
Michael Power

I am making this submission in my personal capacity, in my own time. It will not be the most polished submission the Committee receives, but I did not want that to stop me from sharing my experiences of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter).

As a practising lawyer who has worked in commercial law, public law, and in providing legal services to the underprivileged through the Homeless Person’s Legal Clinic, I have had first-hand experience of the Charter for many years. I have also used the Charter in my work at the Mallesons Stephen Jaques Human Rights Law Group, and in volunteering I have done for the Public Interest Law Clearing House.

Based on that experience, I firmly believe that the Charter is a very valuable and worthwhile law. I say this not from an idealistic perspective, but from a pragmatic one. I have seen the Charter achieve very practical outcomes for people who need its help most. In many cases I have worked on, disadvantaged people who have very little going for them have found hope and strength — sometimes their only hope and strength — from the very practical benefits that the Charter provides. Whatever objections one may have to using the law and the courts to realise and protect human rights, the law is often the only thing that these people have going for them.

On that basis I believe that the Charter, though not perfect, is a sensible and worthwhile bulwark of liberty and social justice. It gives the weakest members of our society a legal leg to stand on, when they have nothing else for support. It should be strengthened and celebrated, and certainly not gutted or undermined.

Question 4: Legal proceedings

I take the view that section 39 of the Charter allows an independent cause of action to enforce human rights protected by the Charter. However, I readily admit that this section are confusingly drafted, and the true legislative intent is unclear.

It is important that people are able to enforce their rights under the Charter using these sections. After all, what is a right without a remedy? The Charter needs to give people a stand-alone remedy to enforce their rights under the Charter, and the Human Rights Act 2004 (ACT) provides a useful model for reform.

In my view, there is no credible argument that giving such a stand-alone right will precipitate a deluge of vexatious litigation or an unmanageable burden on the courts.
My views on this point are set out in more detail in the attached essay I wrote some years ago.

**Question 5: the effects of the Charter**

I have found the Charter to have a very positive effect on legal practice in Victoria.

(c) **Public authorities**

In many cases where I have dealt with public authorities, the mere mention of their obligations under the Charter have caused them to pause, pay attention, and focus their attentions on their duties to the disadvantaged client I represented. This is an inestimably valuable function of the Charter. Though it is occasionally derided as providing a litigious solution to a non-litigious problem, my experience is that the Charter’s most useful role is outside the courtroom. The mere prospect of enforceable legal rights is enough to bring home the important of human rights, and permeate public authorities with a sense of responsibility.

(d) **Litigation and the roles and functioning of courts and tribunals**

I have used the Charter in two or three litigious cases I have worked on. On each occasion, I found it to be a valuable part of the legal case. Legal practice often revolves around technicalities and esoteric legal doctrines with little relevance to your average punter. When human rights were involved, however, the focus changed. We lawyers were arguing the content of human rights themselves — what the people in question were entitled to as a matter of fundamental right and wrong. To me, that is a vital part of giving the ‘justice’ component of the ‘justice system’ true meaning. It refocusses the attention of the assembled legal practitioners on the issues that are important to real people — fundamental right and wrong.

Not once have I found the Charter to unduly lengthen, confuse, burden or subvert the proper functioning of courts or tribunals.

(e) **The availability to Victorians of accessible, just and timely remedies for infringements of rights**

In many cases, the Charter was the only leg that my client had to stand on. Too often in legal practice people have genuinely worthy claims to justice, or good conscience, or even cold hard legal rights and entitlements — but until the Charter is thrown into the mix, they cannot achieve the critical mass of legal causes of action to make their case winnable. For many people I have worked with, the only thing that allows them to get to court — let alone win — is the Charter.

In no cases have I found the Charter to slow or subvert proceedings.
Question 6: Benefits and costs

I firmly believe the Charter has delivered a net benefit to Victoria. I cannot readily identify any significant costs of the Charter.

I would like to dispel the illusion that lawyers benefit from the Charter. I have worked with the Charter for many years, and am a great supporter of its legal and social potential. Not once have I actually received a financial benefit from this work. Quite simply, human rights law does not pay.

If I have obtained a benefit, it has been because I have been able to use my legal training and my place in the justice system to focus on the things that, once all is said and done, really matter. In the Charter’s better moments, I have been able to unlock the justice in the justice system, and use the legal system to achieve real outcomes for people who really need it.

Question 7: Options for improvement

Very briefly:

- the remedies provision could be simplified and improved, as discussed under question 4 above; and
- the rights protected by the Charter could be expanded to include certain key socio-economic rights like the right to drinking water, the right to a liveable environment and the right to housing.

In my view, the first of these reforms is the most important by far.

Yours sincerely

Michael Power
ANNEXURE A
ARTICLE ON s 39 OF THE CHARTER OF HUMAN RIGHTS

I INTRODUCTION

The common law has long recognised that ‘it is a vain thing to have a right without a remedy’;¹ for not only are remedies a necessary concomitant of effective legal rights,² they are in fact ‘part and parcel’ of the rights themselves.³ Hence, whilst section 38 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) is one of its most significant provisions, it is section 39 that practically defines the human rights conferred.

