often creating a significant collateral human rights impact. The simplest example is a change to a definition provision, which of course changes every provision that uses the defined term. A less simple example is a change to a provision that qualifies another. And there are many more complex changes that can occur, say, if a new provision effectively replaces or otherwise sidelines (or effectively extends or otherwise enhances) a related provision, or a different statute or even a completely different part of the law, such as the common law. The immediate problem is how to assess whether such a change has occurred and what its human rights impact might be. But the broader problem is whether and to what extent such changes should be considered or reported on as part of a committee's scrutiny of *bills*. If a bill tinkers trivially with a controversial pre-existing regime, must the entire regime be scrutinised? Or should a proportionality test be imposed requiring a closer connection between the rights implications and the bill at hand?

Third, **human consequences**. Laws don't have human rights. Humans do. A law typically limits a human's rights when it is applied to that human (indeed, by other humans.) So, assessing a bill's compatibility with human rights requires looking ahead,

⁴⁷ *Ombudsman Act 1973*, s13(1A)

not only to the bill's enactment into the statute book, but its eventual application by an institution, such as a court or administrator. Again, this raises the quandaries of how SARC is supposed to assess such effects and how far it should delve into a law's potential practical effect. An example of the problem is SARC's most criticised report about a bill temporarily quarantining civil damages awards won by prisoners.⁴⁸ On its face, this bill has a reasonable purpose of ensuring that a prisoner's debtors can recover those debts. While it obviously discriminates against prisoners, that isn't a discrimination ground for Charter purposes. SARC therefore confined its commentary to privacy issues concerning the publicity of the award. But a submission from the Human Rights Law Resources Centre said that the bill would, in practice, dramatically affect prisoners' willingness and ability to sue the state for mistreatment,⁴⁹ a matter that obviously has enormous human rights implications (although ones that, arguably, are beyond SARC's capacity to properly assess.)

Fourth, **the Charter's operational provisions.** A related difficulty (which qualifies the previous two) is that both the meaning of new laws and their application are affected – and potentially ameliorated – by other provisions of the Charter, which provide for rights-friendly interpretation and rights-compatible conduct by public authorities.⁵⁰ In its first year of Charter scrutiny, SARC had to ignore these provisions because they were not yet operational. But, since 1st January 2008, it has at times taken them into account. But should it? There are a number of difficulties. The effect of Charter's operative provisions is quite complex and difficult to assess. Both of the key provisions are subject to built-in defences that involve assessments of the purpose and requirements of the laws themselves, and are also sporadically affected by transitional rules and, respectively, savings provisions and regulatory exemptions.⁵¹ Moreover, if SARC declines to report on incompatible provisions because that incompatibility will be 'cured' by other rules, then it arguably is not fulfilling its mandated function of alerting Parliament that the bills it is considering would be incompatible with human rights but for the operation of the rest of the Charter.

Finally, **non-enactments.** Parliamentary scrutiny has traditionally been directed to what a bill does, rather than what it doesn't do. But some human rights – notably those that give a right to 'protection' – blur or remove that distinction.⁵² The simplest – but still controversial – example is the right against discrimination, which will be infringed if a bill's beneficial effect excludes some groups. A particular Charter equality right – 'to equal and effective protection against discrimination'⁵³ – has been interpreted by SARC as requiring a demonstrable justification for any limitations on that protection. The result has been that some of SARC's most extensive critiques have been directed at legislation whose purpose is to extend human rights protection (albeit, arguably, not quite far

⁴⁸ Corrections Amendment Bill 2008

⁴⁹ Human Rights Law Resources Centre, *Submission to the Scrutiny of Acts and Regulations Committee on the Corrections Amendment Bill 2008 (Vic)*, 11 August 2008.

⁵⁰ Charter ss. 32(1) & 38(1).

