
Legal redress under the Victorian Charter of Human Rights and Responsibilities

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This article assesses whether the Victorian Charter of Human Rights and Responsibilities can fairly be described as an effective means of creating better protection for human rights in Victoria. After providing an overview of the Charter as a whole, it assesses the various mechanisms by which legal redress is made available and is limited under the Charter: through the obligation to interpret statutes in accordance with human rights; the requirement that public authorities comply with human rights; and the attempt to exclude damages as a remedy. It concludes that although the Charter does open up some pathways for legal redress, the pathways are constrained and convoluted. The limitations and uncertainties in the current set of remedies create barriers to effective redress. Unless and until the Charter is amended to include a clear, simple and effective set of legal remedies for those whose Charter rights have been violated, it will not be a wholly effective guardian of rights.

INTRODUCTION

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) received Royal Assent on 25 July 2006 and comes into force progressively from 1 January 2007.¹ In his second reading speech, the Attorney-General claimed that, in introducing the Charter, the government was fulfilling “its commitment to provide better protection for human rights for all people in Victoria through the enactment of a charter of rights and responsibilities that will strengthen and support our democratic system”.² In response, the leader of the National Party denounced the Charter as “unnecessary, divisive, disruptive of the rule of law as we know it in the State of Victoria, calculated to cause confusion in the minds of Victorians, and substantially constituted by a body of meaningless rhetoric”.³

This article assesses whether the Charter can fairly be described as an effective means of creating better protection for human rights in Victoria or whether it is simply “meaningless rhetoric” as some of its critics argue.⁴ It begins by giving a brief overview of the Charter’s main provisions. Most of the provisions of the Charter do not focus on legal redress for violation of rights or the role of the courts, but this does not mean that the Charter does not allow for any legal redress. The remainder of the article therefore considers the extent to which legal redress is now available under the Charter that would not have been available before it came into effect. Three issues that are particularly relevant to

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¹ The Charter was enacted after a consultation process that began in July 2005. The process is summarised in Victoria, Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) pp 140-148. The government-appointed Human Rights Consultation Committee received submissions from 2,500 people and groups and held 55 public meetings. The majority supported some form of greater protection for human rights in Victoria. The committee therefore advised the government that it should introduce a statutory bill of rights and appended a draft Bill to its report. The Charter that became law in July 2006 was based to a significant extent on the recommendations of the committee.

² Victoria, Legislative Assembly, *Parliamentary Debates*, 4 May 2006, p 1289 (Rob Hulls).

³ Victoria, Legislative Assembly, *Parliamentary Debates*, 13 June 2006, p 1981 (Peter Ryan).

⁴ Victoria, Legislative Assembly, *Parliamentary Debates*, 13 June 2006, p 1981 (Peter Ryan); Victoria, Legislative Council, *Parliamentary Debates*, 20 July 2006, p 2635 (Peter Ronald Hall).

understanding the extent to which the Charter provides legal remedies or allows for judicial intervention in ways that would previously have not been possible are discussed: the interpretative mandate in s 32 of the Charter; the requirement that public authorities comply with human rights; and the provisions of the Charter that attempt to limit the availability of legal remedies. These provisions and the way in which they interact will be at the heart of the capacity of the Charter to provide legal redress to those whose rights have been violated.

It is acknowledged at the outset that legal remedies and judicial action are only one set of mechanisms by which the Charter will be made effective. Other important mechanisms include the provisions of the Charter directed at discouraging the Victorian Parliament from passing legislation that violates human rights and those directed at encouraging a culture of human rights within the executive. We return to these themes at the end of this article. However, even in states such as the United Kingdom where significant effort was put in to transforming government practices and procedures prior to the coming into effect of its *Human Rights Act 1998* (UK),⁵ it has become clear that effective legal remedies in the courts are a necessary part of holding the government to account for breaches of rights.

OVERVIEW OF THE CHARTER

The Charter is not a constitutionally entrenched or “higher law” bill of rights along the lines of the United States or South African Bills of Rights. Victorian courts will not be able to strike down laws that are inconsistent with the Charter. Instead, the Charter is an ordinary statute that may be amended or repealed in the same way as any other statute. It protects human rights by:

- requiring proponents of legislation and the Parliament to consider the rights-impact of their legislation;
- requiring courts (where possible) to interpret legislation in accordance with human rights; and
- requiring public authorities to comply with human rights.⁶

This type of bill of rights, sometimes known as the Commonwealth model,⁷ is based on similar Acts in the Australian Capital Territory,⁸ New Zealand⁹ and the United Kingdom,¹⁰ although, as will be discussed, there are some important differences between them.

The Charter is divided into five Parts.

Part 1 contains two substantive provisions, in addition to the usual purpose, citation, commencement and definitional provisions. First, it provides that the Charter does not limit rights or freedoms that are not included in the Charter (s 5). Second, it identifies the ambit of the Charter’s operation: only persons have human rights; the Charter binds the Crown; and the Charter applies to the branches of Victorian Government in the manner set out in the other Parts of the Act (s 6).

Part 2 sets out the rights that are protected by the Charter, as well as a general limitation clause qualifying the protection of those rights. The rights outlined in the Charter are largely based on the *International Covenant on Civil and Political Rights* (ICCPR),¹¹ although there have been some additions, omissions and drafting alterations. The limitation provision combines elements of the Canadian and South African limitation provisions and provides:

⁵ See Croft J, “Whitehall and the Human Rights Act 1998” (2001) 4 EHRLR 392.

⁶ The second and third modes of protection are the focus of this article. They come into effect on 1 January 2008. The rest of the Charter, including the provisions relating to the first mode of protection, comes into effect on 1 January 2007.

⁷ Gardbaum S, “The New Commonwealth Model of Constitutionalism” (2001) 49 Am J Comp L 707; see also Hiebert J, “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?” (2004) 82 Tex LR 1963.

⁸ *Human Rights Act 2004* (ACT).

⁹ *New Zealand Bill of Rights Act 1990* (NZ).

¹⁰ *Human Rights Act 1998* (UK).

¹¹ Opened for signature 16 December 1966, 999 UNTS 17 (entered into force 23 March 1976).

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.¹²

Part 3 contains the provisions that give effect to the rights set out in Pt 2. Section 30 provides for parliamentary scrutiny by the Scrutiny of Acts and Regulations Committee. Section 28 requires that the proponent of legislation provide a reasoned statement as to whether or not the proposed legislation is consistent with human rights. Section 38 requires that public authorities comply with human rights and s 32 requires that legislation be interpreted (where possible) in accordance with human rights. If the Supreme Court finds that legislation cannot be interpreted in a manner that is consistent with the rights under the Charter, it may make a “declaration of inconsistent interpretation”.¹³ The responsible Minister must then prepare a written response to the declaration, to be laid before both Houses of Parliament and published in the *Government Gazette*.¹⁴ Importantly, the court’s declaration does not affect the validity, operation or enforcement of the legislation.¹⁵ Moreover, in exceptional circumstances, Parliament can make an “override declaration”, enabling it to side-step the application of the Charter altogether.¹⁶

Part 4 renames the Victorian Equal Opportunity Commission as the Victorian Human Rights and Equal Opportunity Commission and confers on it functions that are intended to make it an “independent monitor” of the operation of the Charter.¹⁷ The Commission is required to prepare an annual report, to give advice to the Attorney-General, and to provide education about the Charter and human rights.¹⁸

Finally, Pt 5 mandates a review of the Charter’s operation by 2011 and provides for further reviews, confers a regulation-making power on the Governor in Council, and provides for consequential amendments to other Victorian legislation. (One of the most important of these amendments makes clear that the Ombudsman has the power “to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities”). It also contains a savings provision, specifying that the Charter does not affect the law relating to abortion or child destruction.¹⁹

THE INTERPRETATIVE MANDATE

Section 32 of the Charter provides:

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of –
 - (a) an Act or provision of an Act that is incompatible with a human right; or

¹² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2). See also *Canadian Charter of Rights and Freedoms*, Pt I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK), s 1; *South African Constitution* (1996), Ch 2: *Bill of Rights*, s 36.

