

**‘Human Rights Responsibilities of Public Authorities Under the *Charter of Rights*’**

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**INTRODUCTION**

I would like to thank the Law Institute of Victoria for inviting me to speak this morning about public authorities.

This aspect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“*Charter*”) is probably the most unique and least understood aspect of the *Charter*. I hope I can clarify its operation, but I am unable to give you a conclusive opinion on many areas of operation of these provisions because some of the provisions are unique to Victoria.

One major problem with the *Charter* provisions relating to public authorities arises because of the determination of the Victorian Government not to give individuals whose rights have been violated by a public authority a free-standing remedy. Why? There was a fear of opening the litigation flood gates; the government did not want the focus of the *Charter* to be litigation; and the government did not want massive damages payouts.<sup>1</sup> This has resulted in the enactment of some very complex provisions, the operation of which will certainly require test-case clarification. The real shame of this is the misdirection of public spending: public monies will be expended on litigation costs that could have otherwise been spent on compensating those whose rights had been violated had a free-standing cause of action with capped damages been enacted!

In this paper, we need to consider the impact the *Charter* has on public authorities. We will consider (a) the obligation for public authorities to act compatibly with human rights; (b) the definition of public authorities; and (c) the consequences if a public authority fails to do so.

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<sup>1</sup> See Victoria Government, *Statement of Intent*, May 2005.

## **THE OBLIGATION TO ACT COMPATIBLY: s 38**

Section 38(1) outlines two situations where public authorities act unlawfully. First, it is unlawful for a public authority to act in a way that is incompatible with protected rights. Under s 3, an “act” predictably includes a positive act, a failure to act, and a proposal to act. This imposes an obligation to act compatibly with the substance of the rights; that is, a substantive obligation.

Secondly, it is unlawful for a public authority, when making a decision, to fail to give proper consideration to a protected right. This is a procedural right, ensuring that the protected rights are a relevant part of the decision-making process.

There are two exceptions to unlawfulness under s 38(2). First, there is an exception where the law dictates the unlawfulness; that is, an exception to these duties is where the public authority could not reasonably have acted differently or made a different decision because of a statutory provision/the law or a Commonwealth enactment. For example, this applies where the public authority is simply giving effect to incompatible legislation.<sup>2</sup>

Secondly, under s 38(4) and (5), religious bodies have an exception to s 38(1). The obligations in s 38(1) do not require a public authority to act or decide in a way that impedes or prevents a religious body from acting in conformity with the religious doctrines, beliefs or principles, in accordance with which the religious body operates. “Religious bodies” is defined quite generously as those bodies established for religious purposes, or educational and charitable religious bodies.

Under s 38(3), these obligations only apply when a public authority is exercising a public function. In effect, the *Charter* creates three categories of body: (a) those that are core or wholly public; (b) those that are functional public or hybrid public-private; and (c) those that are wholly private. We will come back to these categories shortly when we discuss the definition of “public authority”.

These are quite onerous obligations for “public authorities”. There will be test case litigation to establish, *inter alia*, what these obligations mean, what needs to be done to comply with the obligations, and the breadth of the exceptions.

### **DEFINITION OF “PUBLIC AUTHORITY”**

As mentioned above, the *Charter* essentially creates three categories of body. This comes from reading together ss 3, 4 and 38(3).

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<sup>2</sup> See the notes to *Victorian Charter 2006* (Vic), s 38.

## **Category 1: Core or Wholly Public Authorities**

Under the *Charter* the core/wholly public authorities have the broadest rights obligations. Core/wholly public authorities are subject to the s 38 obligations in all their activities. That is, core/wholly public authorities, who only exercise public functions, are bound by the *Charter* obligations in all their activities (e.g., even in their private-type activities, such as contracting for the cleaning of offices or gardeners or building).

The public authorities that are considered core/wholly public authorities are defined quite specifically under the *Charter*. Indeed, the core/wholly public authorities are listed in s 4, as follows: public officials (see *Public Administration Act 2004*); the Victorian Police; local Councils and Councillors; Ministers; members of a parliamentary committee when acting in administrative capacity; an entity declared to be so by regulations; and an entity established by statute that has functions of a “public nature”.<sup>3</sup> Aside from the final type of body listed, core/wholly public authorities are readily identifiable and there is little scope for argument as to which bodies are core/wholly public authorities. In relation to the final type of body listed, the scope of the meaning of “public nature” will be further explored in discussing the functional/hybrid category.

There are two exclusions from this definition. First, Parliament is excluded from the definition.<sup>4</sup> This is consistent with parliamentary sovereignty. The exclusion of Parliament is aimed at preserving parliamentary sovereignty. Parliament, as sovereign law maker, is empowered to act in a manner that is incompatible with the protected rights and such acts are not to be considered unlawful.

Secondly, courts and tribunals are excluded, except in their administrative capacity.<sup>5</sup> The reason for excluding courts and tribunals was to ensure that the judiciary is not obliged to develop the common law in a manner that is compatible with protected rights. This reasoning is based on the fact that Australia has a unified common law.<sup>6</sup> If it was otherwise, there was concern about the risk that the High Court of Australia may strike down that part of the *Charter*.<sup>7</sup> Whether or not one agrees with this reasoning, the outcome is clear: courts and tribunals are not public authorities under

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<sup>3</sup> For a definition, see *Victorian Charter 2006* (Vic), ss 3 and 4.

<sup>4</sup> *Victorian Charter 2006* (Vic), s 4(1)(i).

<sup>5</sup> *Victorian Charter 2006* (Vic), s 4(1)(j). The Charter provides examples of “administrative functions in the Notes to s 4(1)(j) which include: committal proceedings, issuing of warrants, listing cases, and adopting practices and procedures.

<sup>6</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563-64.

<sup>7</sup> See Human Rights Consultation Committee, Victorian Government, *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005.

the Charter. However, the courts and tribunals will still have a non-*Charter* based ability to use human rights to influence the development of the common law, as this is a general common law principle.