⁵¹ Charters. 32(1) is limited to interpretations that are consistent with a provision's purpose. Charter s. 38(1) is subject to exceptions in the rest of that provision, notably for where another law makes compliance unreasonable: Charter s. 38(2). It is also limited to public authorities, defined in Charter s. 4 to exclude the non-administrative functions of courts (s. 4(1)(j)) and bodies exempted by regulation (presently Victoria's parole boards) (s. 4(1)(k): see *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2008*.) Both provisions are potentially subject to the savings regime for abortion and child destruction laws in Charter s. 48 and to a transitional provision in Charter s. 49.

⁵² E.g. Charter s. 17, giving families and children a right to protection.

⁵³ Charter s. 8(3).

enough.)⁵⁴ Again, the difficulty for SARC is how far it should examine a bill's omissions, a question that leads deep into policy territory.

To date, SARC has conceived its role broadly on all of the above issues, reporting sometimes in great detail on matters that go significantly beyond the bill in question. But it has done so without, to date, clearly delineating how far it is prepared to go.

R I G H T S O F S C R U T I N Y : A C H A R T E R D I A L O G U E ?

As if SARC's Charter s. 30 responsibilities weren't enough, the Charter has also prompted (if not exactly required) a small but significant amount of additional scrutiny by the Committee. Whereas Charter s. 30 is concerned with a bill's compatibility with Part 2 of the Charter (which contains all the 'human rights'), the additional scrutiny is concerned with Part 3 of the Charter (which contains all – or nearly all – of the statute's operative provisions.)

The Charter's operative provisions are what distinguish it from the constitutional model, on the one hand, and a mere declaration of human rights⁵⁵, on the other. Part 3 sets out what various institutions should do or not do in relation to human rights. But, consistently with the parliamentary human rights model, a lot of the provisions – notably those that affect parliament itself or the validity of its statutes – do not provide for any enforcement. Indeed many are accompanied by express provisions disclaiming any civil remedies or statutory invalidity. Rather, adherence to the Charter's human rights dialogue – and even to the continuing existence of the statute itself – is primarily a matter of administrative and political devotion, i.e. the so-called human rights culture.

The human rights culture is a creature, not of rules, but of talk. The formal role of watching over the operation of the human rights culture is given to the Victorian Equal Opportunity and Human Rights Commission. Charter s. 41(a) gives VEOHRC new function of sending a report to the Attorney-General:

that examines:

- (i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and
- (ii) all declarations of inconsistent interpretation made during the relevant year; and
- (iii) all override declarations made during the relevant year;

The obvious flaw in this reporting mechanism is that it is 'annual'. So, any criticism of the culture will often occur after any problem has arisen. It is doubtful, given VEOHRC's limited resources, that this flaw is ameliorated by a further function, which isn't time-specific, 'to advise the Attorney-General on anything relevant to the operation of this Charter.'

But there is another entity that is well positioned, both institutionally and temporally, to identify and report on the non-operation of the Charter's operational provisions quickly and, indeed, in advance of their actualisation. In particular, that entity is especially well placed to speak directly to the body that is both the most extreme threat to the continuation of the human rights culture and one that is best placed to respond to those threats. The latter body is, of course, Parliament. The former entity is SARC.

⁵⁴ E.g. *Alert Digest No 1 of 2008*, on the Relationships Bill 2008; *Alert Digest No 10 of 2008*, on the County Court Amendment (Koori Court) Bill 2008

⁵⁵ E.g. *Legislative Standards Act 1992* (Qld).

This Part examines SARC's reporting on the operation of the Charter in two respects. First, scrutiny of the statements of compatibility prepared by members introducing bills. Second, its scrutiny of threats that bills may pose to the Charter itself.

