CASE NOTE

BARE V INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

ONE STEP FORWARD, ONE STEP BACK: THE VICTORIAN CHARTER IN BARE V INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

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Bare v Independent Broad-Based Anti-Corruption Commission is a landmark in the history of Victoria’s Charter of Human Rights and Responsibilities. The Court of Appeal’s recent decision has significant implications for future litigation under the Charter. First, while not binding on this point, Bare considered in detail whether a breach of s 38(1) of the Charter by a public authority constitutes a jurisdictional error. Second, the Court adopted a cautious approach to the use of international law to construe the scope of Charter rights. This departs from previous Charter case law. Third, Bare demonstrates the Charter’s power to have a normative influence on the behaviour of public authorities, by requiring them to give proper consideration to human rights. Finally, Bare illustrates how the Administrative Law Act 1978 (Vic) augments the Charter’s power as a human rights instrument.

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I  INTRODUCTION

Bare v Independent Broad-Based Anti-Corruption Commission (‘Bare’)\(^1\) is the most significant case brought under the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘Charter’) since the High Court’s decision in Momcilovic v The Queen (‘Momcilovic’).\(^2\) This case note will critically examine the Victorian Court of Appeal’s decision in Bare and highlight its practical implications for litigators looking to use the Charter in court.

Bare has several significant consequences for litigators. First, while not binding on this question, Bare considers in detail whether a breach of s 38(1) of the Charter by a public authority constitutes a jurisdictional error. Second, the Court adopts a very cautious approach to the use of international law to construe the scope of Charter rights. Litigators will need to take care in their use of international legal materials in future cases. Third, the Court’s finding of a breach of s 38(1) shows that the Charter can be a powerful instrument for ensuring that human rights are taken into account by public authorities. Finally, the case illustrates how the Administrative Law Act 1978 (Vic) (‘Administrative Law Act’) bolsters both claims of unlawfulness and access to remedies under the Charter.

\(^1\) (2015) 326 ALR 198.
\(^2\) (2011) 245 CLR 1.
II Facts

The appellant, Nassir Bare, migrated from Ethiopia to Australia with his family in 2004. Bare alleged that, on 16 February 2009, police assaulted and racially vilified him during a random traffic stop. According to Bare, he was handcuffed, knocked to the ground, sprayed in the face with capsicum spray and kicked in the ribs. His head was pushed repeatedly into the gutter, chipping his teeth and cutting his jaw. During the assault, one of the police officers told Bare: ‘you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars’.

On 3 February 2010, Bare complained to the Office of Police Integrity (‘OPI’) about the assault. Bare claimed that the police officers’ conduct breached his right under s 10(b) of the Charter not to be treated or punished in a cruel, inhuman or degrading way.

Bare requested an independent investigation of his complaint by the OPI, rather than an internal investigation by Victoria Police. The OPI was an independent body tasked with investigating serious police misconduct, and ensuring that police have regard to the human rights set out in the Charter. It was established in part to address the concern that police investigations into police wrongdoing are compromised by the tendency ‘to close ranks and cover up misconduct.

Under s 40(4)(b)(i) of the Police Integrity Act 2008 (Vic), the Director of the OPI had a discretion to investigate a complaint if he considered it to be ‘in the public interest’ to do so. The ‘public interest’ encompassed matters such as

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3 The facts and legal grounds set out in this Part are taken primarily from Williams J’s judgment at first instance: Bare v Small [2013] VSC 129 (25 March 2013) [1]–[41] (‘Small’).
4 Ibid [3].
5 Police Integrity Act 2008 (Vic) s 9, as repealed by Independent Broad-Based Anti-Corruption Commission Amendment (Investigative Functions) Act 2012 (Vic) s 16.
6 Ibid ss 6(2), 8(1), as repealed by Independent Broad-Based Anti-Corruption Commission Amendment (Investigative Functions) Act 2012 (Vic) s 16. See also Victoria, Parliamentary Debates, Legislative Assembly, 13 March 2008, 848–9 (Bob Cameron, Minister for Police and Emergency Services).
whether the complaint raised systemic issues, and the resources available to the OPI.8

Bare contended that, under s 10(b) of the Charter, he had an implied right to an effective, independent investigation of his mistreatment. The Director would act incompatibly with this implied right, contrary to s 38(1) of the Charter, if he declined to investigate and instead referred the complaint to an internal investigation. Section 38(1) states that it is unlawful for a public authority to act in a way that is incompatible with a human right (‘the substantive obligation’) or, in making a decision, to fail to give proper consideration to a relevant human right (‘the procedural obligation’).

