

Chapter 5

Charter Remedies

*The Hon Justice Mark Moshinsky**

I Introduction

One aspect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) which has caused difficulty in practice and been the subject of adverse comment is the remedies provision in s 39.¹ In a detailed study of the provision, Professor Gans described it as ‘irremediable’.² In *Director of Housing v Sudi*,³ Weinberg JA said that s 39 ‘is drafted in terms that are convoluted and extraordinarily difficult to follow’. Part of the difficulty with s 39 is that it has an operation which is both conditional and supplementary.⁴ It contains a condition which must be satisfied before a person can seek relief or a remedy on a ground of unlawfulness arising because of the Charter (namely, that the person may seek relief or a remedy in respect of the relevant act or decision otherwise than because of the Charter, on the ground that the act or decision was unlawful); once the condition is satisfied, the provision enables the person to rely on a supplementary ground of unlawfulness, namely unlawfulness arising because of the Charter.

In contrast, the remedies provision in the *Human Rights Act 2004* (ACT) (the ACT Charter) is a model of simplicity and clarity. Section 40C of that Act, which was introduced with effect from 1 January 2009, and which follows much more closely the comparable provision in the *Human Rights Act 1998* (UK), enables a person to start a proceeding in the Supreme Court against a public authority where the person claims that the public authority has acted in contravention of s 40B of the Act (described below) and the person alleges that he or she is or would be a victim of the contravention. The section also provides that the person may rely on the person’s rights under the Act in other legal proceedings. The Supreme Court may grant the relief it considers appropriate except damages: s 40C(4). Thus s 40C creates a right of action for contravention of the relevant provision of the Act and confirms that a person may rely on rights under the Act in other legal proceedings.

* I would like to thank my associate, Mr Huw Whitwell, for his assistance.

1 It should be noted that this remedies provision relates only to the acts or decisions of public authorities.

2 J Gans, ‘The Charter’s Irremediable Remedies Provision’ (2009) 33 *Melbourne University Law Review* 105.

3 (2011) 33 VR 559 at [214].

4 See *Director of Housing v Sudi* (2011) 33 VR 559 at [96] (Maxwell P); *PJB v Melbourne Health* (2011) 39 VR 373 at [296]-[297] (Bell J).

In 2015, an independent review of the Victorian Charter after eight years of operation,⁵ recommended that the remedies provision be amended to enable a person who claims a public authority has acted incompatibly with his or her human rights, in breach of s 38 of the Charter, either to apply to the Victorian Civil and Administrative Tribunal (VCAT) for a remedy, or to rely on the Charter in any legal proceedings; and that the amendment should be modelled on s 40C of the ACT Charter. As at the time of writing this chapter, it was not known whether the Victorian Government would adopt these recommendations.

This chapter will outline the legislative history of the remedies provisions in the Victorian Charter and the ACT Charter; discuss the case law on the Victorian Charter remedies provision; discuss the operation of the ACT Charter remedies provision; and outline the recommendations for reform of the Victorian Charter remedies provision.

II Legislative History of the Victorian Charter Remedies Provision

Section 39 of the Victorian Charter is in the following terms:

39. Legal proceedings

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right –

- (a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and
- (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

Section 39 must be read together within s 38 (conduct of public authorities) which, subject to some exceptions, makes it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The expression ‘public authority’ is defined in s 4. The word ‘act’ is defined in s 3(1) as including a failure to act and a proposal to act.

Unlike most provisions of the Charter, s 39 did not follow the draft Bill attached to the Report of the Human Rights Consultation Committee⁶ which preceded the

5 M Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (1 September 2015). Chapter 4 deals with remedies and oversight – the role of the courts.

6 Human Rights Consultation Committee, ‘Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee’ (2005).

introduction of the Charter. The relevant provision in the draft Bill attached to the Consultation Committee's report was in the following terms:

40. Legal proceedings

(1) If an act or decision of a public authority is made unlawful by this Charter, a person aggrieved by that act or decision may seek any relief or remedy, including –

- (a) judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and
- (b) a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence –

where that relief or remedy would have been available had the act or decision been unlawful apart from this Charter.

(2) To avoid doubt, if a declaration of unlawfulness is sought in relation to an act or decision made unlawful by this Charter damages must not be awarded unless a person has a right to damages apart from the operation of this section.