Watching statements

A common feature of recent parliamentary human rights laws is a provision for direct communication from the executive to parliament, via a statement declaring whether or not each bill is compatible with the Charter. Much like Charter s. 30, this system serves two potential purposes. The first is to alert Parliament about whether or not it is about to limit rights. The second is to make it necessary for those who develop and draft bills to give careful advance attention to human rights. However, the more consequential extra-parliamentary dialogue will only operate if the intra-parliamentary monologue is accurate.⁵⁶

Victoria's Charter incorporates a significant advance on the UK, NZ and ACT models: in place of a bland assertion of compatibility, Charter s. 28 requires that the statement spell out 'how' a bill is compatible with human rights.⁵⁷ This has turned out to be the key source of human rights talk in Victoria to date. Many statements of compatibility extend for several, sometimes dozens, of tightly spaced Hansard pages, incorporating all manner of rights assessments, minor and major, and including both detailed case analysis and some of the most laboured and bewildering rights talk imaginable. It is doubtful that anyone other than a handful of public servants and legal advisers ever reads a word of them. Whether this system is working as intended is a complex question and for others to judge, but SARC has done some judging of its own.

A strict reading of Charter s. 30 would suggest that SARC's reporting function is independent of the statement regime. SARC is required to consider bills, not statements of compatibility. The advantage of SARC ignoring the statements is that Parliament benefits from two completely independent human rights assessments of each bill. But there are overwhelming downsides: a duplication of resources and a doubling of sometimes turgid reading for parliamentarians. So, unsurprisingly, SARC's reports soon started referencing the statements, often to signal its (occasionally muted) agreement with the reasoning set out.⁵⁸

What if SARC disagrees? SARC could signal that passively, by issuing reports that put a different view. But that would put the burden on parliamentarians to work out when SARC and the executive differed. Instead, SARC eventually started expressly criticising deficient statements of compatibility. A turning point was the statement to the Infertility Treatment Amendment Bill 2007, which improbably declared that there were no human rights issues raised by the Bill. The Committee, which had held a public inquiry, strongly disagreed, arguing that the bill – which provided for the donation of spare human embryos for research – engaged the Charter's rights to life and against non-consensual experimentation.⁵⁹

SARC has since, in a sizeable number of its reports, commented on a statement of compatibility for being:

⁵⁶ In Victoria, where there is yet to be a statement that a bill is incompatible with human rights, there's obvious cause for concern.

⁵⁷ Charter s. 28(3)(a).

⁵⁸ *Alert Digest No 9 of 2007* on the Summary Offences (Upskirting) Amendment Bill 2008

⁵⁹ *Alert Digest No 4 of 2007*.

- **incomplete**, i.e. failing to note, much less justify, a limitation on human rights by a provision (though no statement to date has been as egregious as the one for the Infertility Treatment Amendment Bill 2007)⁶⁰
- **unreadable**. SARC criticised several statements of compatibility for analysing the human rights impact of legislative provisions in complex bills without identifying (by clause) what provision was being discussed.⁶¹
- **inaccurate**: SARC has criticised several statements for misdescribing the provision they address or a case that is relied upon.⁶²
- **selective**: SARC criticised one statement for making an assertion that overseas decisions support its reasoning, without mentioning a adverse, recent Court of Appeal decision on virtually identical legislation.⁶³
- **technical**. SARC criticised several statements for relying entirely on controversial narrow readings of rights, without providing alternative analyses if those readings were thought by Parliament (or were later found by courts) to be unconvincing.⁶⁴
- **tendentious**. SARC has complained on occasion that statements, particularly in purporting to justify the reasonableness of limitations, have amounted to little more than a re-assertion of the government's policy.⁶⁵
- **perfunctory**. One statement was criticised for its 'brief and perfunctory' analysis of an omnibus criminal procedure law that engaged a variety of human rights in a complex manner.⁶⁶
- **trivial**: SARC has also criticised statements for providing a full analysis of the reasonableness of limitations to freedom of movement flowing from minor adjustments to the status of crown property.⁶⁷
- **good**. In part to add a constructive element to its reporting function, and to ameliorate the sometimes dour tone of its reports, SARC has at times singled out particular statements for praise. Notably, it has done so in a number of instances despite disagreeing with aspects of those statements.⁶⁸

SARC has adopted a practice of writing to the Minister involved in the more extreme cases, while simply noting the less extreme features of statements in its report.

