Jurisdiction report for the Parliament of Victoria

1. The Scrutiny of Acts and Regulations Committee

1.1 Scrutiny of primary and delegated legislation

The Scrutiny of Acts and Regulations Committee (SARC) is responsible for the scrutiny of all primary and delegated legislation in Victoria.

SARC is required to consider and report on any Bill introduced into the Parliament of Victoria\(^1\) and has the power to consider and report on any Act that was not considered when it was a Bill (within 10 sitting days after Royal Assent).\(^2\) The scrutiny of primary legislation is undertaken by the full Committee (all seven Members).

SARC is also responsible for the scrutiny of all subordinate legislation, a task which is undertaken by the Regulation Review Subcommittee, which comprises five Members of SARC.\(^3\)

1.2 Scrutiny of primary legislation - practices, challenges and successes

The Committee tables a written report, the Alert Digest, on all Bills that were introduced (and any Acts that were passed) during the previous sitting week. The Alert Digest is adopted by the Committee at its regular Monday afternoon meeting on a sitting week and is tabled in Parliament the next day, i.e., the first day of the sitting week.

The Executive Officer (who is also the Committee’s Senior Legal Adviser) is responsible for submitting a draft of the Alert Digest for the consideration of the Chair on all Bills introduced into Parliament (and any Acts that have been passed) during the previous sitting week. The draft is provided to the Chair in the week prior to the next sitting week, typically on a Wednesday but by Thursday at the latest if more time is needed. The draft Alert Digest includes:

- a brief summary of each Bill or Act
- a discussion of any provisions that are relevant to the Committee’s terms of reference under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), under the ‘Charter Report’ heading\(^4\)

\(^1\) *Charter of Human Rights and Responsibilities Act 2006*, section 30. See also *Parliamentary Committees Act 2003*, sections 17(a) & (b).

\(^2\) *Parliamentary Committees Act 2003*, section 17(c)(ii).

\(^3\) SARC’s responsibility to scrutinise regulations is set out in the *Subordinate Legislation Act 1994*. The statutory oversight of the regulation making process includes scrutiny of whether regulations: unduly trespass on rights and liberties of the person; or are incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*.

\(^4\) That is, the Committee’s terms of reference with respect to the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).
• a discussion of any provisions that are relevant to the Committee’s non-Charter terms of reference, under the ‘Content’ heading
• any correspondence received from Ministers in response to issues raised by the Committee (and on which it wrote to the relevant Minister) in its previous Alert Digest.

If the Chair approves the draft she will authorise its distribution to the other members of the Committee. The Chair may first request clarification on, or amendments to, any part of the draft. The objective of the Executive Officer and the Chair is to ensure circulation to all members as quickly as possible but not later than the Friday before the following Monday’s meeting.

Members typically receive the draft Alert Digest by email on the Friday afternoon and are provided with hard copies at the Committee meeting. Given the sometimes tight timelines for the production, consideration and printing of Alert Digests, it is the practice of the Committee’s Executive Officer and Human Rights Advisors, where necessary, to continue refining and editing the Alert Digest during the weekend. If this occurs, any additions or deletions are highlighted in the hard copy version of the Alert Digest provided on Monday (typically using the ‘track changes’ feature in Word).

Meetings to consider each draft Alert Digest are held as Full Committee meetings and require a quorum of at least four of the Committee’s seven Members. The draft Alert Digest is presented at the meeting by the Executive Officer and each Bill is considered by the Committee in turn. For each Bill, the Executive Officer highlights any issues and clauses that have been noted in the ‘Content’ section and the Human Rights Advisor then highlights any issues and clauses that have been noted in the ‘Charter Report’ section.

The Committee considers the draft Alert Digest and may also consider any written submissions or verbal presentations made by persons or organisations invited to attend the meeting for that purpose. The Committee will decide upon the terms of any comment it considers appropriate to make on a Bill and instructs the Executive Officer accordingly. This may include a comment that the Committee will seek further advice by writing to the Minister or that the Committee draws a particular legislative practice to the attention of the Parliament.