On its face, this proposed provision would enable a person who alleged that an act or decision of a public authority was unlawful because it was in breach of the Charter, to commence a proceeding seeking any relief or remedy, provided that that relief or remedy would be available had the act or decision been unlawful apart from the Charter. It would be unnecessary to show that the act or decision was unlawful apart from the Charter; the claimant would merely need to show that the type of relief or remedy sought would have been available if the decision had been unlawful apart from the Charter. This draft provision reflected the discussion in section 6.6 and recommendation 30 of the report of the Consultation Committee.⁷

The Consultation Committee considered the issue of tribunal review in section 6.7 of its report. The comments are of interest given the recommendations in the 2015 independent review. After outlining the jurisdiction of VCAT, including merits review of government decisions, the Consultation Committee said:⁸

When the Charter becomes law, those people who are taking matters to VCAT under its existing jurisdiction will be able to include arguments about Charter rights in their cases. VCAT would also continue to have jurisdiction over discrimination matters referred from the Equal Opportunity Commission Victoria as is the case now.

Potentially, the Charter could go further and allow VCAT to review all administrative decisions on their merits where there is just a human rights claim. However, rather than allowing VCAT to simply substitute its own decision in all cases, a more cautious approach would be needed if this idea was to be put into practice.

When considering this idea of extending merits review of government decisions, the Committee has looked to other places to see what the benefits and dangers might be. Rights based merits review does not exist in the ACT, New Zealand and United Kingdom, so taking this step requires caution.

The Committee considers that it would be best to remain within the current rules of VCAT and allow the Charter to settle in to the existing legal system. The Committee recommends that more work be done on establishing a rights based merits review at VCAT over time. As such we encourage the issue of remedies

7 Ibid pp 123-125.

8 Ibid p 126.

generally, and limited merits review by VCAT in particular, to be included in the four year review of the Charter.

The Consultation Committee considered the issue of damages in section 6.8 of its report. The Committee noted that the ‘Statement of Intent’ of the then Victorian Government indicated a preference for no additional causes of action and said that the Committee did not think that damages added significant extra value to the Charter model at that stage, and that most people seemed more interested in making sure rights are observed than in receiving compensation.⁹ The Committee also said that overseas experience showed that damages are rarely awarded and are not within the contemplation of many people who might seek justice for a rights violation.¹⁰ For these reasons, the Committee recommended that none of the remedies available in relation to any conduct made unlawful by the Charter should enable the award of damages unless a right to damages was available under existing law.¹¹

The remedies provision was evidently redrafted between the time of the Consultation Committee’s report and the introduction into Parliament of the Bill which became the Charter.¹² There are several differences between the Consultation Committee’s draft and the final version of the remedies provision. Among other things, the final version makes it a condition of seeking relief that ‘otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful’. If that condition is satisfied, then the person ‘may seek that relief or remedy on a ground of unlawfulness arising because of this Charter’. The inclusion of this condition has raised a number of interpretational issues, which are discussed below.

Neither the Second Reading Speech,¹³ nor the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic), sheds light on why the provision was redrafted. It may be inferred that the changes were intended to ensure that the introduction of the Charter did not lead to a large increase in litigation. The Explanatory Memorandum included the following comment in relation to cl 39 of the Bill:¹⁴

Sub-clause (1) provides that if a person has a right to seek relief or a remedy *otherwise than because of this Charter*, founded on the unlawfulness of some conduct by a public authority, then any unlawfulness generated by this Charter (as set out in clause 38) may be a further ground in the cause of action. This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under Part 2.

9 Ibid p 128.

10 Ibid.

11 Recommendation 31: see Human Rights Consultation Committee, ‘Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee’ (2005), p 128.

12 Charter of Human Rights and Responsibilities Bill 2006 (Vic). Clause 39 of the Bill as introduced into Parliament was in the same terms as s 39 of the Charter.

13 Victoria, *Parliamentary Debates* (Legislative Assembly), 4 May 2006, p 1289 at p 1294.

14 Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic), p 28 (emphasis in original).

III Legislative History of the ACT Charter Remedies Provision

As originally enacted, the ACT Charter did not expressly require public authorities to adhere to human rights or expressly create a right of action for contravention of the Charter. It neither included nor excluded remedies – it was silent on the issue, except for affirming the right to compensation for wrongful conviction, stating that all those who are wrongfully convicted and punished have a right to be compensated according to the law.¹⁵

However, the ACT Charter was amended with effect from 1 January 2009 by the *Human Rights Amendment Act 2008* (ACT). That Act introduced new ss 40, 40A, 40B, 40C and 40D (forming new Pt 5A).