On 19 October 2010, the Director’s delegate decided that Bare’s complaint should not be investigated by the OPI. Bare sought judicial review of this decision in the Supreme Court of Victoria.9 Bare claimed that the decision was unlawful both on common law grounds, and under s 38(1) of the Charter. Bare argued that the delegate had acted in a way that was incompatible with his implied right to an effective investigation under s 10(b). Bare also argued that the delegate had failed to give proper consideration to his express rights under ss 10(b) and 8(3) of the Charter. Section 8(3) provides that ‘[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination’. Bare’s application was dismissed at first instance.10

III KEY CHARTER ISSUES ON APPEAL

Bare’s appeal presented four important questions concerning the Charter.11 The first question was whether a breach of s 38(1) of the Charter constituted a jurisdictional error (‘the jurisdictional error issue’). The second question was whether there was an implied procedural right to an effective investigation under s 10(b) of the Charter (‘the implied right issue’). If s 10(b) contained such an implied right, Bare argued, the delegate’s decision was incompatible with that right, in breach of the substantive obligation under s 38(1). The third question was whether the delegate failed to give proper consideration to Bare’s express rights under ss 8(3) and 10(b) when deciding not to investigate his complaint, in breach of the procedural obligation under s 38(1) (‘the proper consideration issue’). Bare thus sought to challenge the delegate’s

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decision under both the substantive and procedural limbs of s 38(1). The fourth question was whether Bare was entitled to a remedy if the delegate's decision was unlawful under s 38(1) ('the remedy issue').

IV THE JURISDICTIONAL ERROR ISSUE

A Background

There is a jurisdictional error of law when a decision-maker acts outside the limits of his or her power. A finding of jurisdictional error has at least two important implications. First, a person may seek a broader range of remedies. Orders in the nature of prohibition and mandamus are only available for jurisdictional error. Orders in the nature of certiorari are also usually limited to jurisdictional error, unless the error appears on the face of the decision-maker's record. Second, judicial review by the High Court and the state Supreme Courts for jurisdictional error is constitutionally entrenched.

In Bare, the jurisdictional error issue arose in connection with this second implication. Section 109 of the Police Integrity Act 2008 (Vic) contained a privative clause which purported to oust judicial review of the delegate's decision. If s 109 of the Act applied to the decision, Bare could only escape its reach by establishing that a breach of s 38(1) of the Charter constituted jurisdictional error, review for which is constitutionally entrenched.

In separate judgments, Tate JA and Santamaria JA held that s 109 did not apply to the delegate's decision. This meant that the delegate's decision could

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12 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 141 [163] (Hayne J). See also Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, 571–5 [66]–[77] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell J) ('Kirk').
15 See ibid.
be challenged on the basis of either jurisdictional or non-jurisdictional error of law. Consequently, their Honours did not need to decide the jurisdictional error issue. Warren CJ dissented on the application of s 109, and so was required to decide this issue.

B Warren CJ’s Reasoning

Warren CJ was unconstrained by authority. In Director of Housing v Sudi, Bell P implied that Charter unlawfulness constituted jurisdictional error. The Court of Appeal subsequently overturned Bell P’s decision on other grounds, without expressing an opinion on the jurisdictional error issue.

Applying the High Court’s approach in Project Blue Sky Inc v Australian Broadcasting Authority, Warren CJ held that the relevant test was whether the legislature intended that non-compliance with s 38(1) would lead to invalidity. Her Honour concluded, on the basis of the text, context and purpose of s 38(1), that Parliament did not intend a breach to constitute jurisdictional error.

With respect to text, Warren CJ noted that the word ‘unlawful’ does not necessarily mean ‘invalid’. More importantly, Warren CJ held that the s 38(1) obligations are ‘limited and imprecise’, and thus lack the ‘rule-like quality’ indicative of a jurisdictional limit on power. The substantive obligation requires a public authority to balance competing rights and interests in accordance with s 7(2) of the Charter. The procedural obligation