## **Category 2: Hybrid or Functional Public Authorities**

### Extent of Obligations and Definition

The second category of body are functional/hybrid public authorities. These part-public and part-private authorities are bound by the s 38 human rights obligations *only* when they exercise functions of a public nature; these bodies are not bound when exercising their private functions. This is made clear in s 4(1)(c), which defines this category to include an ‘entity whose functions are or include functions of a public nature, when exercising those functions on behalf of the State or a public authority, whether under contract or otherwise.’ This category would, for example, include a private security firm when providing security at a prison, but would not include that same private security firm when offering security to a supermarket or commercial entity.

The definition for functional/hybrid public authorities is much less definitive than for core/wholly public authorities. The *Charter* contains an inclusive list of factors that are relevant to determining whether a function is of a public nature under s 4(2). It should be noted that these factors are relevant to both the final body listed under the core/wholly public authority category (s 4(1)(b)) and to functional/hybrid public authorities (s 4(1)(c)). These factors are not exhaustive, and the presence of one or more factors does not necessarily mean the function is of a ‘public nature’.

The s 4(2) factors are: (a) whether the function is given by or under statute, for example, the powers of arrest under the *Transport Act 1983*; (b) whether the function is connected to or generally identified with functions of government, for example, the provision of correctional services, by way of managing a prison, under the *Corrections Act 1986*; (c) whether the function is regulatory in nature; (d) whether the entity is publicly funded to perform the function; and (e) whether the entity is a company whose shares are held by or on behalf of the State, for example, companies responsible for retail supply of water within Melbourne.<sup>8</sup>

For the purposes of functional/hybrid public authorities only, under s 4(4), a public authority may be ‘acting on behalf of the State or a public authority’ even if no agency relationship exists. Moreover, under s 4(5), the fact that an entity is publicly funded to perform the function does not necessarily mean it is exercising that function on behalf of the State or a public authority.

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<sup>8</sup> The examples are articulated in ss 4(2)(a), (b) and (e) respectively.

Obvious examples in the Victorian context include a privatised utility, a non-government organisation that undertakes government welfare services (for example, Hanover through the provision of services to homeless persons and community legal centres through the provision of legal advice), security firms running security at correctional facilities, self-regulating professional bodies (such as those for media and, potentially, those for the legal and medical professions), and public patients in private hospitals.

### Guidance from Britain

The concept of attaching human rights obligations to hybrid public-private bodies has been borrowed from the *Human Rights Act 1998* (UK) (“*HRA UK*”) and slightly altered. There is growing jurisprudence and commentary on the functional public authority category in Britain which may be of assistance, but the differences between the *Charter* and *HRA UK* must be accounted for. The main difference in terms of the meaning of the functional/hybrid category is that the *Charter* explicitly lists factors relevant to assessing whether a function is a “function of a public nature”. The *HRA UK* does not explicitly list factors. Rather, s 6(3)(b) simply states that ‘public authority includes any person certain of whose functions are functions of a public nature...’ and s 6(5) states that ‘a person is not a public authority by virtue only of (3)(b) if the nature of the act is private.’ This drafting difference may amount to little more than semantics, however, given that the British jurisprudence has identified factors very similar to those listed under s 4(2) of the *Charter*.

Examples of the functional/hybrid category identified in British parliamentary debate on the Human Rights Bill include the press complaints commissions, the BBC, the public telephone company (the ITC), the British Board of Film Censorship, Railtrack (the train operator), general practitioners, privatised utilities, and water companies.<sup>9</sup>

Much guidance (both good and bad) can be gleaned from the British jurisprudence. In summary, to be ‘a person certain of whose functions are functions of a public nature’ requires there to be feature(s) which impose a public character or stamp on the acts of the person/body. To date, the jurisprudence indicates that there will be a function of a public nature where there is statutory authority for what is done, statutory responsibility imposed on the body in question, a true delegation or sharing of powers or functions, a close proximity between the body and a public body, and public funding for the activity in question.<sup>10</sup> A brief overview of the cases is warranted.

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<sup>9</sup> Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the *Human Rights Act*’ in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 83.

<sup>10</sup> Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the *Human Rights Act*’ in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 98-99.

In *Poplar Housing v Donoghue*,<sup>11</sup> a local authority had a statutory duty to directly provide or otherwise arrange the provision of housing to some homeless people. The local authority created a private housing association, and transferred its housing stock to it, with the intention that the private housing association would discharge the local authority's statutory duty. A close connection between the two bodies was maintained: five members of the local authority were board members of Poplar Housing, and the local authority provided continual direction on the relations between Poplar Housing and its tenants.

Poplar Housing sought possession of one of its houses from Donoghue, claiming that Donoghue was intentionally homeless and thereby not entitled to be provided with public housing. Donoghue claimed that this breached her right to respect for her home under art 8, that Poplar Housing was performing a function of a public nature, and that Poplar Housing was thus bound by human rights obligations under s 6(3)(b).

The Court of Appeal held that Poplar Housing was performing a function of a public nature. The test was articulated as follows: To be a function of a public nature requires there to be feature(s) which impose a public character or stamp on the act, including statutory authority for what is done, some extent of control exercised by a public authority, an enmeshing of activities of the public and private body.<sup>12</sup> The Court of Appeal recognised that this was a 'borderline' case, and that each case must be assessed on its facts.<sup>13</sup> Taking in account all the circumstances, however, Poplar Housing was a functional public authority. Emphasis was placed on the special institutional arrangements in this case, the closeness of the relationship between the two bodies, and the fact that there was no intention to treat persons that were already tenants at the time the housing stock was transferred any differently after the transfer.<sup>14</sup>

The *Leonard Cheshire Foundation* case<sup>15</sup> presented a very similar fact scenario to the *Donoghue* case, but was decided differently. Leonard Cheshire Foundation ("LCF") was a private charity. It provided residential accommodation to disabled people under a contract it had with a local authority. The local authority had the statutory duty to provide the residential accommodation, which it did via the LCF contract and at public expense.