These aren't reports that a 'Bill is incompatible with human rights'. Arguably, they aren't reports on bills at all. However, scrutiny committees have long interpreted their function as including reporting on explanatory memoranda attached to bills, on the basis that the absence of an explanation 'insufficiently subjects the exercise of legislative power to

⁶⁰ E.g. *Alert Digest No 14 of 2007* on the Port Services Amendment Bill 2007; *Alert Digest No 15 of 2008* on the Major Crime Legislation Amendment Bill 2008

⁶¹ E.g. *Alert Digest No 14 of 2007* on the Animals Legislation Amendment (Animal Care) Bill 2007

⁶² E.g. *Alert Digest No 4 of 2009* on the Crimes Amendment (Identity Crime) Bill 2009

⁶³ E.g. *Alert Digest No 5 of 2008* on the Justice Legislation Amendment Bill 2008.

⁶⁴ E.g. *Alert Digest No 13 of 2007* on the Transport Legislation Amendment Bill 2007; *Alert Digest No 14 of 2008* on the Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008

⁶⁵ E.g. *Alert Digest No 15 of 2008* on the Relationships Amendment (Caring Relationships) Bill 2008

⁶⁶ E.g. *Alert Digest No 16 of 2007* on the Criminal Procedure Legislation Amendment Bill 2007

⁶⁷ E.g. *Alert Digest No 2 of 2008* on the Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008

⁶⁸ E.g. *Alert Digest No 4 of 2008* on the Police Integrity Bill 2008; *Alert Digest No 8 of 2008* on the Primary Legislation Amendment Bill 2008; *Alert Digest No 7 of 2009* on the *Fair Work (Commonwealth Powers) Act 2009*.

Parliamentary scrutiny'. In a practice note subsequent to its report on the Infertility Treatment Bill, the Committee explained that it regards statements of compatibility as equivalent to explanatory memoranda that 'is critical to Parliament's exercise of legislative power in an informed manner'.⁶⁹ Similar practice notes could be used to spell out particular standards for statements, though apart from the expectation that all significant rights issues will be addressed, this has not occurred to date.

Whatever its exact legal justification, SARC's reporting on statement would seem to be its most consequential Charter role. While some of SARC's criticisms have received quite prickly responses, the government has responded expressly in some cases either in letters acknowledging SARC's viewpoint, or in a change in its statement-writing practices made expressly in response to SARC commentary. The government has even issued revised statements when the bill in question reached the upper house.⁷⁰

Arguably, SARC's scrutiny of statements seems to be the best way of curing the potential flaws in the statement of compatibility process. It ensures that statements are read by someone outside of – and indeed independent of – the executive. And it ensures that any flaws in those statements are promptly made apparent to Parliament. In short, it turns the monologue inherent in the statement of compatibility process into a dialogue.⁷¹ Both the JCHR and ACT committee have both engaged in a similar practice and the former, in particular, has been regarded as giving 'potency' to the practice of making statements.⁷²

The downside is that SARC, by more-or-less unilaterally insisting on particular standards for compatibility statements, does so without any authority for those standards. Errors on its part might produce either bad statements of compatibility or a lot of bad blood. However, this prospect may be ameliorated to an extent by ministerial responses to SARC's comments, by informal contacts between the committee and the executive, and by those annual reviews of the human rights culture by VEOHRC.

Watching the Charter

Another common feature of parliamentary rights models is a provision for communication between the judiciary and the legislature. The Charter provides for a court to make a declaration about a statutory provision's compatibility with human rights.⁷³ The Consultation Committee proposed that SARC be given a mandatory reporting role on such declarations:⁷⁴

(2) The Attorney-General must provide a copy of a declaration of incompatibility to the Human Rights Scrutiny Committee within 7 days after receiving the declaration.