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36.

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37.

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5)(a).

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31.

¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), Explanatory Memorandum, p 28.

¹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 41, 42 and 43.

¹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 48.

- (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

This interpretative mandate is one of the central mechanisms by which the Charter gives effect to human rights.²⁰ From 1 January 2008, it requires that, where possible, all who interpret and apply the law (including courts, tribunals, public servants and others) interpret all Victorian legislation, new and old, in a way that is consistent with human rights.²¹ It is not, of itself, a legal remedy, but may be combined with other provisions of the Charter or used in litigation where statutory interpretation is at issue, to create an entitlement to legal remedies in circumstances where such an entitlement has not existed before.

There will often be an overlap between s 32 and common law principles of interpretation. Those principles include the requirement for clear and express language before a statute will be taken to abrogate fundamental common law rights and the presumption that Parliaments legislate consistently with Australia's existing international human rights obligations.²² Under the Charter, however, the requirement to interpret legislation consistently with human rights becomes an explicit statutory interpretative command, and not just one interpretative maxim among many; moreover, its ambit is made concrete by reference to the rights listed in Pt 2.

Section 32 does not, however, authorise those who interpret and apply the law (including the courts) to give effect to human rights in all circumstances. If legislation cannot be interpreted consistently with the human rights contained in the Charter, it remains fully valid and effective and may authorise conduct (including the making of delegated legislation) that breaches human rights. The only possible form of legal redress in these circumstances is a declaration of inconsistent interpretation from the Supreme Court.²³ These declarations are discussed below.

In some cases, however, s 32 may have a significant impact on the interpretation of Victorian legislation. First, ambiguity is not required before it operates. Section 32(1) is framed in terms sufficiently broad to encompass all statutory provisions, not merely those that are ambiguous.²⁴ If the established meaning of an existing statutory provision is inconsistent with the Charter, it will have to be reconsidered in light of the Charter to see if another interpretation that is consistent with human rights is possible. If it is possible, and also consistent with a purposive interpretation of the legislation in question, then that interpretation is to be preferred even if there is established case law to the contrary. The United Kingdom courts have taken a similar approach to the interpretative provision in the *Human Rights Act 1998* (UK). For example, in *R v Offen* [2001] 1 WLR 253, the decision in *R v Kelly* [2000] 1 QB 198 just a year earlier was held to no longer be good law. In *Offen* the court ruled (at 175-176) that the interpretation of the *Crime (Sentences) Act 1997* (UK) requirement that life sentences be imposed in all but "exceptional circumstances" now required a broader understanding of what circumstances might be considered exceptional so as to ensure that the provisions complied with

²⁰ Cf the *Human Rights Act 2004* (ACT), ss 30, 31; the *New Zealand Bill of Rights Act 1990* (NZ), s 6; and the *Human Rights Act 1998* (UK), s 3.

²¹ See s 49(1). However, it is important to note the transitional provisions: *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 49(2) and (3). In *Wilson v First Count Trust Ltd (No 2)* [2004] 1 AC 816, the House of Lords held that although s 3 of the *Human Rights Act 1998* (UK), the United Kingdom equivalent of s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), applies to the interpretation of all legislation regardless of when it was enacted it, s 3 does not apply to causes of action which accrued before s 3 came into force (at [17]-[23]) (Lord Nicholls).

²² See Taylor J, "Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy" (2004) 32 *Fed L Rev* 57; Kirby M, "Domestic Implementation of International Human Rights Norms" (1999) 5 (2) *AJHR* 109; and Cranwell G, "The Bangalore Principles and the Internationalisation of Australian Law" (2002) 32 *AIAL Forum* 1.

²³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36. Cf *Human Rights Act 2004* (ACT), s 32(2).

²⁴ Cf *New Zealand Bill of Rights Act 1990* (NZ), s 6, as discussed in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 and see generally Butler A and Butler P, *The New Zealand Bill of Rights Act* (LexisNexis NZ Ltd, 2005) pp 166-168; cf also *Human Rights Act 2004* (ACT), s 30(3), which sets out the circumstances in which the interpretative clauses fall to be applied.

the *Human Rights Act 1998* (UK).²⁵ *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 indicates a parallel willingness to reconsider settled interpretations in New Zealand.²⁶ It is important, therefore, to understand that even well-settled interpretations of statutes may be disrupted by the Charter. It will no longer be enough to simply rely on the existing case law in relation to statutes where a more human rights consistent interpretation of the Act in question is possible.

The direction to interpret statutes in a manner that conforms to the human rights set out in the Charter is not, however, absolute. Unlike the *Human Rights Act 1998* (UK), the interpretative mandate under the Victorian Charter is subject to an explicit rider that the human rights sensitive interpretation be “consistent[] with [the] purpose” of the legislation being interpreted.²⁷ This reflects concerns about suggestions by some United Kingdom judges that the very purpose of the Act can and should be ignored in giving robust effect to the interpretative mandate²⁸ and a similar debate in New Zealand.²⁹

It is impossible to tell yet how far this interpretative mandate extends. The Explanatory Memorandum states:

The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.³⁰

But the purpose and object of legislation can be identified at several different levels of abstraction. At one level of abstraction, the purpose of legislation is to achieve exactly what it says, according to its plain and natural meaning.³¹ This would give the most limited scope to the interpretative provision. At another, higher level of abstraction, the purpose of legislation is to address some social problem or social mischief. This is the level of abstraction commonly identified in purpose or objects clauses. It is the level of abstraction at which courts operate when giving a “purposive” interpretation to legislation.³² We would argue that this is the level of abstraction at which interpreters of legislation should approach their interpretative role under the Charter. Interpreters therefore should seek a human rights consistent interpretation that is also consistent with the mischief that the legislation seeks to redress.

This does not mean that the interpreters, including courts, can rewrite legislation. As the House of Lords now insists, perhaps in response to the overly expansive approach in *R v A* [2002] 1 AC 45, the power remains a power to interpret legislation and not a power to legislate. So interpreters, especially courts, cannot choose between “several ways of making a provision [human rights]-compliant” where such a choice would “involve issues calling for legislative deliberation” and would “require courts to make decisions for which they are not equipped”.³³ Courts ought not “adopt a meaning inconsistent with a fundamental feature of legislation” or “go [against] the grain of the legislation” or depart from

²⁵ “It is clear that as a result of [the statutory provision], offenders are now being sentenced to life imprisonment when there is no objective justification for that sentence. Such a result can be categorised as being arbitrary and not proportionate” (at [106]).

²⁶ *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 at 440-441 (though it was not necessary to decide the point in this case); see also *Re S* [1992] 1 NZLR 363 at 372; *Re M* [1992] 1 NZLR 29 at 40.

²⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32.

²⁸ For a good overview see Charlesworth H, “Human Rights and Statutory Interpretation” in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (Federation Press, 2005). The most notorious case in which this was claimed to have occurred in the United Kingdom was in *R v A* [2002] 1 AC 45 at [46] (Lord Steyn); see also at [15] (Lord Slynn); at [110] (Lord Hope); at [140] (Lord Clyde); at [163] (Lord Hutton).

²⁹ Compare eg *R v Poumako* [2000] 2 NZLR 695 at [37] (holding that legislative intent could be ignored in favour of a *Bill of Rights* consistent interpretation) and *R v Pora* [2001] 2 NZLR 37 at [48]-[56] with *R v Poumako* [2000] 2 NZLR 695 at [58]-[63], [80]-[83] and *R v Pora* [2001] 2 NZLR 37 at [107], [115]-[116]. Further discussion about the limits of the New Zealand interpretative provision can be found in *Quilter v Attorney-General* [1998] 1 NZLR 523 at 526, 541-543, 581.