It is therefore significant that section 39 deviates from the broad remedial provisions in most other bills of rights, by limiting litigants to existing actions and remedies. For a number of reasons, that deviation is deeply unsatisfactory. The avenues provided for legal redress appear unnecessarily complex and restricted. The section is poorly drafted, making its intent ambiguous and its effects unclear. The extrinsic materials appear preoccupied with what the section doesn’t do, aloof to how it might actually work. Judging by the history of section 39, the convoluted caution of this new remedial approach was actuated by fear — of voluminous litigation, extensive legal change, and political headaches.

¹ Ashby v White (1703) 92 ER 126, 136.
³ Minister for the Interior v Harris & Others (1952) (4) SA 769, 780, cited with approval in August & Another v Electoral Commissioners (1999) (3) SA 1 (CC) [34], referred to in Matthew Chaskalson et al, Constitutional Law of South Africa (2002).
Yet the UK experience over the last ten years suggests that many of those concerns were ill-founded, and the complex constraints of section 39 are unnecessary. After a decade of operation, the equivalent provisions of the Human Rights Act 1998 (UK) ("HRA") have not precipitated a deluge of vexatious litigation. Nor has the existence of a broad and independent remedies provision rent deep and irreversible change to the law. On the other hand, the UK experience of human rights damages is more nuanced: though awards of damages have been modest in scale, they have embroiled the HRA in legal and political controversy.

Accordingly, the UK experience suggests the best approach is to replace section 39 with an independent cause of action and a broad remedial discretion, yet exclude the possibility of damages. In other words, a provision along the lines of the recently enacted section 40C of the Human Rights Act 2004 (ACT) is the best replacement. That approach would secure legal clarity, procedural simplicity and powerful legal protection for human rights. At the same time, it would avoid the unnecessary controversy which damages invite, avoiding the break with public law tradition imposed by the UK’s European obligations. When the Charter falls due for review in 2011, the Government would do well to follow the ACT example.

The argument will proceed as follows. The first two sections examine the history and thinking behind section 39, and analyse the meaning and effect of the text. The third section explains why the HRA is influential and examines the UK experience, before drawing on that experience to outline an appropriate replacement for section 39.

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4 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 44.
To understand Parliament’s intention in enacting such an unusual and unprecedented remedies provision as section 39, it is necessary to examine the origins of the provision. The proposal for a Victorian bill of rights came from the Justice Statement of 2004, which called for public discussion on the prospect. To lead that discussion, a Consultative Committee was appointed in April 2005, due to report in November 2005. In May 2005 (with consultation still ongoing) the Victorian Government released its Statement of Intent, setting out the Government’s position with a view to guiding debate.

The Statement of Intent set out some important parameters: a preference for civil and political rights rather than social and economic rights, a preference for a ‘parliamentary’ bill of rights, and a predilection for protecting human rights through the legislature rather than the courts. Of these, perhaps the most important was the Government’s preference ‘to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation.’ In a blunt post-scriptum to that preference, the Statement of Intent provided:

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8 Ibid.
9 Ibid.
Consistent with its focus on dispute prevention, the Government does not wish to create new individual causes of action based on human rights breaches.\textsuperscript{10}

That preference for non-litigious solutions became a major theme in the development of the \textit{Charter}.\textsuperscript{11} In subsequent statements, the Attorney-General proclaimed that, ‘[o]ur focus is not on litigation but on respecting people’s rights in the first place.’\textsuperscript{12} Clearly, the Government preferred a Charter that would promote change within the apparatus of government, rather than through lawyers and courts. The Attorney-General made clear that the courts would not be given ownership of the \textit{Charter}, borrowing instead from Canadian\textsuperscript{13} and UK\textsuperscript{14} rights literature to impress the need for a ‘dialogue between the three arms of government — the Parliament, the executive and the courts — while giving Parliament the final say.’\textsuperscript{15} There was also a concerted emphasis on human rights education and promotion, and on other ‘cooperative activities’ that would nurture a ‘human rights culture’.\textsuperscript{16}

Against this backdrop, the Consultative Committee reported back in November 2005.\textsuperscript{17} The Committee reported that an ‘overwhelming majority of submissions

\textsuperscript{10} Ibid.


\textsuperscript{13} See generally Peter Hogg and Alison Bushell, ‘The Charter Dialogue between courts and legislatures (or perhaps the Charter of Rights isn’t such a bad thing after all)’ (1997) 35 \textit{Osgoode Hall Law Journal} 75.


\textsuperscript{15} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls, Attorney-General) (‘Second Reading’) 1290.

\textsuperscript{16} Ibid, 1294-5.