The Committee also considers the terms of any section 85 provision in a Bill concerning any limitation or abridgment of the jurisdiction of the Supreme Court of Victoria. The Committee may then make a report to the Parliament that such a provision in the Bill is consistent with the purposes of the Act, or it may seek further advice from the Minister before making such a comment.

After having dealt with new Bills, the Committee then considers any Ministerial correspondence received in response to queries raised in the previous Alert Digest. These responses are published in the Alert Digest with or without further comment. All Ministerial responses, omitting formal parts, are published with the Committee’s Alert Digest.

The Committee records, in the minutes of the meeting, the adoption of the Alert Digest (with or without amendment(s)) as a report to the Parliament concerning those Bills, and also notes those Bills where any Ministerial correspondence is involved.
The limited amount of time available to conduct the scrutiny of Bills can be a challenge for SARC, especially when Parliament sits on alternate weeks, which has been common this year and last year. This is compounded when there is a significant number of Bills and / or Bills which raise complex issues under the Committee’s terms of reference.

The strictly limited time between the introduction of a Bill and the tabling of the Committee’s report can also pose a challenge for organisations and members of the public who may wish to make submissions to the Committee on a particular Bill. Nevertheless, the Committee sometimes receives a significant number of submissions on topical or controversial Bills, such as last year’s Public Health and Wellbeing Amendment (No Jab, No Play) Bill, on which the Committee received and published over 150 submissions.

Increasing public input and providing SARC with more time to scrutinise Bills were two of the key themes in the report of the 2015 Review of the Charter (discussed below).

SARC’s successes with respect to the scrutiny of primary legislation are discussed in the conference paper presented by the Hon. Richard Dalla-Riva MLC and Ms Sarala Fitzgerald (under the subheading ‘The effect of SARC’s human rights scrutiny work’).

1.3 Membership, staffing, reporting and constraints

Membership and staffing

SARC has a total of 7 Members and is currently comprised of four Labor Members, two Liberal Members and one Member of the National Party.

SARC has a government majority and is chaired by a government MP.

The current membership of SARC is as follows:

- Ms Lizzie Blandthorn, MLA, Chair
- Mr Richard Dalla-Riva, MLC, Deputy Chair
- Ms Melina Bath, MLC, Member
- Mr Josh Bull, MLA, Member
- Mr Steve Dimopoulos, MLA, Member
- Ms Sonya Kilkenny, MLA, Member
- Mr John Pesutto, MLA, Member

SARC is served by a Secretariat of four staff, who are employed by the Legislative Assembly as Parliamentary Officers. The current Secretariat comprises:

- Mr Nathan Bunt, Executive Officer
- Ms Helen Mason, Legal Adviser
- Mr Simon Dinsbergs, Business Support Officer
- Ms Sonya Caruana, Administrative Officer

The Committee is also served by two Human Rights Advisors, who are engaged as consultants to the Committee and who share the work of scrutinising and preparing draft Charter Reports on Bills:

5 The Act effectively made immunisation of a child a condition of their enrolment at an early childhood service (i.e., childcare centres and kindergartens).
• Professor Jeremy Gans, who teaches in the field of criminal law at Melbourne University and who has been advising the Committee on the Charter since 2007; and

• Ms Sarala Fitzgerald, who is a practising barrister in human rights, employment and administrative law and who worked for five years with Victoria’s Human Rights and Equal Opportunity Commission running litigation under the Charter and reviewing Statements of Compatibility. Ms Fitzgerald has been advising the Committee on the Charter since December 2015.

The Committee has been trialling the two-advisor model since last year and has been very satisfied with its operation.

Professor Gans is currently responsible for scrutinising and reporting on all Bills in the Attorney-General, Police, Corrections, Health and Corrections portfolios, which have historically accounted for approximately two thirds of the Committee’s Charter Reports on Bills.

Ms Fitzgerald is currently responsible for scrutinising and reporting on all Bills in the remaining portfolios, which have historically accounted for approximately one third of the Committee’s Charter Reports on Bills.

Professor Gans is also responsible for the review of delegated legislation (regulations and legislative instruments) for compatibility with the Charter.