³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), Explanatory Memorandum, p 23.

³¹ *APL Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at [423]-[424] (Hayne J).

³² *APL Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at [178] (Gummow J).

³³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 572.

“the underlying thrust of the legislation”.³⁴ A court “can read in and read down; it can supply missing words” and change the meaning of the legislation, so long as it remains faithful to “the fundamental features of the legislative scheme”.³⁵ The explicit requirement in the Charter that interpreters adhere to the purpose of statutory provisions means that it would be inappropriate for Victorian judges to follow the example of the United Kingdom judge who argued that judges “can do considerable violence to the language and stretch it almost (but not quite) to breaking point”.³⁶

In practice, what might this mean? The United Kingdom interpretative provision³⁷ has been used to expand the range of “exceptional circumstances” in which a sentencing discretion existed;³⁸ to replace a legal burden of proof with an evidential burden of proof;³⁹ and to interpret a provision in the *Rent Act 1977* (UK) relating to a person who was living with a tenant “as his or her wife or husband” as including same-sex partners.⁴⁰ In New Zealand, the interpretative provision of the *New Zealand Bill of Rights Act 1990* (NZ) (the Bill of Rights), s 6, has been applied by the judiciary in a variety of ways.⁴¹ In some circumstances it has been used quite permissively. For example, in *Hopkinson v Police* [2004] 3 NZLR 704, the New Zealand Court of Appeal held that s 6 of the *Bill of Rights* required that an Act that prohibited persons from dishonouring the New Zealand flag be read as permitting flag-burning in order to ensure it was consistent with the right to free expression in s 14 of the *Bill of Rights*. In other cases, however, the scope of the interpretative provision has been more limited. In *Quilter v Attorney-General* [1998] 1 NZLR 523, eg, the *Marriage Act 1955* (NZ) could not be interpreted to enable same-sex couples to marry.

We will have to wait to see how cautiously Victorian courts treat the proviso in their interpretative mandate. The experience both in the Australian Capital Territory and the United Kingdom suggests that new interpretations of existing legislation will be relatively infrequent and commonly focused on restricting or expanding the range of criteria relevant to statutory discretions, particularly those involved in the administration of justice.

Finally, it is worth noting that the interpretative obligation applies to all statutes, not just those that regulate relationships between individuals and government. To that extent, the Charter has the potential to impact on private relationships.⁴² Any other approach would have absurd consequences for statutory provisions cast in general terms: they could bear one (human rights compliant) meaning when applied to relationships between government and individuals and another when applied to relationships between individuals. Accordingly, just as in the United Kingdom, the Charter may be relied on, eg, to attempt a human rights consistent interpretation of limitation of actions legislation or

³⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 572. For example, see *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

³⁵ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 585.

³⁶ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 585.

³⁷ There are few cases in the Australian Capital Territory. The most significant, *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 is quite unclear in its application of the interpretative provision. It goes further in attempting a human rights compatible interpretation than any of the parties suggested was possible. Indeed, it goes further than might have been thought possible given the requirement in the Australian Capital Territory that interpretation remain consistent with the purpose of the legislation. See generally McKinnon G, “Case Comment on *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125”, *ACT Human Rights Act Research Project Working Paper No 2* (May 2006): <http://acthra.anu.edu.au/articles/McKinnon%20SI%20bhnf%20CC%20v%20KS%20bhnf%20IS.pdf> viewed 9 November 2006.

³⁸ *R v Offen* [2001] 1 WLR 253.

³⁹ *R v Lambert* [2002] QB 1112; *R v Carass* [2002] 1 WLR 1714.

⁴⁰ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

⁴¹ Butler and Butler, n 24, p 183.

⁴² The language of the interpretative obligation in s 32(1) is unqualified: it applies to all statutory provisions. Section 6(2)(b), which defines the application of s 32 (as a provision in Div 3 of Pt 3), does not limit the obligation to statutes regulating public law relationships. And “human rights” is not limited by the definition in s 4 or anything in Pt 2 to rights against government or public authorities. The *New Zealand Bill of Rights Act* is applicable to statutes regulating private relationships (see Butler and Butler, n 24, p 107). However, the New Zealand Court of Appeal has made it clear that the standards that apply to public actors do not necessarily apply in the same manner to private parties. See eg *Hosking v Runting* [2005] 1 NZLR 1 at [61].

residential tenancies legislation.⁴³ Equally, although only natural persons have human rights,⁴⁴ it would seem inevitable that corporations could rely on the interpretative mandate to urge human rights compliant interpretations of statutory provisions cast in general terms.⁴⁵ Again, the alternative would be that a statutory provision had one (rights-compliant) meaning when applied to individuals and another when applied to corporations. While this particular outcome may not have been anticipated by some of the participants in the political debate, the wording of the section requires this conclusion.

DECLARATIONS OF INCONSISTENT INTERPRETATION

In some cases it will be impossible to interpret a statutory provision so that it is consistent with human rights (or at least it will be impossible to do so while paying sufficient attention to the purpose of the legislation). If the Supreme Court reaches this conclusion in proceedings before it, it may make a declaration “that a statutory provision cannot be interpreted consistently with a human right”.⁴⁶ Again, such a declaration may not be seen as a legal remedy (for the reasons discussed below in relation to its legal effect) but it is a method of using the courts to assist in making rights effective.

There is no freestanding right to seek a declaration of inconsistent interpretation. A declaration can only be made in proceedings that have independently attracted the jurisdiction of the Supreme Court or in which a question of law has been referred to the Supreme Court. Moreover, a declaration of inconsistent interpretation does not “affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made ... or ... create in any person any legal right or give rise to any civil cause of action”.⁴⁷

The fact that declarations of inconsistent interpretation (and analogous declarations of incompatibility under the *Human Rights Act 2004* (ACT)) do not have any effect on the validity, operation or enforcement of legislation has generated two concerns.

The first concern is that the provision authorising such declarations is unconstitutional. This is because such declarations are said not to establish or determine any immediate right, duty or liability and therefore do not involve “matters” in the sense required by the Commonwealth *Constitution* for the exercise of federal jurisdiction.⁴⁸ Some commentators have argued that these declarations do, indeed, involve matters.⁴⁹ Whether or not that is correct, the issue does not arise directly in relation to the Victorian Charter in most cases. The federal requirement of a matter does not apply to most proceedings in Victorian courts. It seems implausible that a *Kable*-type⁵⁰ argument would succeed. If a proceeding in a Victorian court did arise in federal jurisdiction⁵¹ and a declaration of inconsistent interpretation would not form part of a matter, it might not be possible to make such a declaration in those proceedings,⁵² however, such a declaration could still be made in non-federal proceedings. More

⁴³ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142. Unlike the *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990* (NZ), however, the Charter cannot be relied on (at least for now) to develop the common law: see below, text at n 97.

⁴⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6(1).

⁴⁵ This seems to have been assumed silently in *Kingsley's Chicken Pty Ltd v Queensland Investment Corp* [2006] ACTCA 9 (in drawing an analogy with the *Human Rights Act 2004* (ACT) rather than in applying it); contrast *Vosame Pty Ltd and ACT Planning & Land Authority* [2006] ACTAAT 12.

⁴⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 33 and 36. If an override declaration has been included in the legislation, the Supreme Court cannot make a declaration of incompatibility. See below, text at n 61.

⁴⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).

⁴⁸ Stellios J, “Federal Dimensions to the ACT Human Rights Act” (2005) 47 *AIAL Forum* 33.

⁴⁹ Lindell G, “The Statutory Protection of Rights and Parliamentary Sovereignty – Guidance from the United Kingdom?” (2006) 17 *PLR* 188.