\textsuperscript{17} Department of Justice (Vic), \textit{Report of the Human Rights Consultation Committee} (2005) (‘Consultative Committee Report’).
and people involved’ wanted an effective system of complaint, to hold the
government accountable where it had breached human rights.18 Although the
submissions differed on the form that compliant mechanism should take, there
was a strong general view that ‘there is little point in having a right if there is no
means of ensuring it is observed.’19 Trapped between the Statement of Intent,
and the ‘strong feeling in the community’ from ‘people who believe that “where
there is a right, there must be a remedy”,’ the Committee took the middle
ground.20 It found that to enforce the obligation on public authorities,
‘[r]emedies that now exist under Victorian law should also be applied to work
with the Charter.’21

To implement its recommendations, the Committee included section 40 in its
Draft Charter.22 That inclusion was strange, since section 40 is apparently
superfluous: section 38 declares a breach of the obligation on public authorities
‘unlawful’, which is sufficient to support an application for judicial review, or a
declaration.23 The Committee Report discloses two reasons for the inclusion.
The first is the intention to ‘provide greater clarity and certainty than the
approach in the Australian Capital Territory’24 (which, we shall see, section 39
spectacularly fails to do).25 The second is to ensure beyond doubt that the
Charter would ‘exclude the possibility of damages or other forms of monetary
compensation.’26 Whilst excluding damages this way may appear overcautious,
the Committee had been warned of the very real risk of the courts implying such

18 Ibid 115.
19 Ibid 115.
20 Ibid 114.
21 Ibid.
22 Department of Justice (Vic), Draft Charter of Human Rights and Responsibilities (2005) (‘Draft
Charter’) s 40.
23 See, eg, the operation of the comparable obligation under the Human Rights Act 1998 (UK) (section
6) in judicial review proceedings.
24 Consultative Committee Report, above n 17, 114.
25 See Part III, below.
26 Consultative Committee Report, above n 17, 114.
remedies. Similar implications had been made in the USA and (more notoriously) in New Zealand, when the Court of Appeal in Baigent’s Case found that the absence of an express remedies clause did not prevent the Court from implying a right to damages for breach of human rights.

Even if such concerns were justified, the verbosity of their guarantor was not. The Committee’s draft was less concise than it could have been, but pales in comparison to the statutory verbiage which was added in clause 39 of the bill. According to one commentator, none of those additions ‘are good ones or even neutral ones. They aren’t plain language. They’re imprecise. They’re ambiguous. They are a world of trouble.’

III SECTION 39: MEANING AND EFFECT

The product of that drafting process has been described as a ‘nightmare.’ Section 39 makes ‘awkward’ and ‘convoluted’ provision for the application of existing remedies to a breach of human rights, the inherent complexity of which is exacerbated by messy drafting and ambiguous language. Section 39 does not make clear when existing remedies can be used, or exactly what remedies are available.

A When can remedies be sought?

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27 Consultative Committee Report, above n 17, 144-146.
31 Ibid.
32 Evans & Evans, above n 11, 115.
Section 39(1) provides 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 ground that the act or decision was unlawful,' then they may seek that remedy on a ground on unlawfulness arising because of the Charter (i.e. a breach of section 38). There are divergent views as to what this ambiguous condition requires.

Evans and Evans take a broad view. They argue that when section 39(1) refers to a relief or remedy that a person 'may seek' on a non-Charter ground, it speaks in general terms, requiring that a pre-existing remedy be available for 'unlawfulness' as a matter of law. In other words, conduct that is 'unlawful' because it breaches section 38 is capable of supplying the 'unlawfulness' element of another offence. For example, the court could exercise its discretion to exclude unlawfully obtained evidence where that evidence was obtained in breach of human rights, and section 38.

On the other hand, Pound and Evans take a narrow view. They argue that 'may seek' in section 39(1) requires the existence of a viable non-Charter cause of action in the same proceedings, whereupon that same remedy may also be sought on Charter grounds. So, for example, a person seeking the exclusion of evidence must show that it was 'unlawful' on some non-Charter ground, before seeking to exclude it based on a breach of human rights. This narrow view has

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33 Evans and Evans, above n 11, 126; Evans and Evans, 'Legal Redress', above n 33, 281.
34 Evans and Evans, 'Legal Redress', above n 33, 275.
35 Evans and Evans, above n 11, 126.
37 Pound and Evans, above n 37.
apparently also been accepted by the Solicitor-General and by Ron Merkel QC. It draws support from *Sabet*, where Justice Hollingworth held that an appellant who sought orders in the nature of certiorari and injunction on natural justice grounds was also entitled to seek those remedies on *Charter* grounds. In so finding, her Honour seemed to imply that the natural justice argument was a necessary precondition to the *Charter* argument, particularly when she held it was necessary that 'the relief or remedy sought is the same.'

Narrowly interpreted, section 39 is much less useful. The *Charter* argument is reduced to an extra ground of review in an existing cause of action — a 'backstop' in case the principal challenge fails. That goes much further than the Attorney-General’s stated intention to create 'no new causes of action for breach of human rights.' Moreover, its practical effect is 'just weird.' If an applicant has a strong *Charter*-based argument for certiorari, what is the point of requiring a non-*Charter* argument to be 'tacked on'?