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20 Ibid 303 [378], 304 [381] (Tate JA), 364 [600] (Santamaria JA).
21 Ibid 221–30 [74]–[115]. Because this case note is concerned primarily with the Charter questions addressed in Bare, I will not examine the divergent reasoning of Warren CJ, Tate JA and Santamaria JA on the construction of s 109 of the Police Integrity Act 2008 (Vic).
22 [2010] VCAT 328 (31 March 2010) [121].
23 Director of Housing v Sudi (2011) 33 VR 559, 569 [49] (Warren CJ), 596 [214] (Weinberg JA) (‘Sudi’).
25 Bare (2015) 326 ALR 198, 238 [145].
26 Ibid 236 [139].
27 Ibid 238 [146], citing Project Blue Sky (1998) 194 CLR 355, 393 [100]; see also at 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ).
29 Bare (2015) 326 ALR 198, 238 [146] (Warren CJ). This argument presumes that the rights protected by s 38(1) of the Charter are subject to reasonable limitation in accordance with
is a ‘common or garden’ activity for which there is ‘no formula’.30 The character of these obligations tells against a breach of s 38(1) resulting in invalidity.31

With respect to context, Warren CJ held that ‘unlawful’ should be given a consistent meaning across ss 38(1) and 39(1) of the Charter.32 The word ‘unlawful’ does not appear to be limited to jurisdictional error in s 39(1), and thus should not be interpreted to denote jurisdictional error in s 38(1).33

With respect to purpose, Warren CJ held that the Charter was directed to ensuring that ‘human rights are observed in administrative practice and the development of policy’, rather than providing an avenue for judicial review by the courts.34 The threat of invalidity for breach of s 38(1) was not the only way to achieve this purpose.35 There remain a range of remedies available to a plaintiff for s 38(1) unlawfulness, including declarations, injunctions and orders in the nature of certiorari for error on the face of the record. The interpretive clause in s 32(1) is another mechanism by which the Charter advances this purpose.36 For these reasons, Warren CJ held that this interpretation would not remove ‘the normative force of the Charter’.37

Finally, Warren CJ noted that, if every breach of s 38(1) led to invalidity, all decisions by public authorities would require ‘Charter clearance in some form’.38 This would result in public inconvenience and delays in governmental decision-making.39 The text of s 38(1) ‘would have to be resolutely clear to infer such an outcome.40


30 Bare (2015) 326 ALR 198, 238 [146], quoting Castles v Secretary, Department of Justice (2010) 28 VR 141, 184 [185] (Emerton J) (‘Castles’).

31 Bare (2015) 326 ALR 198, 238 [146] (Warren CJ).

32 See ibid 239–40 [150]–[151].

33 See ibid.

34 Ibid 239 [149], quoting Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).


36 Ibid.

37 Ibid.

38 Ibid 240 [151].


For Warren CJ, this was sufficient to dispose of Bare’s appeal.\textsuperscript{41} The privative clause protected the delegate’s decision.\textsuperscript{42} Even if the delegate had breached s 38(1), the error was not jurisdictional, and thus not susceptible to judicial review.\textsuperscript{43}

\textbf{C Tate JA and Santamaria JA’s Reasoning}

Although Tate JA and Santamaria JA did not need to decide this issue,\textsuperscript{44} both made substantial comments in obiter. Tate JA observed that there were ‘powerful considerations on both sides of the argument’.\textsuperscript{45} Her Honour noted only one argument in favour of,\textsuperscript{46} and at least three arguments against,\textsuperscript{47} Bare’s submission that a breach of s 38(1) was a jurisdictional error. Santamaria JA was content to ‘offer some observations’ on the parties’ contentions.\textsuperscript{48} His Honour largely echoed Warren CJ’s reasoning on this issue, raising no arguments in favour of, and at least four arguments against, Bare’s submission.\textsuperscript{49} The balance of Tate JA and Santamaria JA’s comments thus weighed in favour of Warren CJ’s conclusion.\textsuperscript{50} Where relevant, these comments will be examined below.

\textbf{D Analysis}

There are several important points to draw out of the Court’s consideration of this issue. First, Warren CJ’s claim that the s 38(1) obligations are ‘limited and imprecise’\textsuperscript{51} is concerning for human rights litigators. It suggests that human
rights are indeterminate and uncertain, a critique often mobilised by those who oppose legal frameworks for the protection of human rights.  

Second, although Warren CJ held that the need for ‘Charter clearance’ of public decision-making ‘would place a substantial burden on the [s]tate’, it might be argued that this was the very object of the Charter. The Charter’s main purpose is to ‘protect and promote human rights’, by ‘imposing an obligation on all public authorities’ to act compatibly with human rights. The second reading speech contemplates public authorities dealing with ‘difficult issues of balancing competing rights and obligations in carrying out their functions’. It states that s 38(1) was intended to ‘ensure that human rights are observed in administrative practice’.  