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<sup>11</sup> *Poplar Housing and Regeneration Community Asscn v Donoghue* [2001] EWCA Civ 595 ("*Donoghue*").

<sup>12</sup> See Kate Markus, 'What is Public Power: The Courts' Approach to the Public Authority Definition Under the *Human Rights Act*' in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 91; Dawn Oliver, 'Functions of a Public Nature under the *Human Rights Act*' [2004] *Summer Public Law* 329, 331.

<sup>13</sup> *Donoghue* [2001] EWCA Civ 595 [66].

<sup>14</sup> *Donoghue* [2001] EWCA Civ 595 [66].

<sup>15</sup> *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366.

LCF planned to close one residential house and transfer the residents to another residential house. Similarly to the *Donoghue* case, the residents claimed interference with their right to a home under art 8, that LCF was a functional public authority, and that LCF had acted unlawfully under s 6(3)(b).

The Court of Appeal held that LCF was not exercising functions of a public nature. A number of considerations influenced this decision. First, the court held that the extent of public funding was relevant, but not determinative. On the facts, LCF did receive public funding. Secondly, whether the body was standing in the shoes of the public authority was relevant, but on the facts LCF could not be said to be standing in the shoes of the local authority. Thirdly, whether the statute granted any powers to body was relevant. On the facts, LCF was not granted any statutory powers. Fourthly, whether the body was otherwise exercising statutory powers was relevant, which LCF did not. Accordingly, other than the funding criteria, none of the *Donoghue* criteria applied to LCF.<sup>16</sup>

Two other consequential arguments also influenced the decision. The court was concerned that if LCF was considered a functional public authority, then so too would lodging houses and small private hotels be considered functional public authorities when providing residential accommodation for local authority residents, which they do on occasion. Moreover, the courts were concerned about anomalies that would arise between private and public residents. If LCF is considered public, as the court's reasoning goes, the LCF will be public authorities regarding residents paid for by the local authority but not others, and that this would not make sense given that there was no substantive difference between the character of the services provided to publicly-funded and privately-funded residents.<sup>17</sup>

The House of Lords decision in *Aston Cantlow v Wallbank*<sup>18</sup> is of interest for its veiled criticism of the Court of Appeal decisions. In *Aston Cantlow*, the Parochial Church Council sought to make a private landowner (the lay rector/priest) pay for repairs to part of a church. One issue of contention was whether the Parochial Church Council was a functional public authority, which may have been contravening property rights under the *HRA UK*.

The House of Lords held that the Parochial Church Council was not exercising a function of a public nature; rather, the scenario was more akin to enforcing a

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<sup>16</sup> See Kate Markus, 'What is Public Power: The Courts' Approach to the Public Authority Definition Under the *Human Rights Act*' in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 94; Dawn Oliver, 'Functions of a Public Nature under the *Human Rights Act*' [2004] *Summer Public Law* 329, 332

<sup>17</sup> See Dawn Oliver, 'Functions of a Public Nature under the *Human Rights Act*' [2004] *Summer Public Law* 329, 332-33.

<sup>18</sup> *Aston Cantlow and Parochial Church Council v Wallbank* [2003] UKHL 37.

restrictive covenant (that is, a property right). Although the House of Lords did not directly refer to the earlier Court of Appeal decisions and thus did not overrule them, its general discussion of the meaning of functional public authorities indicates its dissatisfaction with the earlier lower court decisions.

In particular, Lord Nicholls outlined his preference for a more generous interpretation to be given to ‘functions of a public nature’ than for the category of core/wholly public authorities. His Lordship insisted that the focus of the functional public authority test be on function, highlighting that there is a distinction between functions which are public and those which are private, with the function being the determinative factor. Lord Nichols acknowledged that s 6(3)(b) is fact sensitive and that consequently the court could not develop a single, one-size-fits-all test. Rather, his Lordship outlined relevant factors that aid in the determination of whether the function is public or private: was the body in question publicly funded, exercising statutory powers, taking the place of a central government or local authority, or providing a public service.<sup>19</sup>

In the *Hampshire Farmers Markets Ltd* case,<sup>20</sup> the local authority originally managed the operation of a farmers market on publicly owned land. The local authority incorporated HFML as a not for profit, handed over the management of the farmers market to HFML, and supported HFML in its operations. The local authority retained ownership of the land upon which the market was held, such that the public retained the common law right of access to the land. A problem arose when HFML did not issue a stall licence to Hammer Trout Farm, although Hammer Trout Farm had held such a licence during the period in which the local authority managed the market.

The Court of Appeal held that the regulation and organisation of the common law right of access to public land was a public function, such that HFML was a functional public authority. The Court of Appeal considered the factors relating to “function of a public nature” as outlined in the *Donoghue* and *Leonard Cheshire Foundation* cases. On the negative, there was no statutory basis for the exercise of the powers, and no subjection of HFML to government oversight. On the positive side, however, HFML did further the public interest by providing access to trading outlets, HFML did manage public markets, the public retained a common law right of access to the public markets because of the continued public ownership of the land, and HFML had stepped into the shoes of the local authority.<sup>21</sup>

<sup>19</sup> See Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the *Human Rights Act*’ in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 96-97; Dawn Oliver, ‘Functions of a Public Nature under the *Human Rights Act*’ [2004] *Summer Public Law* 329, 333

<sup>20</sup> *R (Beer, trading as Hammer Trout Farm) v Hampshire Farmers Markets Ltd* EWCA Civ 1056.

<sup>21</sup> See Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the *Human Rights Act*’ in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 97-98; Dawn Oliver, ‘Functions of a Public Nature under the *Human Rights Act*’ [2004] *Summer Public Law* 329, 334-35, 348-49.