The extrinsic materials provide little guidance. The Explanatory Memorandum lends itself to the narrow view, when it says that section 38 unlawfulness 'may be a further ground in the cause of action.' However, the weird procedural

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39 Pamela Tate, 'The Charter of Human Rights and Responsibilities: A Practical Introduction' (Speech delivered to the Continuing Legal Education Program of the Victorian Bar, Melbourne, 7 March 2007) 29.
41 *Sabet v Medical Practitioners Board* [2008] VSC 346.
42 *Sabet v Medical Practitioners Board* [2008] VSC 346, [104].
43 *Sabet v Medical Practitioners Board* [2008] VSC 346, [105].
44 *Second Reading*, above n 15, 1294.
requirements of that view conflict with the Second Reading’s assurance that existing legal avenues were ‘available in respect of breaches of the charter in the same way that they are available for breaches of other laws...’\textsuperscript{47} It also conflicts with the Consultative Committee’s draft, which required only that a non-Charter remedy ‘would have’ been available in the same proceedings — a clear statement of the broad view.\textsuperscript{48}

If the narrow view is accepted, there is further uncertainty as to how arguable the non-Charter ground of unlawfulness must be. The Solicitor-General has argued that it must disclose a reasonable cause of action, sufficient to survive a strike-out application.\textsuperscript{49} On the other hand, Merkel argued by analogy with the federal courts’ approach to accrued jurisdiction,\textsuperscript{50} concluding that section 39 requires mere standing to argue the non-Charter point.\textsuperscript{51} If Merkel’s view is incorrect, it invites closer attention to the standing requirements of the section — for example, if an action under the Administrative Law Act 1978 (Vic) is brought, must the ‘public authority’ also be a ‘tribunal’?\textsuperscript{52}

\textbf{B \ What remedies are available?}

Section 39 fails to clarify not just when it allows remedies to be sought on Charter grounds, but also what remedies can thus be sought. This ambiguity arises because section 39(1) only facilitates remedies or relief which rely ‘on the

\textsuperscript{47} Second Reading, above n 15, 1294.
\textsuperscript{48} Draft Charter, above n 22, s 40.
\textsuperscript{49} Tate, above n 39, 29.
\textsuperscript{50} See Merkel, above n 40, 4-5; see generally Beck \textit{v} Spalla (2005) 142 FCR 555, 559; Burgundy Royale Pty Ltd \textit{v} Westpac (1987) 18 FCR 212, 219; Johnson Tiles \textit{v} Esso Aust (2000) 104 FCR 564, 598-599.
\textsuperscript{51} Merkel, above n 40, 5.
\textsuperscript{52} Pound and Evans, above n 37.
ground that the act or decision was unlawful’. Whilst this covers most administrative law remedies, many other remedies (especially criminal remedies) do not rely on unlawfulness. In other jurisdictions, such remedies as a stay of proceedings or the exclusion of evidence have been very important in protecting human rights.\(^{53}\)

That omission begs the question — is section 39(1) impliedly excluding the application of section 38 to such remedies, or merely not providing them? The latter interpretation is consistent with the Explanatory Memorandum’s assertion that section 39 merely ‘sets out guidance regarding legal proceedings in relation to an unlawful act or decision of a public authority’.\(^{54}\) On the other hand, the existence of a detailed and complex scheme for the use of the conduct mandate in ‘legal proceedings’ might suggest that Parliament intends section 39 to state the available remedies exhaustively.

If section 39 is a limiting provision, it is further unclear exactly how much it excludes. Section 39(1) only covers with those remedies that a person ‘may seek’ for a breach of the conduct mandate — does that exclude the ability of the court to award remedies, or merely the standing of an applicant to apply for them? Where a person has already applied for an order on a ground other than unlawfulness (like the application for bail in \textit{Gray v DPP}, discussed below) can the court consider a breach of the \textit{Charter} as a factor relevant to that discretion?\(^{55}\) Would section 39 go so far as to limit the interpretation mandate’s potential to make remedies available (i.e. where the court’s statutory power to

\(^{53}\) Evans and Evans, above n 11, 142-6.


\(^{55}\) Evans and Evans, above n 11, 141, 143-5.
grant a remedy is read consistently with human rights,\textsuperscript{56} or where an authorising provision is read narrowly so as to render government conduct \textit{ultra vires})?\textsuperscript{57}

In two recent cases involving the \textit{Charter}, restrictive interpretations of section 39 were rejected — but without detailed consideration or conclusive authority. In \textit{BAE Systems},\textsuperscript{58} McKenzie DP rejected the extreme submission that section 38 cannot be used in legal proceedings except in accordance with section 39.\textsuperscript{59} He considered a breach of section 38 relevant to the discretion to grant an exemption under the \textit{Equal Opportunity Act 1995} (Vic).\textsuperscript{60} In \textit{Gray v DPP},\textsuperscript{61} Bongiorno J went further and considered a breach of section 38 of the \textit{Charter} relevant to his discretion to grant bail. Indeed, Bongiorno J did not refer to section 39 at all, merely stating that the Crown's lengthy delay in bringing the accused to trial was a breach of the right in section 25(2)(c), and 'must have an effect on the question of bail'.\textsuperscript{62}

Whether limiting or declaratory, section 39 is unsatisfactory. If it is a limiting provision it is arbitrary and unfair, since it removes important remedies for the protection of human rights based on an arid legal distinction between 'unlawfulness' and other grounds. If it is merely explanatory, it leaves much unexplained — by ignoring important human rights remedies it gives no guidance as to their use, and casts doubt on their very availability.