⁵⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁵¹ For example, because a New South Wales resident sought to invoke the Charter against the Victorian Government: see Commonwealth *Constitution*, s 75(iv).

⁵² Because s 36 of the Charter (which authorises the making of such declarations) would not be picked up as part of the law governing the proceedings.

significant perhaps is the question whether declarations of inconsistent interpretation fall within the class of “judgments, decrees, orders, and sentences” of the Supreme Court in respect of which the High Court can hear appeals. It is at least arguable that the Supreme Court could be authorised to give declarations of inconsistent interpretation that did fall within the appellate jurisdiction of the High Court, given the High Court’s decision in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289⁵³ and given that such a declaration will be made in the course of duly constituted proceedings in which the inconsistent provision is being applied (rather than by way of a freestanding application for a declaration).⁵⁴

The second concern is that declarations of inconsistent interpretation will be devoid of any effect whatsoever. The legislation that is the subject of the declaration remains in force and, according to the Supreme Court at least, results in breaches of human rights. Although the declaration triggers a process in which the Attorney-General must communicate the declaration to the Minister responsible for the inconsistent legislation and the Minister must make a public parliamentary response to the declaration, there is no obligation on government to remove the breach.⁵⁵ It is quite unclear what the political force of a declaration of inconsistent interpretation will be in encouraging government to do so. In the United Kingdom, such declarations have been highly effective in encouraging changes to legislation,⁵⁶ even in relatively controversial areas such as national security.⁵⁷ No declaration has been issued in the Australian Capital Territory so there is no Australian precedent for government action. The Victorian Parliament’s decision to use the terminology “declarations of inconsistent interpretation”⁵⁸ rather than “declarations of incompatibility”,⁵⁹ as is used in the Australian Capital Territory and the United Kingdom, is a potentially interesting signal. The emphasis on interpretation may suggest that the Parliament intends to label declarations as merely disagreements between the Parliament and the courts over interpretation rather than acknowledging that declarations are evidence of problems with human rights compliance in the State. Such an approach may be faithful to the model of dialogue about human rights between Parliaments and the courts, in which each has a coordinate and not exclusive power to interpret rights. However, it does not inspire confidence in the declaration as an effective means of bringing about change.⁶⁰ Time will tell whether a political convention of responding to declarations in a positive way emerges.

THE OVERRIDE PROVISION

The override provision contained in s 31 provides an exception to the general interpretative mandate contained in s 32 and the power to make declarations of inconsistent interpretation. Section 31 provides in part:

⁵³ Holding that the High Court could hear an appeal against an Attorney-General’s reference in a criminal matter after the prosecution had been terminated by the entry of a *nolle prosequi*.

⁵⁴ It may have been preferable to describe *declarations* of inconsistent interpretation as *findings* of inconsistent interpretation (or of incompatibility: see below, text at n 59). It would then have been clearer that the question whether a human rights compatible interpretation of a statutory provision can be found arises as an incident of applying that provision and that appeals lie against the substantive orders in those proceedings, not against interpretative conclusions reached on the way to making those orders.

⁵⁵ Unlike in the United Kingdom, the making of a declaration does not trigger any fast-track procedure under which the Attorney-General or Minister may amend the legislation to remove the inconsistency: *Human Rights Act 1998* (UK), s 10.

⁵⁶ As of April 2005, the government had introduced legislation to address every incompatibility identified by the courts: Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament*, 19th report of Session 2004-2005, at [228]-[230].

⁵⁷ For example, *A v Secretary of State for Home Department* [2005] 2 AC 68. The United Kingdom Parliament subsequently passed legislation in response to this case: *Prevention of Terrorism Act 2005* (UK).

⁵⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36.

⁵⁹ *Human Rights Act 2004* (ACT), s 32; *Human Rights Act 1998* (UK), s 4.

⁶⁰ Hogg P and Bushell A, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall LJ* 75; Hiebert J, *Charter Conflicts* (McGill-Queen’s University Press, 2002); Debeljak J, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (D Phil Thesis, Monash University, 2005).

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.
- ...
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.

At one level, this provision is a strikingly inapt borrowing from the Canadian Charter. It has no counterpart in other statutory bills of rights in jurisdictions such as New Zealand and the United Kingdom. In the Canadian context, a similar provision gives the national and provincial Parliaments the ability to legislate notwithstanding a determination by the courts that legislation is inconsistent with the Charter *and is therefore invalid*.⁶¹

Under the Victorian Charter, the courts cannot determine that legislation is invalid. A declaration that legislation is inconsistent with the Victorian Charter does not affect its validity or operation. The Victorian Charter is not entrenched. The Parliament can always enact legislation that is incompatible with the Charter and does not need the authorisation of s 31 to do so.

What, then, is the function of s 31?

First, and most obviously, it allows the Parliament to remove a legislative provision from the operation of the Charter. That is the effect of s 31(6) once an override declaration is made. The legislative provision must then be interpreted according to the usual principles of statutory interpretation, without the s 32 requirement that a human rights compliant interpretation be favoured. And the Supreme Court is not able to make a declaration of inconsistent interpretation. Section 31 can therefore be seen as a mechanism for preferring certainty and predictability regarding the meaning of legislation to having the courts consider whether and how to interpret legislation consistently with human rights. The Parliament may well choose to employ the override when it regards the values of certainty and predictability as meeting the high threshold requirements of the section, eg if it believes that it is particularly important that national scheme legislation receive the same interpretation in Victoria as in other States without a Charter of Rights.

Second, s 31 has a political function, signalled in particular by the high threshold in s 31(4):

It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

Section 31(3) reinforces this provision, by requiring a statement from the proponent of legislation containing an override declaration explaining the exceptional circumstances, as does s 31(7), providing that override declarations are limited in duration. From the point of view of the proponent of legislation (usually government), s 31 allows derogation from rights within the framework of human rights. The exception stands within the law, as it were, and must be justified in terms of the law, rather than standing outside the law as an exercise of brute government power. Conversely, s 31 provides a point of political reference requiring government to justify derogation from rights. Of course, the constraints here are purely political. There is nothing to stop government making the requirement of exceptional circumstances a hollow requirement – except the political consequences. And those consequences are likely to be slight, unless the human rights values of the Charter become part of Victorian political culture.

⁶¹ *Charter of Rights and Freedoms*, Pt I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK), s 33.

THE OBLIGATION ON “PUBLIC AUTHORITIES” TO COMPLY WITH HUMAN RIGHTS

The Charter explicitly provides that government and those discharging public functions act unlawfully if they fail to give effect to human rights.⁶² This is another key mechanism by which the Charter attempts to make rights effective. Section 38(1) provides:

Subject to this section, it is 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 Charter obligation applies to “public authorities”. That is also the term used in the *Human Rights Act 1998* (UK) where it is defined to include courts and tribunals and “any person certain of whose functions are functions of a public nature” and to exclude “either House of Parliament [and] a person exercising functions in connection with proceedings in Parliament”.⁶³ The Joint Committee on Human Rights in a recent report recommended that (for the time being at least) the definition should be left unelaborated and be left for the courts to develop.⁶⁴

In Victoria the term “public authority” is defined. There is a list of entities that are expressly stated to be public authorities for the purposes of the Charter. These include most of the core relevant bodies such as government Ministers,⁶⁵ police,⁶⁶ public officials (which includes heads of government departments and directors and officers of statutory entities exercising public functions),⁶⁷ local councils, councillors and council staff,⁶⁸ and members of parliamentary committees, courts and tribunals when acting in an administrative capacity⁶⁹ (though the obligation does not extend to Parliament or parliamentary proceedings or to courts acting in a judicial capacity).⁷⁰ There is also a partial exemption given in the Charter for religious bodies: the Charter makes clear that nothing in s 38(1) requires a public authority (whether or not the religious body itself) to do anything which would “impede or prevent” a religious body “from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates”.⁷¹

The list set out in the Charter is not, however, exhaustive. The definition of public authority includes “an entity established by a statutory provision that has functions of a public nature; and ... an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)”.⁷² There are two

⁶² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38 read with ss 6 and 4; cf *Human Rights Act 2004* (ACT), s 6. This is a far clearer position than that of the Australian Capital Territory where there is no such clear statement of executive obligation.