Third, Warren CJ’s contextual argument based on s 39(1) requires closer examination. Santamaria JA’s reasoning was very similar to that of Warren CJ. However, their Honours’ analysis is brief and, with respect, not entirely clear. Section 39(1) sets out the Charter’s remedial scheme. It states that:  

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

This provision has been a source of consternation. In Director of Housing v Sudi (‘Sudi’), Weinberg JA described s 39(1) as ‘convoluted and extraordinarily difficult to follow’.  

Notwithstanding the proximity of s 39(1), the Supreme Court has progressively clarified its operation. As noted by Maxwell P in Sudi, s 39(1) ‘has an operation which is both conditional and supplementary.’ A person must first satisfy the ‘may seek’ condition: that, independently of the Charter, he or she ‘may seek’ any relief or remedy in respect of an act or decision of a public

53 Bare (2015) 326 ALR 198, 239–40 [151].  
54 Charter s 1(2)(c) (emphasis added).  
55 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).  
56 Ibid (emphasis added).  
58 (2011) 33 VR 559, 596 [214].  
59 Ibid 580 [96].
authority on the ground that the act or decision was unlawful’.\footnote{Ibid, quoting Charter s 39(1) (emphasis added).} If this condition is satisfied, the person may seek that relief or remedy on a ground of Charter unlawfulness, such as a failure to give proper consideration to human rights.\footnote{Sudi (2011) 33 VR 559, 580 [96] (Maxwell P), citing Charter s 39(1).}

The contextual argument put by Warren CJ and Santamaria JA in Bare\footnote{Bare (2015) 326 ALR 198.} rests on the following propositions:

1. s 39(1) of the Charter uses the words ‘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’;

2. under Victorian law, a person may seek relief in respect of a public authority’s act or decision on the ground that the act or decision was unlawful by relying on a jurisdictional error, a non-jurisdictional error, or a combination of both;\footnote{See ibid 239 [150] (Warren CJ), 371–2 [621] (Santamaria JA).}

3. therefore, the word ‘unlawful’ in s 39(1) is ‘used to include errors of law that do not result in invalidity’;\footnote{Ibid 371 [621] (Santamaria JA) (emphasis in original); see also at 234 [133], 239 [150] (Warren CJ).}

4. therefore, ‘there is no basis for presuming that the same term, when used in s 38(1), relates solely to errors that are jurisdictional’;\footnote{Ibid 372 [621] (Santamaria JA); see also at 234 [133], 239 [150] (Warren CJ).} and

5. therefore, the word ‘unlawful’ in s 38(1) denotes non-jurisdictional error.

With respect, this reasoning is unconvincing. The jurisdictional error issue arises because the word ‘unlawful’ in s 38(1) is ambiguous. But as the third proposition accepts, the word ‘unlawful’ is equally ambiguous in s 39(1). It is used to include both jurisdictional and non-jurisdictional errors of law. Contrary to the fifth proposition, the word ‘unlawful’ in s 39(1) provides no basis for presuming that the same word in s 38(1) relates solely to errors that are non-jurisdictional.

Tate JA and Santamaria JA noted a different contextual argument for the same conclusion. Section 39(1) makes Charter unlawfulness ‘supplemen-
tary’. It seems incoherent to claim that Parliament intended for a breach of s 38(1) to lead to invalidity, but also stipulated through s 39(1) that ‘a breach of s 38(1) would not warrant relief unless some other ground of unlawfulness could be found.

This argument relies on a particular view of s 39(1). The precise operation of s 39(1) is yet to be resolved. Courts have held that the ‘may seek’ condition is satisfied if a person in fact exercises a right to seek relief in respect of a public authority’s act or decision, on a non-Charter ground of unlawfulness.

The non-Charter ground does not need to be successful, but it may need to be sufficiently arguable to survive an application to strike out. This is the ‘factual availability’ interpretation of s 39(1).

The alternative, ‘abstract availability’ interpretation is broader. On this interpretation, a person may seek relief on a ground of Charter unlawfulness provided that the act or decision is, in principle, amenable to judicial review, and the person has standing and brings the claim in the correct forum. There is no need for an arguable non-Charter ground of unlawfulness. The ‘abstract availability’ interpretation has not yet been applied by the courts.