\textsuperscript{56} Evans and Evans refer to the court's sentencing power 'to punish the offender to an extent and in a manner which is just in all the circumstances': \textit{ibid} 279.
\textsuperscript{57} Evans and Evans, 'Legal Redress', above n 277.
\textsuperscript{59} \textit{Ibid}, [70].
\textsuperscript{60} \textit{Ibid}.
\textsuperscript{62} \textit{Ibid}, [12], [18].
Not even the apparently straightforward section 39(3) is clear. Though subsection 39(3) clearly excludes damages, it inadequately defines which damages it intends to exclude. In some situations, section 39(1) might allow the Charter to supply the element of 'unlawfulness' necessary to establish a tortious right to damages — for example, the tort of malfeasance in a public office.\textsuperscript{63} In such a case, is the right to damages an entitlement 'arising because of this Charter'? \textsuperscript{64} The strong statement in section 39(3) coupled with a wealth of extrinsic materials all make the Government's antipathy to human rights damages very clear.\textsuperscript{65} Then again, section 39(4) is equally clear in preserving pre-existing rights to damages. Moreover, interpreting section 39(3) to allow damages in such cases is more consistent with the international law right to an effective remedy for human rights violations,\textsuperscript{66} and is probably more consistent with section 32 of the Charter.\textsuperscript{67} It is instructive to observe that even the most straightforward provision of section 39 is open to multiple interpretations.

IV INTERNATIONAL COMPARISON

A \textit{The Significance of the} Human Rights Act 1998 (UK)

Section 39 is without precedent amongst the major bills of rights in other jurisdictions. Comparable bills of rights tend either to make no provision for

\begin{itemize}
  \item \textsuperscript{63} Evans & Evans. Another good example is the right to damages in lieu of an injunction, available under the \textit{Supreme Court Act 1986 (Vic)} s 38: Evans and Evans article, 275.
  \item \textsuperscript{64} Evans and Evans, 'Legal Redress', above n 33, 276.
  \item \textsuperscript{65} \textit{Second Reading}, above n 15, 1294; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28; \textit{Statement of Intent}, above n ?, 1.
  \item \textsuperscript{66} \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2.
  \item \textsuperscript{67} \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 32(1).
\end{itemize}
remedies,\textsuperscript{68} or to create an independent cause of action with a broad remedial discretion.\textsuperscript{69} In some jurisdictions, there were good reasons for taking a different approach: the constitutional bills of rights in Canada,\textsuperscript{70} South Africa\textsuperscript{71} and the United States\textsuperscript{72} all have very different legal effects to those sought in Victoria, and the New Zealand statute's minimalist approach provoked a notorious example of judicial invention in \textit{Baigent's Case}.\textsuperscript{73}

That the Charter broke away from the example set by the \textit{HRA}, on the other hand, is somewhat more remarkable. The two jurisdictions share strong similarities and historical legal ties, and in several important respects the \textit{Charter} took its lead from the \textit{HRA}:\textsuperscript{74} witness the interpretation mandate,\textsuperscript{75} the declaration of incompatibility\textsuperscript{76} and the obligation on public authorities.\textsuperscript{77} It is therefore remarkable that the \textit{Charter} abandoned sections 7-8 of the \textit{HRA}, which enforce the obligation on public authorities through a free-standing cause of action and a broad remedial discretion.

\textsuperscript{68} See, eg, \textit{Bill of Rights Act 1990 (NZ); United States Constitution; Human Rights Act 2004 (ACT)} as originally enacted.


\textsuperscript{70} \textit{Constitution Act 1982}, being Schedule B to the \textit{Canada Act 1982 (UK)} c 11, Part 2.

\textsuperscript{71} \textit{Constitution of the Republic of South Africa 1996} Chapter 2.

\textsuperscript{72} \textit{United States Constitution}, Amendments 1-10.


\textsuperscript{74} Evans and Evans, above n 11, 218.

\textsuperscript{75} \textit{Human Rights Act 1998 (UK)} s 3; \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 32.

\textsuperscript{76} \textit{Human Rights Act 1998 (UK)} s 4; \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 36.

\textsuperscript{77} \textit{Human Rights Act 1998 (UK)} s 6; \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 38.
Instead, the Victorian Parliament chose section 39. The history of that section suggests they were motivated by a combination of factors: their prejudice against litigious human rights models, their concerns that an independent cause of action would invoke excessive legal activity, and their apprehension of the vast legal change and acute political headaches that an open remedies provision would bring. Instead they introduced a section so baffling, confusing, 'constrained and convoluted' as to beg the question — could the UK alternative be any worse?

The affinities between Victoria and the UK also make the IIRA experience relevant to redrafting section 39. Hence as we evaluate section 39 against the UK experience, we should also draw lessons for the way ahead. To that end, two aspects of the UK experience are particularly noteworthy: the impact of sections 7-8 on the courts and the law, and the ramifications of providing damages for breaches of human rights.

B A Lawyers' Picnic?