⁶³ *Human Rights Act 1998* (UK), s 6.

⁶⁴ United Kingdom Parliament, Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, 7th Report of the 2003-2004 Session (2004).

⁶⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(f).

⁶⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(d).

⁶⁷ Where such persons meet the definition of a “public official” within the meaning of the *Public Service Act 2004* (Vic): *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(a).

⁶⁸ Within the meaning of the *Local Government Act 1989* (Vic): *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(e).

⁶⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(g) and (j).

⁷⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(i) and (j). The exclusion of the courts reflects the constitutional difficulty in requiring the Victorian courts to develop the *national* common law consistently with a Victorian statute: *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at 62 (Gleeson CJ, Gaudron and Gummow JJ); at 83 (Kirby J). Contrast *Human Rights Act 1998* (UK), s 6(3)(a) (public authority includes a court or tribunal) and *New Zealand Bill of Rights Act 1990* (NZ), s 3 (this applies to acts done by the judicial branch of government).

⁷¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(4). This exemption was added as a government amendment in the Legislative Assembly without apparent explanation or debate.

⁷² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4. Section 3 of the *New Zealand Bill of Rights Act 1990* (NZ) provides that the Act “applies only to acts done ... (a) [b]y the legislative, executive, or judicial branches of the government of New Zealand; or (b) [b]y any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law” (emphasis added).

areas of particular uncertainty: what is a function of a public nature and when is a function being exercised on behalf of the State or a public authority? The Charter sets out a multi-factor test for determining when a function is of a public nature:

- (2) In determining if a function is of a public nature the factors that may be taken into account include –
- (a) that the function is conferred on the entity by or under a statutory provision;
 - (b) that the function is connected to or generally identified with functions of government;
 - (c) that the function is of a regulatory nature;
 - (d) that the entity is publicly funded to perform the function;
 - (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

Whether factors (a), (c), (d) and (e) apply in any individual case will be relatively clear (but not always free from doubt and the weight to be given to any of them is not clear, particularly as s 4(5) provides that the fact that para (d) is satisfied “does not necessarily mean that it is exercising that function on behalf of the State or a public authority”). Factor (b) will be called on to carry a good deal of the analysis. But it is doubtful that it can provide much assistance (outside of some clear cases – notably, privately operated prisons). What constitute “the functions of government” is ultimately a deeply contested political question about the proper role of the government and the state in contemporary society. The functions of government have never been static and uncontroversial. There is no widely accepted definition of “the public” in Australian law or politics and the boundaries between the private and public have fluctuated with developments such as privatisation and public-private partnerships.⁷³ It therefore remains to be seen how widely the obligation to comply with human rights will reach into the “private” contracted-out sphere as the courts work out what constitute the functions of government.

REMEDIES FOR BREACHES OF HUMAN RIGHTS

The s 38 obligation to comply with human rights would not be of much comfort to those affected by breaches of human rights if there were not some mechanism for seeking redress.⁷⁴ The government signalled from the outset its opposition to a Charter that would lead to increased litigation and an obligation on government to pay damages.⁷⁵ It preferred an approach that focused on education and conciliation. It is surprising, then, that the Charter does not confer a complaints handling or conciliation function on the Human Rights Commissioner (an additional title for the Equal Opportunity Commissioner rather than a new substantive office). However, the Ombudsman is specifically given an expanded human rights role.⁷⁶ The initial steps towards ensuring compliance with the s 38 obligation will be taken through education of public authorities about their new responsibilities under the Charter and through internal departmental processes. These are vital steps, but inevitably the process will be imperfect and some Charter rights will be violated by a public authority. What legal redress is available in these circumstances?

The Charter attempts to define the extent to which judicial remedies will be available for breaches of human rights. The consultative process was told that unless a Charter clearly articulated the remedies that it made available, the courts would be likely to imply a right to remedies (as the court had in New Zealand in *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*)) and that set of remedies may not accord with the government's preferences.⁷⁷ Section 39 therefore sets out the remedies that are available (and not available) for failure to comply with human rights.

⁷³ Mantziaris C, “A ‘Wrong Turn’ on the Public/Private Distinction: Neat Domestic Trading Pty Ltd v AWB Ltd” (2003) 14 PLR 197 at 197.

⁷⁴ Indeed, the ICCPR – the key international instrument on which the Charter is based – obliges states parties to provide effective remedies for non-compliance with the rights that it protects (Art 2(3)). Notably, the Charter (like the *Human Rights Act 1998* (UK) and the *Human Rights Act 2004* (ACT)) does not directly implement Art 2(3).

⁷⁵ Victoria, Department of Justice, “Human Rights in Victoria: Statement of Intent, May 2005” reprinted as App B in Victoria, Human Rights Consultation Committee, *Human Rights Consultation Committee: Rights, Responsibilities and Respect* (2005).

⁷⁶ Charter, Consequential Amendment 2.

⁷⁷ Victoria, Human Rights Consultation Committee, n 75, pp 144-146.

- (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.

While there is no stand-alone statutory remedy for breach of the Charter, there are still several legal avenues open that allow for use of the Charter in a manner that gives rise to remedies where none would have existed before the Charter.

First, s 39(1) allows breach of s 38 (the duty on public authorities to comply with human rights) to supply an element of unlawfulness that some other law requires in order to obtain relief or a remedy. One difficult question posed by the drafting of s 39(1) and s 39(3) is the extent to which such breaches may give rise to a right to damages.

Second, statutory provisions that were once interpreted as authorising conduct that breached human rights may now receive a narrower interpretation. Where the unauthorised conduct constitutes a tort or other actionable wrong, the victim may seek damages in tort for that conduct – not because the conduct breached the Charter but because it was not authorised by legislation.

Each of these is now considered in turn.

UNLAWFUL ACTS OF PUBLIC AUTHORITIES

It is clear from s 39(1) that where a rule or law attaches consequences to the fact that government conduct is unlawful, those consequences can attach to conduct that is made unlawful by the Charter. For example, if evidence is obtained as a result of unlawful or improper conduct, there is a discretion to exclude that evidence.⁷⁸ At present, the kinds of conduct that trigger that discretion include tortious conduct (eg trespass) or improper pressure. The Charter will expand the kinds of conduct that trigger the discretion to include breaches of the right to privacy (eg by way of covert surveillance not amounting to a tort) or breaches of the rights to security of the home (eg by way of an overly intrusive execution of a search warrant).⁷⁹

It will also be possible to seek a declaration that a public authority has acted unlawfully by failing to comply with human rights and, if necessary, an injunction to prevent any further unlawful conduct.⁸⁰ In that sense, the Charter “confers” a free-standing cause of action to complain of a human rights violation. Some, including the Attorney-General and Opposition speakers in the parliamentary debate, have suggested that this will not be possible.⁸¹ But s 39(2) puts this beyond doubt. The right to seek a declaration or injunction in relation to unlawful government conduct arises under the general

⁷⁸ This example fleshes out one given in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), Explanatory Memorandum, p 28.