Section 40 contains a definition of ‘public authority’ (and s 40A also relates to that expression). Section 40B is comparable to s 38 of the Victorian Charter and provides that, subject to certain exceptions, it is unlawful for a public authority (a) to act in a way that is incompatible with a human right; or (b) in making a decision, to fail to give proper consideration to a relevant human right. The Dictionary to the Act defines ‘act’ for the purposes of the relevant Part of the Act as including ‘fail to act and propose to act’.

Section 40C is in the following terms:

40C. Legal proceedings in relation to public authority actions

- (1) This section applies if a person –
 - (a) claims that a public authority has acted in contravention of section 40B; and
 - (b) alleges that the person is or would be a victim of the contravention.
- (2) The person may –
 - (a) start a proceeding in the Supreme Court against the public authority; or
 - (b) rely on the person’s rights under this Act in other legal proceedings.
- (3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.
- (4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.
- (5) This section does not affect –
 - (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
 - (b) a right a person has to damages (apart from this section).

Note See also s 18(7) and s 23.

- (6) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

The note under s 40C(5)(b) refers to ss 18(7) and 23 of the Act. Section 18(7) provides that anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention. Section 23 deals with compensation for wrongful conviction.

15 Evans and Evans, *Australian Bills of Rights* (LexisNexis Butterworths, 2008) [4.6].

The Explanatory Statement to the Human Rights Amendment Bill 2007 (which became the *Human Rights Amendment Act 2008*) explained that the amendments contained in the Bill were in line with the recommendations of the 12-month review of the ACT Charter, and aimed to improve the operation of the Act and its accessibility to members of the ACT community. In relation to proposed new s 40C, the Explanatory Statement said:¹⁶

Section 40C(2)(a) creates a direct right of action in the Supreme Court. A victim of an unlawful act by a public authority may institute proceedings against the public authority in the Supreme Court.

Paragraph 40C(2)(b) provides that a victim of an unlawful act by a public authority may also rely on human rights as part of any other legal proceedings in a court or tribunal. This may include, for example, in an action brought against a public authority under the *Administrative Decisions (Judicial Review) Act 1989*, or an order in a civil or criminal proceeding, a stay of proceedings or exclusion of evidence.

Section 40C(2) is modelled on section 7 of the United Kingdom Human Rights Act 1998. It is intended to enable victims of unlawful acts by public authorities to rely on human rights in legal proceedings in courts and tribunals or to institute an independent cause of action in the Supreme Court.

For the purposes of the Act, a victim is a person who is directly affected or who is at risk of being directly affected by the act in question. A victim must be a natural person. It may also be relatives of the victim where a complaint is made about his/her death ... A corporation or a public authority cannot be a victim.

Sub-section 40C(4) provides that the Court may grant such relief it considers appropriate in relation to the unlawful act, except for damages. However, sub-section 40C(5) makes clear that if the same conduct is independently unlawful and compensable, this section does not take away that right to damages.

Paragraph 40C(5)(a) makes clear that nothing in this section restricts any existing rights that a person might have to seek a remedy in respect of an act or decision of a public authority.

Paragraph 40C(5)(b) confirms that nothing in this section affects any right a person may have to damages apart from the operation of this section.

It is convenient at this point to refer to ss 6-8 of the *Human Rights Act 1998* (UK). Section 6 of that Act deals with acts of public authorities. Section 6(1) provides that, subject to certain exceptions, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Sections 7 and 8 then provide in part as follows:

7. Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

¹⁶ Explanatory Statement to the Human Rights Amendment Bill 2007, pp 5-6 (emphasis added).

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

...

8. Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

...

(6) In this section –

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 6(1).

As the above extracts demonstrate, there is much in common between ss 7-8 of the *Human Rights Act 1998* (UK) and s 40C of the ACT Charter. First, s 7(1)(a) of the UK Act provides that a person who claims that a public authority has acted in a way which is unlawful under s 6(1) may bring proceedings against the authority in the appropriate court or tribunal, and s 40C(2)(a) of the ACT Charter provides that a person who claims that a public authority has acted in contravention of s 40B may start a proceeding against the authority in the Supreme Court. Although there is a distinction as regards the court or tribunal in which such an action may be commenced, both provisions create a right of action for contravention of the relevant provision by a public authority.