The introduction of the Human Rights Act caused some to worry aloud that a flood of unmeritorious litigation would imminently swamp the courts. Several years later, the Lord Chancellor remembered, '[t]here were fears that over-enthusiastic lawyers would make excessive use of the Act,' generating chaos in

78 See Part II, above.
79 Evans and Evans, 'Legal Redress', above n 33, 281; see Part III, above.
81 Lord Irvine of Lairg, above n 81, 312.
the courts and inaugurating ‘the rule of lawyers’.\textsuperscript{82} However, after a few years of the HRA in operation it was clear that ‘such fears were well wide of the mark.’\textsuperscript{83} An extensive survey published one year after the HRA commenced found that although certain areas of the law were frequently challenged,\textsuperscript{84} the number of cases being brought was ‘relatively limited’.\textsuperscript{85} That survey reported 297 cases in which the HRA was raised — a mere fraction of the annual caseload of 30 000 criminal cases and 160 000 civil cases — and found that 233 of these awarded no remedy.\textsuperscript{86} That low caseload has remained relatively stable over the years: in 2007 379 reported cases contained human rights arguments, falling to 327 in 2008.\textsuperscript{87}

Predictions that cases would become longer and more complex were proven to be similarly misplaced.\textsuperscript{88} This concern was particularly acute since the HRA gave human rights jurisdiction to every English court, including magistrates.\textsuperscript{89} However, the 2002 survey reported a ‘modest’ increase in the workload of the lower courts, largely due to magistrates providing written reasons for the first time.\textsuperscript{90} In 2002 and in later years, it appeared that most cases involving human rights arguments took place in higher courts — the Department of Constitutional Affairs reported in 2005 that of 354 House of Lords cases, one-third involved the HRA.\textsuperscript{91} Such was the paucity of the impact on lower courts that some queried

\textsuperscript{82} Ibid, 311.
\textsuperscript{83} Ibid, 312.
\textsuperscript{85} Ibid, i.
\textsuperscript{86} Ibid, 44.
\textsuperscript{88} Lord Irvine of Lairg, above n 81, 311.
\textsuperscript{89} Lord Chief Justice Woolf, above n 81, 4.
\textsuperscript{90} Raine & Walker, above n 85, i.
whether the efforts taken to train judges in human rights arguments might have been ‘excessive’.\(^{92}\)

In England, then, providing an independent cause of action for breach of human rights did not lead to a ‘flood’ or even a ‘significant increase’ in the volume of litigation.\(^{93}\) Rather, Lord Irvine described the ‘general impression that has emerged’ as being one where ‘human rights arguments are mostly used to add to, bolster, or put a fresh slant on, pre-existing lines of challenge.’\(^{94}\) That is hardly surprising. After all, section 7 requires applicants to be ‘victims’ of an alleged breach and imposes a one year limitation period,\(^{95}\) compounding the standard disincentives of cost, time and trauma.

Despite this modest increase in litigation, there is no doubt that the HRA has wrought deep changes to English law. A substantial body of human rights law has developed, infiltrating the public law.\(^{96}\) In the name of human rights consistency, the ‘Wednesbury’ standard of judicial review has been replaced by a more stringent ‘proportionality’ standard which is far more attentive to the merits of a decision.\(^{97}\) The common law has been developed in a human rights-consistent manner, even in purely private matters,\(^{98}\) and recent years have

\(^{92}\) Raine & Walker, above n 85, 65.

\(^{93}\) Ibid, 48.

\(^{94}\) Lord Irvine of Lairg, above n 81, 5.


\(^{96}\) DCA Review, above n 92, 13.


increasing seen the HRA used in commercial disputes. The Court of Appeal has pointed out that even in the many cases where HRA arguments and applications are rejected, the courts are now obliged to consider legal issues in light of human rights. Though some have belittled this development, others have applauded it as 'engendering a stronger human rights culture within the courts.'

The HRA has also had a significant impact on government policy and legislation. Claims that the constitutional balance has not been 'significantly altered' underestimate the courts’ newfound capacities to influence legislation and policy. The courts have visibly checked the executive in a number of high-profile cases concerning the terrorism, leading even critics to acknowledge that they have been a 'major irritant' for the government. In the Belmarsh Case and in JJ, the House of Lords declared important components of recently introduced counter-terrorism legislation to be incompatible with the HRA, and quashed certain executive orders made thereunder. It is a measure of the obstacle thus posed that the decisions were not well received by the Government, eliciting criticism from the Prime Minister himself.

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99 Frances Gibb, above n 88.
100 DCA Review, above n 92, 10; Raine and Walker, above n 85, 44.
103 Raine & Walker, above n 85, i.
104 DCA Review, above n 92, 10.
105 Leigh and Masterman, above n 98, 123.
107 A v Home Secretary [2005] 2 AC 68 ('Belmarsh Case').
108 Secretary of State for the Home Department v JJ [2007] UKHL 45.
It is, however, important to note that these far-reaching legal changes were largely not the product of the HRA’s remedies provision. Most of the legal changes referred to could easily have occurred through existing causes of action. Legal challenges against the government have mostly been through judicial review,110 and the arguments encouraging Lord Woolf’s celebrated ‘human rights culture’ can easily be made in existing proceedings. Moreover, significant developments like the ‘proportionality’ standard of review and the horizontal effects of the HRA have been caused, not by sections 7 or 8, but by the interpretation of legislation111 and the courts’ obligations as public authorities.112 Indeed, it appears that the requirement of ‘proper consideration’ in section 38 will produce a proportionality standard of review under the Charter.113

Sections 7-8 have not then, of themselves, given rise to many substantial legal developments. Apart from awards of damages (see below), the only noteworthy legal change that can conceivably be attributed to section 8 is the courts’ expanded power to grant injunctions.114 If these developments have not or will not take place under the Charter already, the introduction of an independent cause of action and a broader remedies provision will not change that. It appears that the drafters of section 39 were, in this particular concern, misplaced.