(3) The Human Rights Scrutiny Committee must review a declaration of incompatibility provided to it under sub-section (2) and report to each House of Parliament on the declaration within 3 months of the declaration having been laid before the Legislative Assembly and the Legislative Council (whichever is the later).

(4) A report under sub-section (3) may contain such recommendations as the Human Rights Scrutiny Committee considers appropriate.

⁶⁹ Scrutiny of Acts and Regulations Committee, *Practice Note No. 2 of 2007*.

⁷⁰ E.g. for the Constitution Amendment (Judicial Pensions) Bill 2007.

⁷¹ Indeed, a leading proponent of Australian human rights laws (and the Chair of Victoria's Consultation Committee) recently described SARC as having 'a special role in examining these Statements of Compatibility': G Willaims, 'The role of parliament under an Australian Charter of Human Rights', Senate Occasional Lecture, 22 May 2009.

⁷² Lester, Pannick & Herberg, *Human Rights: Law and Practice* (3rd ed), LexisNexis, 2009, [8.13]

⁷³ Charter s. 36.

⁷⁴ Human Rights Consultation Committee, *Draft Charter of Human Rights and Responsibilities*, clause 38

However, this proposal didn't appear in the final statute.⁷⁵ Perhaps, along with renaming the declarations as being 'of inconsistent interpretation', this reflected a desire to make it clear that any action following a declaration was strictly a matter for Parliament as a whole. Whatever the rationale, the result is that SARC will only have a role to play if a responsive bill is introduced or the declaration is referred to the committee by the executive or one of the houses.

But the Charter also provides for another form of parliament-court dialogue, via an 'override declaration', which has a (legal) effect of preventing a rejoinder by the courts in the form of re-interpretation or a declaration.⁷⁶ Unlike declarations of inconsistent interpretation, override declarations fall firmly within SARCs remit, as they appear in bills. There has yet to be an override declaration, but the Committee has nevertheless occasionally raised whether there should be. On the first occasion when SARC reported that a provision 'may be incompatible with human rights' – in relation to a bill extending superannuation benefits to opposite-sex but not same-sex de factors – the Committee queried whether Parliament should utilise its power under Charter s. 31 to 'override' the Charter in this circumstance.⁷⁷

While the question of when to use an override is interesting, what is important to this paper is that SARC conceived of its scrutiny function as extending to questions about the correct operation of provisions that give responsibilities to other institutions (in this case Parliament itself.) More recently, the Committee voiced its concern about whether the human rights dialogue is operating as planned, in relation to a bill passed in response to a Court of Appeal case where the Charter was heavily argued but not ultimately applied by the majority. SARC expressed its concern about the interpretation process (given the majority's non-application of the Charter), the statement of compatibility process (which SARC considered to have sidelined some significant human rights issues) and the scrutiny process (because the bill passed through Parliament before SARC reported on it.⁷⁸

SARC's reporting has also reported on threats, not to particular operating provisions, but to the Charter as a whole. The Charter is an ordinary statute so, despite provision for an 'override declaration', any subsequent statute can override or repeal it. While there has yet to be a bill expressing an intent to overturn either the Charter's rights or the Charter itself, it is nevertheless possible that the Charter has been restricted, without express acknowledgement, on a number of occasions. Because the Charter's definitional provisions refer to other Victorian statutes, this is alarmingly easy to do. On at least one occasion to date, a change – declaring the denial of student transport cards to non-Australians – has been negative.⁷⁹ Such silent overrides lack the built-in limitations of the express overrides, such as a five-year sunset or the requirement of 'exceptional circumstances'. More disturbingly, they are not amenable to any court scrutiny, as the Charter will already have changed by the time the court assesses whether or not the law is compatible with it!

SARC has, on a small but significant number of occasions, drawn attention to such silent overrides, including:

⁷⁵ Charter s. 37.