Secondly, s 7(1)(b) of the UK Act provides that a person who claims that a public authority has acted unlawfully contrary to s 6(1) may rely on the Convention right in any legal proceedings, and s 40C(2)(b) of the ACT Charter provides that a person who alleges that a public authority has acted in contravention of s 40B may rely on the person’s rights under the Act in other legal proceedings. The two provisions appear to be substantially the same.

Thirdly, s 8(1) of the UK Act provides that a court or tribunal may grant such relief or remedy or make such order within its powers as it considers just and appropriate, and s 40C(4) of the ACT Charter provides that the Supreme Court may grant the relief it considers appropriate, except damages. Although there is a difference regarding damages, there is otherwise, in each case, a broad power to grant such relief as is considered appropriate.

The key differences between the UK Act and the ACT Charter are, first, that the UK Act empowers a court or tribunal to award damages (in certain circumstances) for a contravention of the relevant provision while the ACT Charter does not and, secondly, that the UK Act enables a proceeding to be commenced in a range of courts and in tribunals, while the ACT Charter enables a proceeding to be commenced only in the Supreme Court.

IV Case Law on the Victorian Charter Remedies Provision

The most extensive judicial consideration of s 39 of the Victorian Charter is contained in *Director of Housing v Sudi*,¹⁷ a decision of the Victorian Court of Appeal. The matter came before the Court of Appeal by way of an appeal from a decision of Bell J sitting as the President of VCAT. Bell J dismissed two applications by the Director of Housing under s 344 of the *Residential Tenancies Act 1997* (Vic) for an order for possession of the premises occupied by Mr Sudi and his son. Bell J held that VCAT had jurisdiction to determine whether or not an application for a possession order under s 344 was brought in breach of the Director's obligations under s 38(1) of the Victorian Charter. His Honour held that the Director had contravened s 38(1) and that the applications were therefore invalid. Consequently, VCAT had no jurisdiction to hear and determine the applications for possession.

The Court of Appeal unanimously allowed the appeal, with each member of the Court (Warren CJ, Maxwell P and Weinberg JA) giving separate reasons for judgment. All members of the Court held that VCAT had no express or implied power to undertake collateral review¹⁸ of the validity of a decision of the Director of Housing to apply pursuant to the *Residential Tenancies Act* for a possession order.¹⁹ It followed that the question whether the Director had contravened s 38(1) of the Charter in bringing the applications could not be raised in the proceeding in VCAT. In terms of s 39(1) of the Charter, the Court in effect held that, assuming that bringing a collateral challenge could constitute the seeking of 'relief or remedy', that relief or remedy could not be sought in VCAT otherwise than because of the Charter.

In the course of their reasons, their Honours made observations concerning the scope and operation of s 39 of the Victorian Charter. After concluding that VCAT had power to undertake neither judicial nor collateral review, Warren CJ said that VCAT did not, apart from the Charter, have power to review the validity of the Director's decisions on the ground of unlawfulness.²⁰ Her Honour then said: 'Accordingly, s 39(1) does not operate to confer jurisdiction on VCAT to grant relief on "a ground of unlawfulness arising because of this Charter".'²¹ Her Honour stated that it was unnecessary to express

17 (2011) 33 VR 559. See M Groves, 'Tribunals, Judicial Review and the Victorian Charter' (2012) 23 *Public Law Review* 3.

18 The expressions 'collateral review' and 'collateral challenge' are used interchangeably in the judgments. Their meaning is discussed by Weinberg JA at (2011) 33 VR 559 at [221]-[224].

19 (2011) 33 VR 559 at [43] (Warren CJ), at [62], [63] (Maxwell P), at [284] (Weinberg JA).

20 *Ibid* [48].

21 *Ibid*.

any opinion on Bell J's implicit conclusion that a public authority's failure to comply with s 38 of the Charter when making a decision constitutes a jurisdictional error that vitiates the decision.²²

Maxwell P set out s 39(1) of the Victorian Charter and said:²³

Plainly enough, s 39(1) has an operation which is both conditional and supplementary. The condition to be satisfied is that a person be able to seek, independently of the Charter, 'any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful.' If – but only if – that condition is satisfied, then s 39(1) enables that person to seek 'that relief or remedy' on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter.