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111 Human Rights Act 1998 (UK) s 3.
112 Human Rights Act 1998 (UK) s 6(3)(a); see generally Leigh & Masterman, above n 98, 235-262.
The truly revolutionary component of section 8 is the introduction of damages as a remedy for breach of human rights. When the Government first argued for the HRA it focussed on the importance of 'bringing rights home' — removing the need to visit the European Court of Human Rights by making its remedies available in domestic courts.\(^ {115}\) Hence, devised 'in the shadow of Strasbourg',\(^ {116}\) section 8 made provision for a classic Strasbourg remedy when it gave the courts a discretion to award damages for a breach of human rights.

In doing so, it went against the long-established tradition in English public law that damages should not generally be available for a breach of human rights. Until the passage of the HRA, the tort of misfeasance in public office was the only public law avenue by which damages could be awarded.\(^ {117}\) The general position was that the government was liable in damages only for private law wrongs, like trespass or breach of contract.\(^ {118}\) The resulting break with tradition led to some confusion when the HRA was first enacted, as several authors speculated that sections 7(1)(a) and 8 together created a kind of 'constitutional tort'.\(^ {119}\)

On top of that legal controversy came a great deal of political controversy, which still persists. Conservatives MPs like Michael Howard have railed against a


\(^ {116}\) Leigh and Masterman, above n 98, 293.

\(^ {117}\) United Kingdom, Parliamentary Debates, House of Lords, 24 November 1997, col 854 (Lord Lester of Herne Hill).


culture of compensation ‘running riot’ under the HRA, and in a 2004 article David Davis MP lamented a nationwide ‘compensation culture’, blaming it on the ‘human rights industry’. Such criticism has real damaging effect on public perceptions of the HRA, and potentially on the very existence of the Act. The Conservative Party is committed to repealing the HRA and replacing it with a ‘British Bill of Rights’ upon winning the next election.

Predictions of large and regular damages awards have not, however, been met by reality. The courts have been extremely restrained in their approach to damages, awarding them for a breach of human rights in only three cases since the HRA was introduced. Section 8(3) expresses an intention to restrict the award of damages in all but special cases, and the Court of Appeal and House of Lords delivered strong messages to that effect in Anufrijeva and Greenfield. In Anufrijeva, Lord Woolf CJ asserted a need to balance the rights of the individual against the broader public in awarding damages, stressing that damages were a remedy of ‘last resort’. In Greenfield, Lord Bingham held that a declaration would suffice in most cases, suggesting that the court’s primary concern should be to protect human rights rather than compensate their breach.

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120 Leigh and Masterman, above n 98, 280-1.
125 R (on the application of Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673.
127 R (on the application of Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673, 677.
This judicial reluctance may well betray a deeper resistance to human rights damages; for as Richard Clayton has pointed out, such a restrictive approach is not strictly required by section 8(3).\textsuperscript{128} It may be that courts are deterred by the limited terms of the provision itself,\textsuperscript{129} or the need to refer to the messy European jurisprudence on damages.\textsuperscript{130} Alternatively, the judges might be adhering to old suspicions — what two authors have dubbed an 'instinctive [hostility] to the idea that public funds are better spent on compensating those who have been temporarily wronged, rather than in properly executing the legislative purpose in the future.'\textsuperscript{131} Lord Chief Justice Woolf endorsed this restrained approach when he said 'it is my belief that we can and should ensure that this remains the situation.'\textsuperscript{132} He adverts to some very good reasons for restricting such awards:

The ECHR is all about securing our civil liberties and not promoting a public law damages culture. The primary result that the Act should seek to achieve is the reinforcement of standards of public administration.\textsuperscript{133}

\textbf{D \hspace{1cm} A Replacement Draft}

When the \textit{Charter} falls due for review 'on or before' October 2011,\textsuperscript{134} section 39 should be redrafted. Compared with its UK equivalent it is convoluted and

\begin{itemize}
  \item \textsuperscript{129} \textit{Human Rights Act 1998 (UK)} s 8(3).
  \item \textsuperscript{131} Leigh and Lustgarten, above n 120, 527.
  \item \textsuperscript{132} Lord Chief Justice Woolf, above n 81, p 2.
  \item \textsuperscript{133} Lord Woolf, 'The Human Rights Act and Remedies' in Mads Andenas and Duncan Fairgrieve (eds), \textit{Judicial Review in International Perspective} (2000) 433.
  \item \textsuperscript{134} \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 44.
\end{itemize}
constrictive, messily drafted and hopelessly ambiguous. Based on the HRA experience, the concerns which led Parliament to disdain its example were misplaced. However, the HRA remedies provision has not been without its problems. Whilst UK experience suggests section 39 was a mistake, it does not necessarily follow that it should be replaced with its HRA equivalent. Rather, it suggests that the best replacement for section 39 is in fact a provision along the lines of section 40C of the Human Rights Act 2004 (ACT).