⁷⁹ See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(2). The explanatory note suggests that this is the intended operation of s 39(2). In Victoria, the law of evidence is largely governed by the common law. In general, the Charter does not apply to the common law: the courts are not obliged as public authorities to comply with Charter rights in judicial decision-making (though the Charter will affect the interpretation of statutory discretions that they exercise); and the Charter cannot be used to develop the common law: see below, text at n 97. But it is not inconsistent with these propositions to conclude that, in light of s 39(2), the Parliament intended that s 39(1) operate in relation to common law entitlements to relief or remedies as well as statutory entitlements to relief or remedies.

⁸⁰ Query whether s 39(3) precludes the award of damages in lieu of an injunction under the *Supreme Court Act 1986* (Vic), s 38.

⁸¹ Indeed, Attorney-General Rob Hulls argued that this is a key strength of the Charter. He claimed that it will prevent over-reliance on the courts by allowing Parliament to reconsider provisions in light of a declaration of inconsistent interpretation: Victoria, Legislative Assembly, *Parliamentary Debates*, 4 May 2006, p 1293. In contrast, Opposition Members Andrew

law and falls within the inherent jurisdiction of the Supreme Court.⁸² No statement has been made (as would be required by s 85 of the *Constitution Act 1975* (Vic)) to cut down its jurisdiction.

The New Zealand courts held soon after the enactment of the *Bill of Rights Act* that they could award remedies to vindicate breaches of human rights, notwithstanding the omission of any remedies provision from the *Bill of Rights*. In *Baigent's Case* it was held that a breach of the *Bill of Rights* could give rise to a damages claim even if other (primarily tortious) claims brought by the plaintiffs had been struck out for failing to state a cause of action or because they were barred by statutory immunities.⁸³ The Court of Appeal based its conclusion on specific provisions in the *Bill of Rights* – namely, references in the Act's long title to “protect[ing]” and “promot[ing]” human rights and respect for the *International Covenant on Civil and Political Rights* – which it held supported the grant of compensation despite the absence of a remedies clause.⁸⁴

It is unlikely, however, that the generally relatively expansive New Zealand approach to remedies will be adopted in Victoria. The different constitutional position will make it difficult to use the Charter to develop common law remedies except to the extent that government misconduct (now including a breach of human rights) is a trigger or relevant consideration in the grant of those remedies. And s 39(3) appears to ensure that a breach of the Charter will not of itself trigger any entitlement to damages for breach of statutory duty or *Baigent*-type “public law damages”. It will be difficult for the courts to sidestep s 39(3), given the clarity of the government's statement of intent, the Explanatory Memorandum and the Attorney-General's second reading speech.⁸⁵

The position is less clear in relation to other torts where the defendant's unlawful conduct is relevant. Consider the tort of misfeasance in public office.⁸⁶ One of the elements of that tort is that the public officer engaged in conduct knowing that it was invalid or unauthorised and knowing that it would probably injure the claimant. Arguably, then, a plaintiff who relies on the Charter to demonstrate that the public officer's conduct was invalid or unauthorised is “seeking that relief or remedy [damages in the tort of misfeasance in public office] on a ground of unlawfulness arising because of this Charter”, something that is permitted in relation to “any relief or remedy” (a phrase not qualified by the exclusion of damages). Alternatively, however, it is arguable that the plaintiff is seeking to recover damages “because of a breach of this Charter”, something precluded by s 39(3).⁸⁷ The relationship between the two subsections is not clear.

One approach would be to argue that, given the clarity of the government's intentions and the parliamentary materials, s 39(3) precludes payment of damages whenever the plaintiff must rely on s 38 to establish that the conduct of a public authority is unlawful. On this approach, s 39(1) is cut back by s 39(3) and allows the plaintiff to rely on such unlawfulness only in order to seek relief or remedies other than damages (notwithstanding that it refers to “any relief or remedy”). However, if the same conduct is independently unlawful and compensable, the Charter does not take away that right to damages – indeed, it expressly maintains them in s 39(4). This provision is discussed below.

McIntosh, Peter Ryan and Victor Perton all criticised the Charter for not providing an independent right to challenge the human rights compliance of public authorities in the absence of another legitimate cause of action: Victoria, Legislative Assembly, *Parliamentary Debates*, 13 June 2006, p 1978 (Andrew McIntosh), p 1983 (Peter Ryan), p 1994 (Victor Perton).

⁸² *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581; *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 288-289 (Callinan J); cf *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 256-257, 260-267, 280-283.

⁸³ *Simpson v Attorney-General* [1994] 3 NZLR 667 at 673-679 (Cooke P); at 685 (Casey J); at 693 (Hardie Boys J); at 714 (Gault J); at 715 (McKay J).

⁸⁴ *Simpson v Attorney-General* [1994] 3 NZLR 667 at 676 (Cooke P); at 690-691 (Casey J); at 702-703 (Hardie Boys J); at 717-718 (McKay J).

⁸⁵ Victoria, Department of Justice, “Human Rights in Victoria: Statement of Intent, May 2005” (2005) (copy on file with the authors); *Charter of Human Rights and Responsibilities Act 2006* (Vic), Explanatory Memorandum, p 28; Victoria, Legislative Assembly, *Parliamentary Debates*, 4 May 2006, p 1294 (Rob Hulls).

⁸⁶ See generally Hannett S, “Misfeasance in Public Office: The Principles” [2005] PL 227.

⁸⁷ A similar tension between the subsections of s 39 is likely to arise in relation to payment of exemplary or punitive damages on the basis that otherwise wrongful conduct is also a breach of the Charter.

An alternative approach would be to argue that, as the Charter must itself be interpreted so far as possible in a human rights compliant manner, s 39 should be interpreted as restricting the right to damages as little as possible and so preserving the ability to rely on a breach of s 38 as an element in a cause of action, so long as that breach is not the *only* element in the cause of action. Article 2 of the ICCPR establishes a right to an effective remedy for violations of ICCPR rights. On occasion, that right includes a right to monetary damages.⁸⁸ That right is not abrogated or limited by the Charter because of its partial implementation.⁸⁹ And “international law ... relevant to a human right may be considered in interpreting ... statutory provision[s]”,⁹⁰ including s 39.

REMEDIES FOR UNAUTHORISED CONDUCT: TORTIOUS AND WRONGFUL CONDUCT

In addition to actions in which breaches of s 38 may now form the basis for a legal remedy, there will be other cases in which actions can be brought for pre-existing claims, particularly in tort, by use of the interpretative provisions. This interpretation can be crucial as there are many scenarios in which some public authority acts in a way that would ordinarily be tortious, a breach of contract or even a crime. Basic rule of law principles mean that public authorities must have legal authorisation to do things that would otherwise be unlawful. So the police officer who forcibly detains a person uses her or his powers of lawful arrest as protection against a claim of false imprisonment and assault. And the children’s services workers who take children from their home argue their powers under child protection statutes against what would otherwise be kidnapping. Of course, even with the advent of the Charter, most of these actions would continue to be justified by statute.

However, the statutory provisions that authorise public authorities to act in ways that would otherwise be unlawful will need to be interpreted in a manner that is consistent with human rights.⁹¹ New Zealand cases, like *Baigent*, show the potential of a human rights charter to give added impetus to the rule of law considerations that militate against a wide interpretation for such provisions.⁹² One of the claims brought by the plaintiffs in *Baigent’s Case* was that, in executing a search warrant at the wrong address, the police were liable for trespass. In order to circumvent this charge the police sought to rely on statutory immunities that protected them from liability arising from the execution of search warrants. However, the New Zealand Court of Appeal held that the statutory immunities had to be interpreted consistently with s 21 of the New Zealand *Bill of Rights* – which prohibits unreasonable search and seizure – and consequently that the immunities did not apply to search warrants executed in bad faith.⁹³

REMEDIES FOR UNAUTHORISED CONDUCT: JUDICIAL REVIEW – RELEVANT CONSIDERATIONS, UNREASONABLENESS AND PROPORTIONALITY

One question that is raised by the Charter is the extent to which it will open up new remedies in administrative law. In the United Kingdom, the *Human Rights Act 1998* (UK) has added impetus to previous developments in administrative law that gave particular weight to human rights. In *Smith v United Kingdom* [2000] 29 EHRR 493, the European Court of Human Rights held that neither the *Wednesbury* unreasonableness standard or the heightened (or anxious) scrutiny standard for administrative decisions that affected rights gave adequate protection to human rights. In *R v Secretary of State for Home Department; Ex parte Daly* [2001] 2 AC 532, some members of the House of Lords,

⁸⁸ United Nations Human Rights Committee, *General Comment No 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [16]; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147 (16 December 2005).