*The Committee’s terms of reference*

Under section 17 of the *Parliamentary Committees Act 2003*, SARC is required to consider every Bill and report to Parliament as to whether it:

• is incompatible with the human rights in the Charter; or
• trespasses unduly on common law rights or freedoms.

Some of the common law rights and freedoms on which the Committee more commonly comments (in the ‘Content’ section of the Alert Digest) involve:

• the retrospective application of laws
• abrogation of the privilege against self-incrimination or the right to silence
• reversal of the onus of proof
• strict or absolute liability offences
• infringements of the rule against double jeopardy
• search of the person or property without a judicial warrant
• infringement of a constitutional right, such as the right to freedom of political communication.

SARC’s other terms of reference regarding Bills under section 17 (which arise relatively infrequently) relate to:

• insufficiently defined administrative powers
• non-reviewable administrative decisions
• personal privacy under the *Privacy and Data Protection Act 2014*
privacy of health information under the *Health Records Act 2001*
the inappropriate delegation of legislative power
the subjection of legislative power to insufficient parliamentary scrutiny
section 85 of the *Constitution Act 1975*.

Since Alert Digests are tabled every Tuesday of a sitting week, the Committee typically tables 15 or 16 Alert Digests each year.

**Inquiries**

SARC also receives Terms of Reference to conduct inquiries in the same way as other committees of the Parliament of Victoria (i.e., the other Joint Investigatory Committees and the Standing Committees of the Legislative Council). These references are given to SARC by resolution of one of the Houses or by Order of the Governor-in-Council and typically require the review of an Act or of an issue concerning an Act, followed by a report to Parliament.

SARC has typically undertaken an average of one inquiry per Parliament, some examples include a:

- 2008 inquiry and report on the Police Integrity Bill 2008
- 2005 inquiry and report on Discrimination in the Law

SARC’s process for conducting inquiries is essentially the same as that followed by all of the Joint Investigatory Committees and by the Standing Committees of the Legislative Council, i.e:

- advertising terms of reference
- calling for submissions from stakeholders and the general public
- conducting research and holding public hearings
- tabling a final report of recommendations and findings in Parliament.

One way in which SARC’s inquiry process differs from most of the inquiries undertaken by the other Joint Investigatory and Standing Committees is that it tends to rely on external consultants for much of the research instead of its own research staff. This is because SARC’s inquiry work is so sporadic compared to the other Committees and SARC’s staffing arrangements are geared to the cycle of scrutinising bills and subordinate legislation. The time available for conducting inquiries can range from 9 to 18 months, depending on the nature of the inquiry.

**Significant reports, activities and scrutiny of legislation practices since the July 2011 conference**

Since the 2011 conference, there have been two reviews of the Charter. The first of these (the four year review) was undertaken by SARC in 2011 and contained a number of recommendations aimed at improving and clarifying the operation of the Charter. The second review (the eight year review) was conducted in 2015 by Mr Michael Brett Young (who was appointed by the Attorney-General). The 2015 review found that SARC has
‘played a key role in monitoring and reporting on the human rights compatibility of new legislation’ and made a number of recommendations intended to improve the effectiveness of SARC’s scrutiny role, including:

- that the Government consider how to allow more time for human rights scrutiny when a Bill raises significant human rights issues
- encouraging SARC to send out notices of Bills before it and to refer to submissions in its reports to Parliament; and
- clarifying that SARC may report on Acts and provisions of Acts after they have passed.6

2. Trends in legislation

The Committee has not identified any particular concerns or trends in legislation in recent years. Two practices which are of note are:

- the continued use (since December 2006) of self-repealing provisions in amending Acts, which typically repeal the Act on the first anniversary of its commencement;7 and
- the use (since 2015) of self-repealing provisions in Appropriation Acts, which provide for the repeal of the Act on the fourth anniversary of Royal Assent.8 This reform followed a 2015 recommendation made by SARC.9

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6 Please refer to Chapter 6 of the report for the full list of recommendations pertaining to SARC.
8 Appropriation (2016-2017) Act 2016, section 7. The note to the section provides that the repeal of the Act “does not affect any matter or thing or the previous operation of the Act (see section 14(2) of the Interpretation of Legislation Act 1984).”