The final case for brief consideration is *Johnson v London Borough of Havering* (2007). When faced with a very similar fact scenario to the *Leonard Cheshire Foundation* case, the Court of Appeal considered itself bound by it because it has had not been implicitly overruled by *Aston Cantlow*. The *Johnson* case is on appeal, so hopefully the House of Lords will clarify its position as to the lower court precedent.

There has been wide criticism of the Court of Appeal approach. First, the limited application of the test has been criticised. Kate Markus argues that the Court of Appeal has improperly conflated the test for amenability to judicial review with the test for ‘function of a public nature’. Rather than developing a functional approach test, she argues that the Court of Appeal is focussing on a “public character or stamp” test (involving whether authority is derived from statute and proximity of the body to a public authority) which is a test more akin to the amenability to judicial review test.<sup>22</sup>

Secondly, the focus of the test has been criticised. Dawn Oliver argues that the test developed by the Court of Appeal is not about the nature of the functions. Oliver argues that the test focuses more on institutional factors (that is, the institutional arrangements between the bodies) and relational factors (that is, the relationship between the body in question and the public authority), whereas the test should focus rather on functional factors.<sup>23</sup>

In Victoria, at least two of the listed factors in s 4(2) of the *Charter* could have relational and institutional implications (ss 4(2)(d) and (e)). It is the application of these factors that will determine whether the criticisms of the British jurisprudence are also levelled at the Victorian jurisprudence. This is not to say that the factors should not be taken into account when deciding which bodies are functional/hybrid public authorities. Rather, it is to highlight that the factors should influence the assessment of the overall test of whether the body is performing ‘functions of a public nature’, rather than allowing the factors to be substituted for the test itself. Indeed, s 4(3)(b) of the *Charter* indicates that the presence of one of the factors alone is not conclusive of the issue.

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<sup>22</sup> Kate Markus, ‘What is Public Power: The Courts’ Approach to the Public Authority Definition Under the *Human Rights Act*’ in Jowell and Cooper (eds), *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, Oxford, 2003), 77, 85, 106-114. Sunkin also draws parallels between suggested tests for “function of a public nature” and tests for amenability to judicial review: see Maurice Sunkin, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the *Human Rights Act*’ [2004] Autumn *Public Law* 643, 651.

<sup>23</sup> Dawn Oliver, ‘Functions of a Public Nature under the *Human Rights Act*’ [2004] Summer *Public Law* 329, especially 331 and 337. For a critique of Oliver’s views on the appropriate reach of the hybrid category of public authority, see Maurice Sunkin, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the *Human Rights Act*’ [2004] Autumn *Public Law* 643, 650-53.

As already indicated, the House of Lords decision appears to have implicitly criticised the Court of Appeal jurisprudence, albeit without overruling the lower court. The House of Lords position is supported by the Parliamentary Joint Committee on Human Rights.<sup>24</sup> In a lengthy report considering the application of the test to determine whether a body exercised “functions of a public nature”, the Joint Committee has suggested an alternative test. The Joint Committee has proposed that a function should be public when the government has taken responsibility for it in the public interest, for instance as part of a government programme of State provision.<sup>25</sup> An example given is the provision of health care. The State has chosen to provide a health care programme in the public interest because the provision of health care is considered a worthwhile public service. Any person or body providing services within this government health program should be considered to be exercising “functions of a public nature.”<sup>26</sup>

There are a number of special features to the test. The test is programmatic rather than substantive.<sup>27</sup> Where private bodies perform duties which are part of a government or state *programme*, they will be considered to be performing functions of a public nature. The test does not rely on the identification of *substantive* subject matters that are considered inherently public, rather than private, such as health, education, environmental protection or residential care. The programmatic focus acknowledges that very few functions are inherently public.<sup>28</sup> Again, let us focus on health care. Many persons or entities can care for the sick – government, private institutions, religious bodies, charities. The provision of health care services is not inherently a function of a public nature. However, if the services are provided as part of a government programme of health care provision, the private body providing the services should be considered to be exercising “functions of a public nature.”<sup>29</sup>

The Joint Committee also recognised that certain factors are not determinative. For example, the statutory basis for power is not determinative of whether a function is of

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<sup>24</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382). See also Maurice Sunkin, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act’ [2004] *Autumn Public Law* 643.

<sup>25</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [138], [140].

<sup>26</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [140].

<sup>27</sup> ‘In our view, discharge of duties necessary for provision of the government program of healthcare is a public function. Discharge of healthcare services, in itself, is not’: Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [140].

<sup>28</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [138] – [139].

<sup>29</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [140].

a public nature. Indeed, the Joint Committee opined that there should be no difference in the treatment of a body that has a statutory duty to deliver services, and another body providing services under contract to the body that has the statutory duty to deliver the services: ‘[t]he loss of a single step in proximity to the stat duty does not change the nature of the function.’<sup>30</sup> Moreover, institutional proximity may be evidence of the body’s role in delivering a government programme but is not determinative of whether the function is of a public nature.<sup>31</sup>

[Note: Since delivering this paper on 18 May 2007, the House of Lords have delivered their judgment on the appeal from the *Johnson* case. In the *YL* case,<sup>32</sup> three of the five Law Lords gave a narrow reading to the term “functions of a public nature”. Lords Scott, Mance and Neuberger held that Southern Cross Healthcare Ltd was not performing a function of a public nature when providing accommodation and care to YL under arrangements with Birmingham City Council, who had made a determination that YL was eligible for assistance under the *National Assistance Act 1948* (UK). Influential factors included: Southern Cross Healthcare Ltd was a private, for profit organisation; that although the local council partly funded YL’s place in the care facility, the care home and its operations were not publicly funded; and the fact that Southern Cross Healthcare Ltd did not exercise statutory powers in relation to YL. The majority essentially held that the contractual relations between YL and Southern Cross Healthcare Ltd, and YL’s claim against the Birmingham City Council as a core public authority under the *HRA UK*, were the correct avenues of redress.