Maxwell P said that the condition for the operation of s 39(1) is clearly satisfied in the case of an application for judicial review; whether at common law or under the *Administrative Law Act 1978* (Vic), a person may seek 'relief or remedy' in respect of public officials on grounds of unlawfulness.²⁴ It was less clear, however, whether the condition would be satisfied in a proceeding where collateral review was available:²⁵

Let it be assumed that a defendant to a criminal proceeding was able to make a collateral challenge, in that proceeding, to the legal validity of an administrative act on which the prosecution case depended. Could it be said that the defendant in that case was able to 'seek a relief or remedy' on the ground of unlawfulness?

It was, however, unnecessary to decide this question because, on any view, the legislative scheme under consideration did not allow collateral challenge. That is, a respondent to an application by the Director of Housing for possession under s 344 of the *Residential Tenancies Act* was not able, independently of the Charter, to seek relief or a remedy by way of collateral challenge.²⁶

Weinberg JA said that there is no reason to doubt that VCAT, which deals with the overwhelming majority of legal proceedings in the State of Victoria, is obliged to have regard to the Charter.²⁷ His Honour referred to the interpretive obligation in s 32(1) of the Charter and then said:²⁸

In addition, VCAT can determine Charter issues in other ways. For example, such issues can arise directly in the course of proceedings. The question whether a public authority has acted unlawfully may be central to the resolution of a dispute where the lawfulness or otherwise of such conduct is an element of the cause of action in the proceeding. Alternatively, illegality on the part of that public authority may be the defence to that cause of action. In each case, the Charter issue arises directly in the course of the proceeding and must be resolved according to law.

His Honour in the above passage drew a distinction between issues which arise directly in a proceeding and those that arise collaterally (which were discussed in detail, later in

22 Ibid [49].

23 Ibid [96] (footnote omitted).

24 Ibid [97].

25 Ibid.

26 Ibid [98].

27 Ibid [150].

28 Ibid [152].

the judgment). It appears that his Honour accepted that, where unlawfulness constitutes an element of a cause of action, unlawfulness under s 38(1) of the Charter may be relied upon without it being necessary to rely on unlawfulness apart from the Charter.²⁹ This is consistent with the view taken by a number of commentators.³⁰

His Honour said, in relation to s 39, that the Charter itself does not create a new remedy; '[t]he implication of s 39 is that there is no new cause of action for breach of any Charter right'.³¹ His Honour said that, effectively, the supervisory jurisdiction of the Supreme Court needs to be invoked by way of Charter protection, using the procedure under Order 56 of the Supreme Court Rules, as well as the Court's powers to grant declaratory and injunctive relief.³² However, the constraints on seeking judicial review apply. Accordingly, the Charter 'cannot be used as a vehicle to engage inferior courts in judicial review' or 'be used in that way by VCAT'.³³ It would seem to follow that, provided that the condition in s 39(1) were satisfied, a decision by the Director of Housing to apply for possession would be amenable to a judicial review proceeding in the Supreme Court.

His Honour discussed the legislative history of s 39, including the contrast between the Consultation Committee's recommendation and draft proposed provision and the ultimate form of s 39.³⁴ His Honour commented that the final form of s 39 'bears little resemblance' to either the Consultation Committee's recommendation or cl 40 of the draft Bill appended to the Committee's report.³⁵

Weinberg JA concluded that s 39(1) could not be invoked as the source of any possible power of VCAT to engage in collateral review on Charter grounds, for two reasons: first, as was plain, the section did not confer on VCAT any power of collateral review; and, secondly, the section did not expand any power of collateral review that VCAT might have under ordinary common law principles. Weinberg JA also said:³⁶

Indeed, it can be argued that the legislative intention disclosed by s 39 is that Charter unlawfulness can be relied upon as a ground in – and only in – a proceeding the object of which is to seek “relief or remedy in respect of an act or decision of a public authority on the ground that ... [it] was unlawful”. That would, by definition, confine such relief to a direct challenge before VCAT, and would exclude any possibility of collateral review.

Thus, both Maxwell P and Weinberg JA raised a question as to whether, whatever the jurisdiction, collateral review (on the ground of Charter unlawfulness) is excluded expressly or by implication by s 39 of the Charter. The question arises because s 39 refers

29 See also, to the same effect (2011) 33 VR 559 at [215], [264], [282].

30 See A Pound and K Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co, 2008) [5230]; C Evans and S Evans, *Australian Bills of Rights* (LexisNexis Butterworths, 2008) [4.35]-[4.36].