⁸⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.

⁹⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2).

⁹¹ The High Court has recently considered such provisions outside the context of a rights charter in *Coleman v Power* (2004) 220 CLR 1 and *Ruddock v Taylor* (2005) 221 ALR 32.

⁹² *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent’s Case*).

⁹³ *Simpson v Attorney-General* [1994] 3 NZLR 667 at 674 (Cooke P); at 694 (Hardie Boys J); at 714-715 (Gault J); at 715-716 (McKay J).

in particular Lord Steyn, held that a more rights-attentive standard of review, based on European notions of proportionality, was needed to bring United Kingdom administrative law into line with human rights requirements. This new standard “may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions” and “may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations” (at 547). However, the United Kingdom courts are yet to fully embrace proportionality as a free-standing ground of review in administrative law (as opposed to using it to determine whether an established limitation of a human right is justified).⁹⁴

There is certainly scope for similar arguments to be made in Victoria under the Charter. However, they are much less likely to succeed, at least in the short term. The *Human Rights Act 1998* (UK) specifically provides that courts are public authorities; the Charter does not include courts within the definition of public authorities, except to the extent that the courts act administratively.⁹⁵ The only directions to the courts are with respect to the interpretative provisions and declarations of incompatibility. The development of the common law and the other actions of courts are not directly addressed by the Charter. Moreover, there is no body like the European Court of Human Rights capable of providing an external standard by which to measure the approach of the Australian courts to human rights. Finally, and perhaps most importantly, the High Court has made clear that there is a single Australian common law.⁹⁶ This makes it difficult for the Victorian courts unilaterally to attempt to develop the common law standard of review in response to the Victorian Charter. It may be that, if human rights Acts become widespread across Australia, the common law will begin to change in response as judges become more used to applying rights standards, eg by adopting (dis)proportionality as the standard of unreasonableness or adopting proportionality as a free-standing ground of review. But while only one or two jurisdictions have such Acts, the national common law cannot develop in response to the human rights Acts in those few jurisdictions.⁹⁷

The most plausible line of development in the short term will therefore be to focus on the statutory requirement in s 38(1) that decision-makers give *proper* consideration to relevant human rights. This language is capable of grounding a standard of review that delivers much of the intensity and flexibility of the United Kingdom proportionality standard in human rights cases. It can now be argued that human rights are a mandatory relevant consideration in all decisions made pursuant to statutory authorisation, except when expressly excluded by statute.⁹⁸ The approach required by the Charter departs from the usual Australian approach to relevant considerations. Under *Peko-Wallsend*, the courts have little scope to consider the weight that the decision-maker gives to each consideration.⁹⁹ However, the requirement in the Charter for public authorities to give “proper consideration” opens the way for courts to consider whether sufficient weight was given to relevant human rights.

REMEDIES FOR UNAUTHORISED CONDUCT: ULTRA VIRES AND DELEGATED LEGISLATION

Another area where there is increased scope for combining the Charter’s interpretative section and pre-existing actions in order to obtain a remedy is in challenges to delegated legislation. It is clear that the Charter allows the Parliament to delegate power to breach rights set out in the Act if it does so

⁹⁴ *Association of British Civilian Internees – Far East Region v Secretary of State for Defence* [2003] 3 WLR 80 at [32]-[37]. There is a useful summary of the cases in *Somerville v Scottish Ministers* [2005] ScotCS CSOH 23 (8 February 2005) at [83]-[95].

⁹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(j).

⁹⁶ See *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 563-564.

⁹⁷ *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at 62 (Gleeson CJ, Gaudron and Gummow JJ); at 83 (Kirby J).

⁹⁸ On statutory exclusion see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2).

⁹⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-43 (Mason J).

clearly.¹⁰⁰ But for legislation that delegates power in wide or ambiguous terms (regrettably a far from rare phenomenon in such legislation), the courts have their instruction in the interpretative provisions. In working out the meaning of such provisions they are, “as far as it is possible”, to prefer an interpretation that is “consistent with human rights”. This may lead to a narrower interpretation of legislation than may have occurred without the Charter and it may thus also ultimately lead to the invalidation of some delegated legislation. This is envisaged in the Charter when it says that the interpretation provision does not affect the validity of a subordinate instrument “that is incompatible with a human right *and is empowered to be so* by the Act under which it is made”.¹⁰¹ The implication of this rider is that a regulation that is incompatible with human rights and not clearly empowered to be so by the authorising legislation is invalid.¹⁰² It is not clear from the face of the section the method by which the Parliament can empower subordinate legislation that is in breach of rights. Express words would clearly suffice and a clear and necessary implication would probably also be sufficient. Anything less than this, however, may not reach the threshold of empowering a breach.¹⁰³ However, Victorian decision-makers will have to avoid the errors made by the Australian Capital Territory Administrative Appeals Tribunal in *Merritt v Commissioner for Housing* [2004] ACTAAT 37 when considering the application of the *Human Rights Act 2004* (ACT) to housing regulations that set priorities for access to public housing. The tribunal stated – probably correctly – that the regulations regarding the allocation of public housing were clear and had been previously interpreted and applied in a consistent and clear manner. It then went on to reason – mistakenly – that this meant that the *Human Rights Act 2004* (ACT) had no role to play (at [53]). The tribunal should have considered whether the regulations were authorised by the legislation under which they were purportedly made. In this case, this would have involved asking whether the delegation of regulation-making power to the Commissioner was so clear that the power delegated should be understood to include the power to ignore the rights of children when setting priorities for housing.

REMEDIES IN CRIMINAL PROCEEDINGS

The principles discussed previously will also apply in the context of criminal proceedings. It is in this context that they have been most commonly deployed in the Australian Capital Territory courts so far.

First, statutory provisions conferring discretionary powers on courts will have to be interpreted in a manner that is consistent with human rights. The s 38 obligation on public authorities to give proper consideration to human rights does not apply to courts.¹⁰⁴ However, the impact of s 32 on generally expressed statutory discretions may well effectively require courts to give such consideration to human rights. So, eg, the power to impose a sentence in order “to punish the offender *to an extent and in a manner which is just in all of the circumstances*”¹⁰⁵ might be interpreted to allow or require a sentencing judge to take into account breaches of any of the offender’s human rights in the course of the investigation, detention or trial. Breach of the right to be tried without unreasonable delay¹⁰⁶ might, as in some cases in New Zealand and the United Kingdom, warrant a reduced sentence.¹⁰⁷

The Australian Capital Territory cases demonstrate the way in which the use of these interpretative provisions in ordinary legal proceedings can give rise to effective remedies. For example, in *R v Upton* [2005] ACTSC 52, the prosecution alleged that Upton had assaulted two people and damaged a motor vehicle in January 2002. His trial was delayed until 2006 for reasons unrelated

¹⁰⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(3)(b).

¹⁰¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(3)(b) (emphasis added).

¹⁰² Cf *Drew v Attorney-General* [2002] 1 NZLR 58 at [68].

¹⁰³ In some circumstances this will also require the use of either the override or a statement by the sponsoring Minister that the primary legislation is not compatible with the rights in the Charter.