The minority judges, Lord Bingham and Baroness Hale, gave a much broader, purposive meaning to “functions of a public nature” and found that Southern Cross Healthcare Ltd was a functional public authority. Without seeking to catalogue an exhaustive list of relevant factors, Lord Bingham was influenced by: the role and responsibility of the State in relation to the subject matter; the nature and extent of statutory obligations in relation to the function; the extent to which the State regulates, supervises and inspects the performance of the function; whether or not criminal penalties can be imposed on those who do not properly perform the function; and whether the State, as a matter of course or by last resort, is willing to pay for the function. The minority opinion better reflects the intention behind imposing human rights obligations on functional public authorities, and it is hoped the Victoria jurisprudence favours the minority opinion.]

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<sup>30</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [137], [142].

<sup>31</sup> Joint Committee on Human Rights, ‘The Meaning of Public Authority Under the *Human Rights Act*’, *Seventh Report* (2003-04 HL 39, HC 382) [137], [143].

<sup>32</sup> *YL (by her litigation friend, the Official Solicitor) (FC) v Birmingham City Council and Others* [2007] UKHL 27

### **Category 3: Wholly Private Entities**

For the sake of completeness, there are “wholly private” entities that are never subject to the *Charter* obligations. An example of such is a private corporation that undertakes no public functions.

## **LEGAL CONSEQUENCES**

### **Causes of action: s 39(1) and (2)?**

Let us turn to the legal consequences for public authorities. Section 39 outlines the legal consequences of unlawfulness. No new cause of action is created under the *Charter*.<sup>33</sup> A person will not be able to independently and solely claim breach of statutory duty, with the statute being the *Charter*. Rather, s 39 links relief to pre-existing relief or remedy. Section 39 contains a general statement of principle, and the provides some examples.

The general statement of principle in s 39(1) states that ‘[i]f, 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 basis that it was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising under the *Charter*.’ The person must only be able to “seek” a pre-existing, non-*Charter* relief or remedy. The person does not have to succeed on the non-*Charter* relief or remedy in order to be able to secure the relief or remedy based on the *Charter* unlawfulness. In practical terms, this means that an applicant needs to be able to survive a strike out application on their non-*Charter* ground, but need not succeed on the non-*Charter* ground.

Section 39(2) of the *Charter*, through the device of a savings provision, then specifies two types of pre-existing relief and remedies that may be available.<sup>34</sup> Section 39(2) is inclusive. The first example is contained in s 39(2)(a) and refers to judicial review of

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<sup>33</sup> This is in contrast to the British model. Under the *HRA*, where a public authority acts unlawfully, a victim can bring a proceeding for breach of statutory duty (with the *HRA* itself being the statute) or a victim can rely on the unlawfulness in any legal proceedings, whether as a defence to proceedings brought by public authorities, or as the basis for an appeal against a decision of a court or tribunal: *HRA 1998* (UK) c 42, s 7(1).

<sup>34</sup> Section 39(2) is clearly a saving provision, but in its context should be read as containing specific examples of the general principle listed in s 39(1). Section 39(1) articulates that a pre-existing relief or remedy for unlawfulness can be used for *Charter* unlawfulness. Directly following is the savings provision of s 39(2). It appears that a savings provision is only necessary because the two examples of pre-existing relief or remedy articulated in s 39(2) fall within the pre-existing relief or remedies envisaged by s 39(1). Moreover the use of the phrase ‘otherwise than because of this *Charter*’ in both sections indicates that the *Charter* may provide an element of the pre-existing relief or remedy required under ss 39(1) or (2). See also Simon Evans and Carolyn Evans, ‘Legal Redress Under the *Charter of Human Rights and Responsibilities*’ (2006) 17 *Public Law Review* 264, 275-6; Human Rights Law Resource Centre, ‘The Victorian Charter of Human Rights and Responsibilities’, *Human Rights Law Resource Manual* (2006) ch 5, 55-56.

an administrative decision under the *Administrative Law Act 1978* (Vic) (“*ALA*”) or the common law.<sup>35</sup>

There are various threshold issues to consider, including: (a) satisfaction of standing requirements; (b) the clarification of how the meaning of “public authority” under the *Charter* will interact with the meaning of “tribunal” under the *ALA*, with the former being much broader in scope than the latter; and (c) whether the impugned decision is the kind of “decision” that can be reviewed under s 2 of the *ALA*.

In terms of the grounds of review, various grounds of unlawfulness will be open to *Charter* argumentation. In terms of error of law (that is, narrow ultra vires and traditional jurisdictional error), a public authority may incorrectly interpret the enabling law as allowing rights-incompatible actions, and thus act beyond its authorised power. A *Charter* based argument will come down to requiring a rights-compatible interpretation of the enabling law and ensuring that the public authority behaves consistently with this.

In terms of improper exercise of power (that is, broad ultra vires, extended jurisdictional error or non-jurisdictional error), a number of grounds will be arguable. The ground of failure to take into account a relevant consideration will take centre stage. It will be argued that a public authority failed to take into account relevant human rights considerations. Indeed, this argument is central to s 38(1) itself, which defines unlawfulness to include a failure ‘to give proper consideration to a relevant human right.’ The inclusion of the word “proper” in s 38(1) was a deliberate choice in order to avoid a “tick-a-box” approach to human rights. When assessing the relevant consideration ground in a *Charter* context, a “tick-a-box” approach which might withstand *Peko-Wallsend* scrutiny, will not withstand *Charter* scrutiny. The *Charter* requires proper consideration to be given to relevant human rights, which may translate into human rights being a dominant relevant consideration and may allow courts to assess whether sufficient weight is given to the relevant human rights consideration.<sup>36</sup>

Another obvious improper exercise ground will be unreasonableness. It will be argued that a public authority has acted unreasonably by not giving adequate weight to the human rights considerations. In this context, it is important to consider proportionality. Will the *Charter* lead to the development of a free-standing ground of proportionality? That is, will the *Charter* allow an applicant to claim that given the human rights considerations, the decision of a public authority was disproportionate and accordingly unlawful.