⁷⁶ Charter s. 31.

⁷⁷ *Alert Digest No 7 of 2007* on the Superannuation Legislation Amendment (Contribution Splitting and Other Matters Bill 2007

⁷⁸ *Alert Digest No 2 of 2009* on the *Serious Sex Offenders Monitoring Amendment Act 2009*.

⁷⁹ Transport Legislation Amendment Bill 2007

- **narrowing of rights**, such as the above limitation on the meaning of ‘discriminates’⁸⁰
- **narrowing of operational provisions**, such as the labelling of new bodies as courts (which are partially exempt from the Charter’s obligations mandate), and passage of regulations exempting bodies altogether.⁸¹
- **giving force of law to non-Victorian statutes**, which may be exempt from the Charter’s scrutiny, interpretation and declaration provisions⁸²
- **giving legal powers to bodies exempt from the obligations regime**, such as bills giving powers to non-Victorian bodies or to bodies exempt from the Charter.⁸³
- **bringing laws within savings provisions**, such as the widening of general criminal offences to cover some abortions⁸⁴
- **the replacement of vague rights-limiting language with unambiguous language**, thus removing or reducing the prospect of a rights-friendly reinterpretation of those provisions⁸⁵

Given the significant uncertainty surrounding most aspects of the Charter’s operation, most of these reports have taken the form of questions to the Minister seeking to clarify the effects of the bill in question. Responses have varied from brief, unexplained assertions that the Charter isn’t being overridden, to qualified acknowledgements that it has been and even a statement that these questions are matters for the courts!⁸⁶ In many instances, responses have been slow indeed, perhaps because these matters were either not considered when the bills were drafted or are sensitive for some reason. Regardless, no bills have been amended or other remedial action has been taken in response to SARC’s queries about these issues.

Once again, the precise basis for SARC reporting on these matters isn’t clear. One argument is that such laws trigger Charter s. 30, on the basis that a law limiting the Charter’s protections is incompatible with human rights. However, this is controversial, because Part 2 of the Charter carefully omits a right to a remedy for limitations of rights (except for some specific rights.) An alternative argument is to rely on SARC’s traditional scrutiny grounds, including that a Bill ‘directly or indirectly’:⁸⁷

- (i) trespasses unduly on rights or freedoms;
- (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;

⁸⁰ *Alert Digest No 13 of 2007*.

⁸¹ *Alert Digest No 13 of 2008* on the Coroners Bill 2008. See also SARC queries about the *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2008*.

⁸² *Alert Digest No 5 of 2008* on the Justice Legislation Amendment Bill 2008; *Alert Digest No 6 of 2009* on the National Gas (Victoria) Bill 2008; *Alert Digest No 7 of 2009* on the *Fair Work (Commonwealth Powers) Act 2009*.

⁸³ *Alert Digest No 6 of 2009* on the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009; *Alert Digest No 7 of 2009* on the *Fair Work (Commonwealth Powers) Act 2009*.

⁸⁴ *Alert Digest No 11 of 2008* on the Abortion Law Reform Bill

⁸⁵ *Alert Digest No 1 of 2008* on the Constitution Amendment (Judicial Pensions) Bill 2007; *Alert Digest No 4 of 2009* on the Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009.

⁸⁶ Ministerial Correspondence on: the National Gas (Victoria) Bill 2008, published in *Alert Digest No 9 of 2008*; the Abortion Law Reform Bill 2008 published in *Alert Digest No 13 of 2008*; the Transport Legislation Amendment Bill 2007 published in *Alert Digest No 15 of 2007*.

⁸⁷ *Parliamentary Committees Act 2003*, s. 17(1).

- (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;

The reasoning here is that the Charter itself (perhaps via its interpretation rule) has now set the bar for how rights, including Charter rights, should be limited, affected or reviewed. A further alternative is again to rely on the failure of a bill's explanatory material to notify Parliament about a bill's effects (broadly conceived.)