31 (2011) 33 VR 559 at [215].

32 Ibid [217].

33 Ibid [218].

34 Ibid [267]-[277].

35 Ibid [277].

36 Ibid [282] (footnote omitted).

to seeking relief or a remedy, and this may exclude a collateral challenge to an act or decision, at least in some circumstances.³⁷

Section 39 of the Victorian Charter was also considered by the Victorian Court of Appeal in *Bare v IBAC*.³⁸ The majority (Tate and Santamaria JJA, Warren CJ dissenting) allowed the appeal, holding that the decision-maker had failed to give proper consideration to Mr Bare's human rights and that this constituted an error of law on the face of the record, review of which was not precluded by a privative clause on its proper construction.³⁹

One of the issues discussed in the case was whether unlawfulness under s 38 of the Charter amounts to jurisdictional error.⁴⁰ Ultimately, it was unnecessary to determine this question (because the majority construed the privative clause as inapplicable). The majority nevertheless discussed the issue and, in the course of that discussion, made some observations about s 39. Section 39 was indirectly relevant because both ss 38 and 39 use the word 'unlawful' and it was submitted that the word must have a consistent meaning in both provisions.

Tate JA said that on one view of the operation of s 39, before relief can be sought on the ground of unlawfulness under the Charter, it is necessary for a litigant also to be able to seek relief on a non-Charter ground of unlawfulness.⁴¹ In a footnote,⁴² Tate JA said that: 'It is not required that a litigant be successful on the non-Charter grounds', citing *Goode v Common Equity Housing Ltd*.⁴³ Her Honour explained: 'The non-Charter grounds may include, for example, in the context of judicial review, breach of procedural fairness, unreasonableness or improper purpose.'⁴⁴ On this view, Charter unlawfulness can only be invoked as a supplementary ground of challenge.⁴⁵

Tate JA said that s 39 is a difficult section, citing the remarks of Weinberg JA in *Sudi*.⁴⁶ Her Honour set out two competing constructions of the provision, namely the 'factual availability' interpretation, which reflects the supplementary approach whereby a litigant relying on the Charter needs also to seek relief on a non-Charter ground, and the 'abstract availability' interpretation, which requires only the use of an existing process and procedure to ventilate a claim based on an alleged breach of s 38(1) seeking a traditional remedy.⁴⁷ Her Honour considered that the question of the proper construction of s 39(1), and its implications for the question of whether a breach of s 38(1) is a

37 Cf *Director of Public Prosecutions v Debono* [2013] VSC 407 at [86] (Kyrou J).

38 (2015) 48 VR 129. See N Boughey, 'The Charter's effect on administrative decision-making' (2016) 27 *Public Law Review* 3.

39 (2015) 48 VR 129 at 203 [235]-[237] (Tate JA), at 285 [495], 350 [669] (Santamaria JA).

40 Ibid 169-181 [116]-[153] (Warren CJ), 251-260 [378]-[397] (Tate JA), 321-331 [599]-[626] (Santamaria JA).

41 Ibid 257 [392].

42 Ibid.

43 [2014] VSC 585 at [28]-[29] (Bell J). See also *Director of Public Prosecutions v Debono* [2013] VSC 407 at [82] (Kyrou J), applied in *Burgess v Director of Housing* [2014] VSC 648 at [214] (Macaulay J).

44 (2015) 48 VR 129 at 257 [392].

45 Ibid.

46 Ibid 258 [394].

47 Ibid 258-259 [394], citing a paper by the author: Justice Mark Moshinsky, 'Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria On-Line Journal* 91.

species of jurisdictional error, should await another case when it was necessary to be resolved.⁴⁸

Santamaria JA considered that s 39(1) of the Charter uses the term ‘unlawful’ to include errors of law that do not amount to jurisdictional error, such as error of law on the face of the record.⁴⁹ His Honour also said:⁵⁰

A further matter needs to be considered when determining the consequences of a contravention of s 38(1). The Charter itself has made provision for the consequences of a breach of s 38. In fact, it has limited the remedies that are available for Charter-unlawfulness. Section 39(1) distinguishes ‘grounds’ from ‘any relief or remedy’. It then provides that if, apart from the Charter, a person has ‘grounds’ for any relief or remedy, those grounds may be supplemented by ‘a ground of unlawfulness arising because of this Charter’. Given that ‘Charter unlawfulness’ performs a supplementary function, there is a basis for considering that it was not a purpose of Parliament that ‘Charter unlawfulness’ itself be a ground of invalidity. There is nothing in the extrinsic materials that suggests that Parliament was seeking to restrict access to the courts and to curtail remedies in circumstances where a public authority was acting wholly outside the law.