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<sup>35</sup> Order 56 of Chapter I of the Rules of the Supreme Court.

<sup>36</sup> See further Carolyn Evans, ‘Administrative Law and Australian Bills of Rights’ (Presented at the *Annual Forum*, Australian Institute of Administrative Law, 14 June 2006) 9-10; Simon Evans and Carolyn Evans, ‘Legal Redress Under the *Charter of Human Rights and Responsibilities*’ (2006) 17 *Public Law Review* 264, 278.

The best guidance on this issue is from the *Daly* case in the United Kingdom.<sup>37</sup> In *Daly*, a number of Law Lords held that the equivalent provision to s 38 of the *Charter*, s 6 of the *HRA UK*, imposes an obligation on the courts to review the proportionality of an administrative decision that interferes with a qualified or limited right. Moreover, their Lordships opined that such proportionality review does not constitute merits review.<sup>38</sup> Further, their Lordships drew a distinction between review on the ground of proportionality and review on the ground of *Wednesbury* unreasonableness. The threshold for illegality/unlawfulness under *Wednesbury* was considered too high to satisfy human rights requirements.<sup>39</sup> Lord Steyn outlined three ways in which proportionality review differs from *Wednesbury* unreasonableness. First, ‘the doctrine of proportionality 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.’ Secondly, proportionality ‘may go further’ than unreasonableness, in that ‘it may require attention to be directed to the relative weight accorded to interests and considerations.’ Thirdly, ‘even the heightened scrutiny test’, introduced into the *Wednesbury* unreasonableness test where human rights are in issue, ‘is not necessarily appropriate.’<sup>40</sup> In other words, ‘the intensity of review is somewhat greater under the proportionately approach.’<sup>41</sup>

The musings about proportionality in *Daly* were the obiter of only a minority of Law Lords.<sup>42</sup> Some later cases do introduce the concept of proportionality into judicial review, such as *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* and *R (Prolife Alliance) v British Broadcasting Corporation*.<sup>43</sup> In the pre-*Daly* case of *Alconbury*, Lord Slynn stated:

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<sup>37</sup> *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (*‘Daly’*). This case replaces the court’s first attempt to introduce proportionality into administrative law. The first attempt was in *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840. In the latter case, the court held that a reviewing court must ask whether the primary decision-maker had reached a reasonable decision as to whether an interference with a Convention right was necessary to achieve a legitimate aim and was proportionate. The reviewing court should use anxious scrutiny when making this assessment. This test was rejected in *Daly* as it was too close to the *Wednesbury* unreasonableness test, a test whose threshold for interference was too high.

<sup>38</sup> As per Lord Steyn (at para 28): ‘This does not mean that there has been a shift to merits review... [T]he respective roles of judges and administrators are fundamentally distinct and will remain so.’

<sup>39</sup> That is, threshold for irrationality under *Wednesbury* unreasonable is considered so high as to effectively exclude any consideration by the court of whether the interference with the right was necessary to meet a pressing social need or was proportionate.

<sup>40</sup> *Ibid*, para 27.

<sup>41</sup> *Id*.

<sup>42</sup> Although *Daly* was vis-à-vis *HRA* review, not judicial review, it is showing the judges taking proportionality seriously as a legal concept.

<sup>43</sup> *R (Wilkinson) v Responsible Medical Officer Broadmoor and Others* (2001) EWCA Civ 1545 and *R (Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 respectively.

I consider that even without reference to the [HRA UK] the time has come to recognise that this principle of proportionality is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the [HRA UK] however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.<sup>44</sup>

[Note: Since delivering this paper on 18 May 2007, the House of Lords have resolved the issue in favour of a free-standing ground of proportionality in *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11. In brief, the *Huang* decision confirms the obiter in *Daly* as good legal principle. It also improves the test of proportionality used by the British courts by bringing the British test of proportionality as outlined in the *de Freitas* case,<sup>45</sup> in line with the proportionality test adopted under the Canadian *Charter of Rights and Freedoms 1982* in *R v Oakes*.<sup>46</sup>]

It is unclear whether or not the *Daly* arguments will hold sway in Victoria. There are a few considerations. First, the drafters of the *Charter* did not appear to intend there to be a free-standing proportionality ground of unlawfulness. According to the drafters' arguments, the *ALA* only codifies common law grounds, and proportionality is not a common law ground, such that human rights and proportionality must be assessed as part of *Wednesbury* unreasonableness. Secondly, there are differences between the *HRA UK* and *Charter* that may undermine a free-standing ground of proportionality in Victoria. The classification of the judiciary as a public authority under the *HRA UK* (meaning that the British judiciary has a *HRA UK* obligation to develop the common law consistently with human rights) is in contrast to the *Charter*. Thirdly, the High Court of Australia has indicated that Australia has a unified common law,<sup>47</sup> which may potentially make it difficult for Victorian judges to unilaterally develop the common law grounds of review to include proportionality.<sup>48</sup> Fourthly, Victoria does not have an external body like the European Court of Human

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<sup>44</sup> Paul Craig, 'The Courts, the *Human Rights Act* and Judicial Review' (2001) 117 *LQR* 589, 602-03.

<sup>45</sup> *De Freitas v Permanent Secretary of Agriculture* [1999] 1 AC 69.

<sup>46</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>47</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563-64.

<sup>48</sup> But then again, it may not be all that difficult. After all, each jurisdiction is free to abrogate the common law with statute, such that the principle of a unified common law admits of jurisdictional differences. Evans also muses that if more jurisdictions adopt human rights instruments, this may be the impetus for the common law to develop: Carolyn Evans, 'Administrative Law and Australian Bills of Rights' (Presented at the *Annual Forum*, Australian Institute of Administrative Law, 14 June 2006) 19.