It is arguable that SARC's reporting on the operation of Part 3 of the Charter is an instance of overreach, on the basis that responsibility for these matters is given to VEOHRC. But it is clear that SARC is better placed than VEOHRC to scrutinise these matters. Surely, no scrutiny committee could or should be expected to stay silent while one of the documents that provides it with a mandatory ground of scrutiny is silently sidelined.

CONCLUSION: RIGHTING CHARTER S. 30

The Charter contains one last scrutiny mechanism, in the form of provisions requiring a 'review' of the Charter after its fourth and eighth years of operation.⁸⁸ The drafters directed that the first review should consider extending both the rights protected by the Charter and the Charter's compliance mechanisms. These directions are optimistic, both in their expectation that the Charter will have received a sufficient measure of support by 2011 to justify significant extensions, and also because of their failure to contemplate that the Charter's existing provisions may be in need of drastic repair.

This paper has identified that even the least of those provisions, Charter s. 30, is rife with ambiguity and, arguably, significant gaps. So, in addition to debating whether or not to add rights to health, housing and education, or to audit the government, the writers of the review may also wish to consider the following modest reforms:

- either giving SARC an expanded jurisdiction to conduct non-bill-specific human rights inquiries of its own choice, or creating a new committee that can do so⁸⁹
- clarifying whether or not SARC can (or must) report on incompatible amendments; laws enacted pursuant to references or application statutes; and abortion and child destruction laws
- clarifying the consequences of non-reporting and, perhaps, empowering each house to identify and respond to any non-reporting by SARC
- clarifying whether or not SARC should report on restatements of the law or the indirect effects of a bill, a bill's omissions, and also whether or not its reports should take account of the Charter's operative provisions
- specify that SARC should (or shouldn't) report on the adequacy of statements of compatibility
- give SARC an express role in reporting on declarations of inconsistent interpretation and override declarations.⁹⁰

⁸⁸ Charter ss. 44 and 45.

⁸⁹ Cf. Law Reform Institute of Tasmania, *A Charter of Human Rights for Tasmania*, 2008, Recommendation 10, recommending a new 'Parliamentary Human Rights Scrutiny Committee' with both a regular compatibility scrutiny function and 'responsibility for reporting on human rights issues raised by Bills generally'.

- specify that SARC should (or shouldn't) report on measures that limit or otherwise impinge on the Charter's operation

Jurisdictions contemplating similar regimes should give thought to these considerations too.

Two subsequent human rights consultations have recommended somewhat different approaches to Charter s. 30. In Western Australia, the recommendation was for an existing delegated legislation committee to be given new bill scrutiny functions, either by a change to standing orders or by a statutory change.⁹¹ In Tasmania, the recommendation was for a new human rights committee, with both a comprehensive scrutiny function and a broader 'responsibility for reporting on human rights issues raised by Bills generally.'⁹² A further, presently ongoing, national human rights consultation will surely recommend some form of enhanced human rights scrutiny for Parliament.⁹³ Faced with the restrictive federal constitutional context, it must also recommend an alternative to judicial declarations of incompatibility. While the federal human rights commission is presently mooted as that alternative,⁹⁴ a parliamentary scrutiny committee may be a further possibility.

In all cases, answering these questions should involve a careful consideration of the function of parliamentary committee human rights scrutiny, not only within parliament, but within the broader human rights dialogue and culture.

⁹⁰ Cf Id, recommending that 'The Committee should also inquire into and report on courts' declarations of incompatibility within three months of the declaration being laid before Parliament'.

⁹¹ Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, 2007 at [6.4.1].

⁹² Law Reform Institute of Tasmania, *A Charter of Human Rights for Tasmania*, 2008, Recommendation 10

⁹³ www.humanrightsconsultation.gov.au.

⁹⁴ Australian Human Rights Commission, 'Constitutional validity of an Australian Human Rights Act' (roundtable,