It appears from the above passage that his Honour considered the ‘factual availability’ interpretation of s 39 – namely that a claimant relying on a Charter ground must also seek relief on a non-Charter ground – to be correct.

Sections 39(3) and (4) have not yet been judicially considered.

V The Operation of the ACT Charter Remedies Provision

While s 40C of the ACT Charter has been relied on by claimants in several cases, there does not appear to have been any detailed discussion of the provision. This may be because it is relatively straightforward and not likely to occasion difficulties of interpretation.

Section 40C(1)(b) provides that the section applies if a person ‘alleges that the person is or would be a victim of the contravention’. This picks up the expression ‘victim’ from s 7 of the *Human Rights Act 1998* (UK). There is a body of case law on this expression,⁵¹ which forms part of the legislative context and is likely to be relevant when construing the provision. It is beyond the scope of this chapter to discuss that case law.

Section 40C(2)(a) provides that the person may ‘start a proceeding in the Supreme Court against the public authority’. This is not limited in terms to a proceeding by way of judicial review or a proceeding seeking a declaration or injunction, and enables a

48 (2015) 48 VR 129 at 259 [396]. See also *Kerrison v Melbourne City Council* (2014) 228 FCR 87 at 123 [148] where the question of the proper construction of s 39 of the Victorian Charter was left open.

49 (2015) 48 VR 129 at 329 [621].

50 Ibid 330-331 [625].

51 See J Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), [4-05]-[4-72]. Also, the Explanatory Memorandum to the Human Rights Amendment Bill 2007 (ACT) refers to international human rights cases in relation to the word ‘victim’.

full consideration of whether, for example, a public authority has acted incompatibly with a human right in the Act in contravention of s 40B.⁵²

Section 40C(2)(b) provides that the person may 'rely on the person's rights under this Act in other legal proceedings'. This makes plain that a person may rely on a breach of the Act as the unlawfulness element in a cause of action which requires such an element, and by way of defence to a proceeding. This provision also enables an application to be made for a stay of a proceeding on the ground that, for example, a public authority has acted incompatibly with a human right in the Act.⁵³

Section 40C(4) provides that the Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages. However, subsection (5) provides that the section does not affect a right a person has to damages (apart from the section). Although the matter is not free from doubt, it would appear to be intended that a person can recover damages in respect of a common law cause of action (for example, trespass) where the element of unlawfulness is supplied by a breach of the Act. However, a person cannot recover damages where there is no other such cause of action, and breach of the Act is the sole claim.

VI Outline of Recommendations for Reform of the Victorian Charter Remedies Provisions

As noted above, the 2015 independent review of the operation of the Victorian Charter recommended changes to the remedies provision. An earlier review of the Victorian Charter, conducted by the Scrutiny of Acts and Regulations Committee,⁵⁴ recommended that s 39 be replaced with a provision barring the provision of relief or remedies for breach of s 38 unless another statute expressly provided for the relief or remedy.⁵⁵ That recommendation was not implemented.

The 2015 independent review outlined the interpretational issues that arise in relation to s 39 and the practical difficulties of access to remedies.⁵⁶ It said that '[t]o embed a human rights culture in Victoria, the remedies that are available to protect Charter rights must be clear and those remedies must be accessible to people who need them'.⁵⁷ After discussing the remedies provisions in the *Human Rights Act 1998* (UK) and the ACT Charter, the review said:⁵⁸

These remedies provisions provide a model that could supplement the remedies that are currently available under the Victorian Charter. Under this model, a person

52 See, eg, *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127 at [51]-[53] (Refshaug J); *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* (2010) 4 ACTLR 161 at [10], [83]; *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTCA 60.

53 See, eg, *R v Forsyth* (2013) 281 FLR 62 at [78]-[79], [237] (Penfold J).

54 Parliament of Victoria, Scrutiny of Acts and Regulations Committee, 'Review of the Victorian Charter of Human Rights and Responsibilities Act 2006' (September 2011).

55 *Ibid* [512]-[515].

56 M Brett Young, 'From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (1 September 2015), pp 119-124.

57 *Ibid* 124.