Rights imposing the proportionality standard from outside. The European influence in Britain on this matter is acknowledged by Paul Craig: ‘It is clearly important that [the British] courts develop a test for scrutiny which is in conformity with the requirements laid down by the Strasbourg Court in *Smith and Grady*. To do otherwise would be to invite claimants to pursue their case before the Strasbourg court.’<sup>49</sup>

On balance, it seems that the development of a free-standing ground of proportionality is more sensible than subsuming human rights considerations under *Wednesbury* unreasonableness. First, proportionality is core to all human rights analysis. It is an integral part of the fundamental assessment of limits to rights. It makes no sense to shy away from this fact, and to dress a proportionality assessment up as a *Wednesbury* unreasonableness argument. Secondly, a free-standing right to proportionality recognises the substance of the analysis rather than hiding behind formality. If the intention of the drafters was to accept proportionality as a ground for review, whether proportionality is recognised as part of *Wednesbury* unreasonableness or a free-standing ground is an issue of form. The substance is the same: allowing courts to assess proportionality. Why not call a spade a spade? Thirdly, the jurisprudence from the European Court and the British judiciary is compelling.

It is important to briefly consider the relevance of *Craig v SA*.<sup>50</sup> By definition, courts and tribunals are not public authorities. Presumably, all other “categories” of public authorities will be considered either administrative decision makers or non-courts. In terms of *Craig*, “courts” proper are not public authorities, such that the retention of jurisdictional error and non-jurisdictional error is neither here nor there in this setting. “Non-courts”, as in administrative tribunals, are not public authorities, such that collapsing all errors into jurisdictional errors is also neither here nor there in this setting. If public authorities are classed as administrative decision makers, all narrow and broad ultra vires grounds are available against them. Alternatively, if public authorities are classed as “non-courts” all errors are jurisdictional errors. The choice of classification for public authorities remains a strategic decision, based on the availability of remedies, the existence of privative clauses, and the like.

The final point of note regarding the first example under s39(2) is that the entire range of administrative law remedies under the common law and the *ALA* are available.<sup>51</sup>

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<sup>49</sup> Paul Craig, ‘The Courts, the *Human Rights Act* and Judicial Review’ (2001) 117 *LQR* 589, 595.

<sup>50</sup> *Craig v South Australia* (1995) 184 CLR 163.

<sup>51</sup> For example, an order that the authority cease pursuing the conduct or action; an order setting aside a decision; an order requiring a public authority to perform a duty; a declaration that a decision or action is unlawful; and an injunction compelling action or stopping action.

The second example of unlawfulness is contained in s 39(2)(b), which allows a person to seek a declaration that the public authority acted unlawfully (that is, incompatibly with rights)<sup>52</sup> and associated relief, such as, an injunction to stop the unlawful conduct, a stay of proceedings, or an exclusion of evidence.

A thoroughly explored example of the operation of s 39(2)(b) relates to the exercise of judicial discretions. Let us consider the judicial discretion to ensure the fairness of court proceedings. This includes a discretion to exclude evidence that is obtained unlawfully or improperly. An accepted example of the exercise of this discretion is to exclude from evidence a confession that is obtained under duress. Under the *Charter*, the pre-existing ground of duress should be extended to include duress resulting from cruel or degrading treatment (s 10). Human rights issues already inform the exercise of discretions, and the *Charter* merely formalises this more fully. This is not a new remedy; it is an existing remedy that will be extended to include a new set of circumstances.<sup>53</sup>

Another judicial discretion is the discretion to stay proceedings where it is unfair for the proceedings to continue, or to prevent an abuse of process. A *Charter* example of the exercise of this discretion would be a stay of proceedings to prevent double jeopardy, which violates the right not to be tried twice for the same offence (s 26).<sup>54</sup>

### **Damages: ss 39(3) and (4)?**

Under s 39(3) of the *Charter*, a person is not entitled to damages because of a breach of the *Charter*. A person may only seek damages if they have a pre-existing right to damages under s 39(4). These sections read together mean that a person could not sue for damages for inhuman treatment in prison *per se*, but could argue that a civil tort, such as assault or battery or false imprisonment was committed, using *Charter* rights to bolster the claim, and seek damages.<sup>55</sup>

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<sup>52</sup> This looks like a free-standing remedy. Evans and Evans argue that s 39(2) puts the availability of this free standing remedy beyond doubt. The right to seek the injunction or declaration in relation to unlawful government conduct exists under the general law, and is clearly within the inherent jurisdiction of the Supreme Court. Given that not statement has been made to reduce this jurisdiction of the Supreme Court, as is required under s 85, it is argued that s39(2)(b) creates a free-standing remedy. See Simon Evans and Carolyn Evans, 'Legal Redress Under the *Charter of Human Rights and Responsibilities*' (2006) 17 *Public Law Review* 264.

<sup>53</sup> See Human Rights Law Resource Centre, 'The Victorian *Charter of Human Rights and Responsibilities*', in *Human Rights Law Resource Manual* (2006), ch 5 at [8.1].

<sup>54</sup> See Simon Evans and Carolyn Evans, 'Legal Redress Under the *Charter of Human Rights and Responsibilities*' (2006) 17 *Public Law Review* 264, 280.

<sup>55</sup> Simon Evans, 'What Difference Will the *Charter of Rights and Responsibilities* make to the Victorian Public Service' (Presented at Clayton Utz, Melbourne, 13 June 2006): 'Section 39 can hardly be taken to have excluded the right to seek compensation for these torts. Section 39(4) can be regarded as preserving precisely these rights.' See also See Human Rights Law Resource Centre, 'The Victorian *Charter of Human Rights and Responsibilities*', in *Human Rights Law Resource Manual* (2006), ch 5 at [8.1].