¹⁰⁴ It will therefore be necessary to identify a breach of human rights by police or prosecutors.

¹⁰⁵ *Sentencing Act 1991* (Vic), s 5(1)(a) (emphasis added).

¹⁰⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25(2)(c).

¹⁰⁷ *Butler and Butler*, n 24, pp 825, 1066-1067; *Mills v HM Advocate* [2004] 1 AC 441 at [23] (Lord Steyn); at [53]-[56] (Lord Hope).

to his conduct. The Supreme Court ordered that the proceedings be stayed. Connolly J held that the *Human Rights Act 2004* (ACT) is relevant in construing the scope of the legislative power to grant stays in criminal proceedings. Section 22(2)(c) of that Act, which confers a right to be tried without unreasonable delay, supports a more generous discretionary power than the general law. On the basis of this expanded interpretation, Connolly J found that “a stay of proceedings may be an appropriate remedy” (at [19]) in cases involving unreasonable trial delay, depending upon whether a stay is a proportional response to the breach of human rights.

Second, legal remedies (apart from compensation) that are available for unlawful conduct will be available for conduct that breaches the accused person’s human rights. The ability of the courts to exclude evidence obtained in breach of human rights has already been noted. The courts also have power to grant a stay of proceedings to prevent abuse of their process where there has been impropriety by the Crown.¹⁰⁸ Presumably, in appropriately serious cases, that power may be exercised as a remedy for breaches of the Charter.¹⁰⁹ Stays will likely be the principal remedy for breach of the right not to be tried twice for the same offence, given that stays are already recognised as an available remedy in such cases. However, in other contexts, given the Australian courts’ reluctance to grant stays, especially permanent stays, even in cases of undue delay,¹¹⁰ breaches of the Charter may be more likely to be remedied through the exclusion of evidence and the sentencing process.

Finally, it should be noted that the impact of the Charter in reshaping statutory discretions and providing remedies for breaches of human rights at trial may be limited. Some important criminal process rights are implemented in a restricted fashion by the Charter.¹¹¹ Many of the other criminal process rights protected by the Charter are already taken into account in exercising statutory and general law discretions. For example, delay is already taken into account in both sentencing¹¹² and applications for stays.¹¹³ It may be that in some cases the Charter provides an *additional* reason for the positive exercise of discretion in these cases, rather than an *independent* reason. That is certainly the experience in some cases under the *Human Rights Act 2004* (ACT).¹¹⁴ However, it may be that the Charter invigorates the exercise of these discretions and that, as in *Upton*, the courts regard the Charter rights as more generous and expansive than those that exist under the general law.¹¹⁵

¹⁰⁸ Unlike in the Australian Capital Territory, this power is an inherent power of the court rather than a statutory power.

¹⁰⁹ This remedy is also available in New Zealand for breach of rights in the *New Zealand Bill of Rights Act 1990* (NZ): Butler and Butler, n 24, pp 1055-1056.

¹¹⁰ See eg *Jago v District Court (NSW)* (1989) 168 CLR 23. For an exceptional case under the *Human Rights Act 2004* (ACT) in which such an order was made, see *Perovic v CW* (unreported, ACT Children’s Court, Magistrate Some, No CH 05/1046), noted at *ACT Human Rights Act Case Database*: see <http://acthra.anu.edu.au/cases/case.php?id=49> viewed 9 November 2006. In *R v Griffin* [2006] ACTSC 77, the judge did not put any weight on the *Human Rights Act 2004* (ACT) in granting a permanent stay.

¹¹¹ Cf ICCPR, Art 14(3)(d) (right to free legal assistance when the interests of justice require) with the *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25(2)(d)-(f) (right to legal assistance subject to *Legal Aid Act 1978* (Vic)); ICCPR, Arts 9(5) and 14(6) (right to compensation for unlawful arrest or detention or wrongful conviction) with the *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39 (no damages remedy generally), ss 21 and 25 (right to liberty and security of the person and rights in criminal proceedings make no provision for compensation).

¹¹² *Mill v The Queen* (1988) 166 CLR 59 at 64. The authors thank Jeremy Gans for this reference.

¹¹³ See eg *Jago v District Court (NSW)* (1989) 168 CLR 23 at 26.

¹¹⁴ See eg Refshauge R, “The Human Rights Act and the Criminal Law”, paper presented at the Assessing the First Year of the ACT Human Rights Act Conference, Canberra, 29 June 2005: see http://acthra.anu.edu.au/articles/Richard_Refshauge.pdf viewed 9 November 2006.

¹¹⁵ However, the Victorian courts are likely to track the approach taken by New Zealand courts and hold that the Charter does not allow them to create parallel remedies to existing statutory remedies except in the course of interpreting those existing remedial provisions consistently with human rights. So, eg, it is unlikely that the Victorian courts would augment the existing statutory provisions relating to costs in criminal proceedings to create a remedy for breaches of human rights. Cf Butler and Butler, n 24, p 973. But cf *R v Martiniello* [2005] ACTSC 9 in which the judge made it a condition of granting the Crown’s application for an adjournment that it pay the accused’s costs of preparation for trial on an indemnity basis.

CONCLUSIONS

The Charter clearly is not a statute that gives dominance to legal remedies as a way of making rights effective. The Parliament has chosen to focus on other methods for ensuring rights compliance that put more emphasis on the role of the Parliament and the executive than the courts. Such an approach has merits. Litigation is a path open only to a relatively small percentage of the population and a judge-dominated approach to rights has its own dangers. An executive and Parliament that take rights seriously and engage in sustained self-scrutiny to ensure that they comply with rights has the potential to be far more effective than does a system that relies on ad hoc judicial review. But as Klug and Starmer have demonstrated in their analysis of the effectiveness of the *Human Rights Act 1998* (UK) five years after its enactment, it is very difficult to establish and maintain a culture of human rights across the public service.¹¹⁶

In those circumstances, it is likely that some legislation and (even more commonly) regulation or policy-making will continue to violate human rights. In such cases a clear, simple and effective right to a legal remedy for breach of the Charter along similar lines to that in the *Human Rights Act 1998* (UK) would have several advantages over the current regime. It would give people whose rights had been violated greater leverage with the relevant government official when making complaints. It would give such complainants a clear path to pursue if their initial complaints prove futile. (This is particularly important for poor or marginalised complainants who are unlikely to have access to lawyers capable of making the complex arguments about remedies outlined in this article.) And it may act to deter public officials from acting in a manner that is inconsistent with the Charter. All of these factors may contribute to the creation of a culture of compliance with human rights that extends well beyond the litigation context.

As this article details, the Charter opens up possibilities for effective legal redress, either directly through legal remedies for breach of human rights or through its interpretative provisions narrowing the range of authorised government conduct. Lawyers involved in a wide range of litigation, but particularly in criminal and administrative law, ignore the Charter at their peril. Yet the pathways to legal redress are constrained and convoluted. In most circumstances they will require a party to be legally represented; in some instances (notably, in relation to declarations of inconsistent interpretation) they require the expense and formality of Supreme Court proceedings.

Perhaps the constrained set of remedies (if not the convoluted pathways required to obtain them) is reasonable given that the Charter is the first bill of rights in an Australian State and all branches of government may take time to get used to the idea of regularly taking rights into consideration. Fortunately, the Charter requires government to undertake periodic reviews to assess its effectiveness.¹¹⁷ The limitations and uncertainties that have been highlighted in the current set of remedies create barriers to effective redress. The first review should therefore recognise the need for a clear, simple and effective set of legal remedies for those whose Charter rights have been violated. Until that occurs, while the Charter may not be a toothless tiger, it will not be a wholly effective guardian of rights.

¹¹⁶ Klug F and Starmer K, “Standing Back from the Human Rights Act: How Effective Is It Five Years On?” [2005] PLR 716.

¹¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 44-45.