58 *Ibid* 126.

whose human rights have been breached could either bring a proceeding using the direct cause of action, or rely on their rights in other legal proceedings. It would resolve the confusion and uncertainty that surrounds section 39, by providing a direct right of action for anyone seeking a remedy for a breach of their human rights.

The review accepted that it would be a departure from the original conception of the Charter to include a direct cause of action, but said that 'the confusing and limited remedies provision in s 39 of the Charter is undermining its effectiveness'.⁵⁹

Having recommended the introduction of a direct cause of action based on the UK and ACT models, the review considered four further issues:

- First, what is the appropriate court or tribunal within the Victorian justice system to hear and determine claims made under the Charter?
- Second, should damages or compensation be a remedy that can be awarded against a public authority that has acted incompatibly with a person's human rights?
- Third, who should have standing to bring an action?
- Fourth, whether a person should be able to seek judicial review of a decision on the ground only that it is unlawful under s 38(1) of the Charter.

In relation to the first issue, the review proposed that VCAT be given original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Charter.⁶⁰ (This is to be contrasted with the ACT provision, which confers jurisdiction on the Supreme Court.) The review commented that conferral of this jurisdiction on VCAT would fit well with its existing Human Rights Division and recommended that it be modelled on the jurisdiction conferred under the *Equal Opportunity Act 2010* (Vic).⁶¹

In relation to the second issue, the review said that the introduction of a direct cause of action under the Charter would itself be a significant step; and that making damages a remedy under the Charter should be considered only as an incremental step once the direct cause of action is established and there is experience of it in operation.⁶²

In relation to the third issue, the review recommended that remedies under the Charter should be available to any human being who claims a public authority has acted, or is proposing to act, incompatibly with his or her human rights; and that, if a person cannot seek a remedy (perhaps because the person has a disability or because the person is a child), then another person should be able to do so on his or her behalf.⁶³ Because remedies under the Charter should be available to persons who are, or will be, affected by a breach of their human rights, the review considered that they should not be available to corporations, interest groups or interested persons who are not directly affected by a breach.⁶⁴

59 Ibid 127.

60 Ibid 129.

61 Ibid.

62 Ibid 131.

63 Ibid.

64 Ibid.

In relation to the fourth issue, the review recommended that the availability of judicial review of a decision on Charter grounds should not depend on the claimant having another, non-Charter ground of review, as this might lead to arbitrary results.⁶⁵

Postscript

Since the draft of this chapter was prepared, the Victorian Government has published its response to the independent review's recommendations. In relation to the recommendation discussed in this chapter, in many cases the response states that the recommendation is under further consideration. Therefore, there is no clear picture yet as to whether the substance of these recommendations will be taken up.

65 Ibid 132.

Australian Charters of Rights a Decade On (2017)
Matthew Groves and Colin Campbell (editors)

AUSTRALIAN CHARTERS OF RIGHTS A DECADE ON

Editors

Professor Matthew Groves

La Trobe University

Dr Colin Campbell

Monash University

THE FEDERATION PRESS

2017

© The Federation Press
All Rights Reserved

Contents

<i>Preface</i>	v
<i>About the Contributors</i>	ix
<i>Table of Cases</i>	xii
<i>Table of Statutes</i>	xvii

PART I Architecture of the Charters

1	Interpreting the Effect of Our Charters <i>Matthew Groves</i>	2
2	The Distinctive Features of Australia's Human Rights Charters <i>George Williams</i>	22
3	The Scope and Application of the Charters <i>Janina Boughey</i>	36
4	Taking Stock of the Audit Power <i>Penelope Mathew</i>	53
5	Charter Remedies <i>The Hon Justice Mark Moshinsky</i>	69
6	Using the Charter in Litigation <i>Emrys Nekvapil</i>	84

PART II Specific Applications

7	Freedom of Expression <i>Colin Campbell</i>	104
8	Religious Freedom under the Victorian Charter of Rights <i>Nicholas Aroney, Joel Harrison and Paul Babie</i>	120
9	The Approach of the Victorian Charter to Women's Rights <i>Ronli Sifris</i>	136
10	Charters and Disability <i>Rosemary Kayess and Belinda Smith</i>	151
11	The Charter of Law and Order <i>Jeremy Gans</i>	169

12	The Second Charters of Prisoners' Rights <i>Matthew Groves</i>	187
13	Privacy Rights and Charter Rights <i>Maira Paterson</i>	203
	<i>Index</i>	227