It is important to distinguish the New Zealand experience with damages. Under the *Bill of Rights 1990* (NZ), the Court of Appeal used its inherent powers to award damages in *Bagient's* case,<sup>56</sup> although there was no explicit right to damages provided for under the *Bill of Rights*. The *Charter* has attempted to avoid a *Bagient*-type outcome, by attempting to override this inherent power to award damages under s 39(3). This is clear from the Government's *Statement of Intent*, the Explanatory Memorandum to the *Charter*, and the second reading speech of the Attorney-General.<sup>57</sup>

### **Essential Message of s 39?**

There are two essential messages flowing from s 39. First, the *Charter* does not create an independent cause of action. That is, a person will not be able to independently and solely claim breach of statutory duty, with the statute being the *Charter* (in contrast to the *HRA UK*, which does allow a free-standing claim). Secondly, for a person to have any chance of securing any relief or remedy (including damages) for an unlawfulness of a public authority, that person must link the public authorities unlawfulness to a pre-existing relief or remedy (or right to damages).

### **CONCLUSION**

Because the remedial provisions under ss 38 and 39 are so weak, the s 32 interpretation provision becomes an extremely important remedial provision. Before we explore this further with some examples, let us consider what we mean by "rights-compatibility". A law may be rights-compatible for a number of reasons. First, the law may not engage or violate or limit a right. Secondly, if a law does engage/violate/limit a right, the limitation may be found to be justified under s7(2), or a qualification or limitation internal to the right. Thirdly, if a law does engage/violate/limit a right and it is not a justifiable limitation, s 32 interpretation may save the law – that is, through s 32 interpretation, the law is re-interpreted so that it is not an unjustifiable limitation on a right.

Let us now consider a few scenarios. First, if a law is rights-compatible, there is no need for a remedy under ss 38 and 39. A person's rights are protected (read, not violated) because the law is compatible, and the public authority cannot rely on a rights-*in*compatible law to justify a violation of the person's rights. In other words, the public authority has its obligations under s 38(1) and the exceptions in s 38(2) will not apply.

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<sup>56</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 ("*Bagient's Case*").

<sup>57</sup> Victoria Government, *Statement of Intent*, May 2005; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Mr Hulls, Attorney-General), respectively.

Secondly, if the law is rights-*incompatible*, s 38(2) allows a public authority to act incompatibly with human rights. However, through s 32 interpretation, the judiciary may alter the statutory obligation/power to make it rights-compatible. Once the law is given a rights-compatible interpretation, the potential violation of human rights will be avoided. The rights-compatible interpretation, in effect, becomes your remedy – the law is re-interpreted to be rights-compatible, the public authority has obligations under s 38(1), and the s 38(2) exceptions to unlawfulness do not apply.

An example of this scenario can be constructed from British jurisprudence.<sup>58</sup> Let us assume that, under mental health law, a patient that is involuntarily hospitalised bears the burden to prove that they are well enough to be released. This reversed onus of proof is an unjustified limitation on a patient's rights to the freedom of movement (s 12) and to liberty (s 21), because the hospital and treating medical practitioners ought to have to prove that the conditions justifying involuntary detention still exist. Under s 38, there is no free-standing remedy for the patient against the hospital, and the hospital can justify its decision under the s 38(2) exception. In this scenario, the involuntary patient should seek a s 32 rights-consistent interpretation of the law, asking the court to interpret the law to place the onus of proof on the hospital to prove that the conditions justifying involuntary detention still exist. The s 32 rights-compatible interpretation is a complete remedy – if the hospital cannot prove the continued existence of the conditions justifying involuntary detention, the patient must be released.

Another example is the Australian Capital Territory case of *R v Upton*<sup>59</sup>. Upton had allegedly assaulted two people and damaged a motor vehicle in 2002. For no fault of his own, Upton's case did not come to trial until 2006. The ACT Supreme Court stayed proceedings because of the delay in bringing the accused to trial. This was done by a rights-compatible interpretation of the legislative provisions relating to stays of proceedings. The Supreme Court held that the discretion to stay proceedings had to be read in light of the right of persons charged with criminal offences to be tried without reasonable delay. The remedy here did not come from the application of ss 38 and 39 – indeed, the *Human Rights Act 2004* (ACT) does not contain equivalent provisions. Rather, the remedy came about through interpreting legislation in a rights-compatible manner.

Thirdly, if the law is rights-*incompatible*, and it is not possible to find a rights-compatible interpretation that is also consistent with statutory purpose under s 32, the only option for the Supreme Court and Court of Appeal is to issue a declaration of inconsistent interpretation under s 36. On this occasion, there will be no recourse against a public authority that acts in accordance with the law, with the public

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<sup>58</sup> *R (H) v Mental Health Review Tribunal North & East London Region (Secretary of State for Health intervening)* [2001] EWCA Civ 415.

<sup>59</sup> *R v Upton* [2005] ACTSC 52.

authority being able to rely on the s 38(2) exception to unlawfulness. The only solution a person has is political.

The final point to note about the strength of the s 32 interpretation power as a remedial provision is that its influence goes beyond holding “public authorities” to account and reaches deep into the private sphere. This must be kept in mind when considering human rights solutions to what appear to be purely private disputes.

Consider the British case of *Ghaidan v Godin-Mendoza*.<sup>60</sup> This case involved a dispute between a landlord and tenant concerning the amount of rent payable under a “statutory tenancy by succession” under rent protection legislation. The landlord does not fall within the core/wholly or hybrid/functional categories of “public authority”, such that the British equivalent provisions of ss 38 and 39 were not in play. Indeed, this is an action between two private parties – a horizontal application of the *HRA UK*, if you will.

The House of Lords used its s 32 equivalent interpretation power to give the relevant legislation a rights-consistent interpretation. The legislation was read to include same-sex co-habitees in the definition of “spouse” (in addition to opposite sex married and unmarried co-habitees), thereby ensuring that a surviving same-sex co-habitee received the benefits of a “statutory tenancy by succession”. This interpretation ensured that the surviving same-sex tenant’s right to a home under art 8 was not violated on the basis of unlawful discrimination based on sexuality under art 14 of the *ECHR*. Consequently, the s 32 equivalent interpretation power provided a rights-based solution to a dispute deep in the private sphere of landlord tenant relations.

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<sup>60</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.