Section 40C was introduced in 2007 and commenced on 1 January 2009,135 along with a direct obligation on public authorities,136 as part of a mandated one-year review of the Act.137 The new sections were omitted based on fears similar to those held in Victoria, including ‘the risk of substantial claims in the early days of the Human Rights Act’.138 However, the ACT recognised that in not enacting a direct right of action, it stood alone amongst human rights jurisdictions.139 Building on the recently enacted Victorian Charter, they enacted a provision that effectively synthesised the UK and Victorian remedies provisions. Section 40C provides a free standing cause of action, and gives the court a broad remedial discretion to grant ‘the relief it considers appropriate except damages.’140

In providing an independent cause of action and a broad and flexible remedies provision, the UK experience suggests that section 40C will be simpler and less hazardous than the half-way house of section 39. It will not induce a deluge of vexatious litigation, or a legal revolution (beyond that which the Charter already represents). Moreover, it avoids the remedial and procedural limitations of

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135 Human Rights Amendment Bill 2007 (ACT).
136 Human Rights Act 2004 (ACT) s 40B.
137 Human Rights Act 2004 (ACT) s 41.
139 Ibid 24.
140 Human Rights Act 2004 (ACT) s 40C.
section 39, providing a cause of action that can be raised whenever human rights are breached, that will yield whatever remedy is 'appropriate'. Like section 8 of the HRA, it is hard to imagine a situation in which it could not afford an appropriate form of legal redress.\textsuperscript{141}

Yet the UK experience also sounds some important cautionary notes about allowing damages to be awarded for a breach of human rights. The meagre awards of damages made under the HRA have induced serious political criticism, playing their part in attracting major opposition to the Act. It is very possible that Australian politicians would be similarly incensed by such modest awards. Moreover, there is no guarantee that Australian courts would reflect the modesty of their English counterparts, rather than the zeal of their New Zealand neighbours.\textsuperscript{142} Unlike the UK, Victoria has no European commitments, and can opt out of a damages provision.

There are also sound reasons in principle against human rights damages. Australian public law has deliberately avoided the prospect of public law damages,\textsuperscript{143} perhaps recognising that compensation for the wronged individual leaves the taxpayer with the bill. Moreover, allowing human rights damages risks forgetting the first purpose of a remedies provision — to protect human rights in the first place.\textsuperscript{144} In the words of Leigh and Lustgarten:

\begin{quote}
Redress is always second best. The most effective form of law is one that prevents violations, not attempts some inevitable inadequate repair after the
\end{quote}

\textsuperscript{141} United Kingdom, \textit{Parliamentary Debates}, House of Lords, 18 November 1997, col 479 (Lord Irvine of Lairg).

\textsuperscript{142} See \textit{Simpson v Attorney-General} [1994] 3 NZLR 667 (Baigent's case).

\textsuperscript{143} \textit{Park Oh Ho v Minister for Immigration and Ethnic Affairs} (1988) 14 ALD 787.

\textsuperscript{144} To 'focus on practical outcomes rather than monetary compensation.' \textit{Second Reading}, above n 15, 1294.
fact. Compensation, or its threat, has an important role in focussing the minds of public authorities on individuals' Convention rights. However, protection rather than recompense should be the primary goal of judicial remedies.\textsuperscript{145}

Hence the UK experience endorses the exclusion of damages in section 40C(4). As lawyers we may found this frustrating, and as humans we may lament the uncompensated victim, but as politicians and policy-makers the Parliament has every reason to secure the popularity and policy balance that the Charter has so delicately earned.

Thus section 40C learns the lessons of the HRA, providing straightforward avenues of redress, in succinct and intelligible language. Of course, it is by no means perfect. In requiring that proceedings be brought in the Supreme Court,\textsuperscript{146} for example, it seems to impose unnecessarily on litigants of less ample means,\textsuperscript{147} who are supposed to be the principal beneficiaries of a human rights Act.\textsuperscript{148} Yet in broad outline, the UK experience suggests it is the best candidate to replace section 39 in 2011.

\section*{V CONCLUSION}

When it enacted the 'nightmarish' section 39, the Victorian Parliament excused its distaste for litigation by arguing it wanted to protect human rights in the first place — by promoting a culture of human rights, and ingraining them in government and the legislature. What the Government failed to note was that strong and effective legal remedies against public authorities are an integral part

\textsuperscript{145} Leigh & Lustgarten, above n 120, 23.
\textsuperscript{146} Human Rights Act 2004 (ACT) s 40C(2)(a).
\textsuperscript{147} Evans & Evans, above n 11, 121.
of achieving that change, and a crucial guarantee of those rights in lieu of
government compliance. It forgot that mistrust of government which drove
public and administrative law to develop legal remedies over the centuries,
enabling the courts to hold government to its promises through law.

We have seen how, in a Charter substantially modelled on the UK HRA, concern
about various forms of legal revolution led to an entirely new remedies provision
being devised. We have also seen how unsatisfactory that new provision is:
messily drafted, ambiguous in effect, and potentially suffocating in its provision
of legal redress for human rights breaches. By examining the UK experience, we
have seen that the more straightforward remedies provision in the HRA did not
prompt the bedlam that the drafters of section 39 feared. To the contrary, the
UK experience suggests that a broad and free-standing remedies provision
causes much less legal and political headaches — provided its provision for
damages is removed. Accordingly, section 39 should be replaced by a provision
in the mould of the ACT's section 40C. If the Charter is to be more than an 'empty
statement', such effective and appropriate legal remedies are essential.