The contextual argument put by Tate JA and Santamaria JA relies on the ‘factual availability’ interpretation of s 39(1). Indeed, Santamaria JA appeared to endorse this interpretation. His Honour stated that s 39(1) provides that ‘if, apart from the Charter, a person has “grounds” for any relief or remedy, those grounds may be supplemented by “a ground of unlawfulness arising because

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66 Ibid (2015) 308 [392] (Tate JA), citing Sudi (2011) 33 VR 559, 580 [96] (Maxwell P); see also at 373 [625] (Santamaria JA).
67 Bare (2015) 326 ALR 198, 309 [392]; see also at 309 [393] (Tate JA), 373 [625] (Santamaria JA).
68 Ibid 310 [396] (Tate JA).
70 Patrick’s Case (2011) 39 VR 373, 438–9 [297] (Bell J); Debono [2013] VSC 407 (1 February 2013) [82] (Kyrou J).
73 See Moshinsky, above n 72, 96, quoted in Bare (2015) 326 ALR 198, 309–10 [394] (Tate JA).
of this Charter”. Tate JA expressly declined to determine whether this interpretation was open, and noted that the proper construction of s 39(1) remained unresolved. The force of this argument is contingent on this question.

Following Bare, there is still no binding Court of Appeal authority on the jurisdictional error issue. While Warren CJ’s judgment and Tate JA and Santamaria JA’s obiter have persuasive force, the issue remains open for a future court.

In any case, the practical consequences for litigators may be limited. There remain powerful remedies available for non-jurisdictional error, and thus for Charter unlawfulness on Warren CJ’s interpretation. As discussed in Part VII below, the Administrative Law Act makes orders in the nature of certiorari readily available for non-jurisdictional error in Victoria.

Moreover, Parliament can already oust the Charter through an override declaration under s 31 of the Charter. Section 31 empowers Parliament to declare that a statutory provision is incompatible with the Charter, with the consequence that the Charter has no application to that provision. Warren CJ’s interpretation of s 38(1) merely permits Parliament to achieve the same result through a privative clause.

V The Implied Right Issue

A Bare’s Argument

Bare claimed that the delegate’s decision breached the substantive obligation under s 38(1) of the Charter. The decision not to investigate was incompatible with his right under s 10(b) of the Charter, Bare argued, because s 10(b)
contained an implied right to an effective investigation of a credible complaint of cruel, inhuman or degrading treatment (‘implied right’).82

Bare’s argument drew on an established body of international jurisprudence. Section 10(b) is virtually identical to corresponding provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’),83 the International Covenant on Civil and Political Rights (‘ICCPR’),84 and the Human Rights Act 1998 (UK) c 42 (‘UKHRA’).85 Each of these instruments has been found to contain an implied right to an effective investigation.86 Courts have held that the implied right is necessary for the practical efficacy of the substantive right not to be subjected to torture or cruel, inhuman or degrading treatment.87 Without the implied right, the substantive right would be merely ‘theoretical or illusory’.88

For example, Assenov concerned a teenager who was allegedly arrested and beaten by police.89 The internal investigation concluded that the teenager’s injuries had been inflicted either by his father or because he had not been compliant with police.90 There was no evidence to support these conclusions, and the authorities failed to contact the people who actually witnessed the incident.91 This failure to conduct an effective investigation constituted a violation of the teenager’s rights under the ECHR.92

Bare argued that this reasoning applied with equal force to the right contained in s 10(b) of the Charter.93 Moreover, in his circumstances, an effective investigation could only be conducted by an entity independent of Victoria

82 Ibid 220–1 [71].
87 See, eg, Assenov [1998] VIII Eur Court HR 3264, 3290 [102].
89 [1998] VIII Eur Court HR 3264, 3271 [8]–[9].
90 Ibid 3290–1 [103]–[104].
91 Ibid.
92 Ibid 3290–1 [104]–[106].
93 See *Bare* (2015) 326 ALR 198, 374 [627]–[629].
Police, such as the OPI.94 Bare also argued that the delegate’s decision to refer Bare’s complaint to an internal investigation was incompatible with the implied right.95

B The Court’s Reasoning

The Court held unanimously that s 10(b) of the Charter did not contain an implied right to an effective investigation, with all three judges giving very similar reasons.

This conclusion was grounded in an unease about the use of international materials to construe the Charter. In Momcilovic, French CJ and Gummow J suggested that courts should be careful in their use of international legal materials, given the different legal and constitutional settings from which they emerge.96 The Court of Appeal held that Bare’s argument ignored these warnings.97 The ECHR, the ICCPR and the UKHRA differed materially from the Charter in their terms and legal setting. These differences were essential to the international jurisprudence on the implied right. Therefore, the international decisions provided no support for the implication of a similar right from s 10(b) of the Charter.98

The Court’s approach to the European case law illustrates this pattern of reasoning. Article 3 of the ECHR states that no person ‘shall be subjected to torture or to inhuman or degrading treatment or punishment.’ Article 1 requires member states to secure the rights and freedoms under the ECHR to everyone within their jurisdiction. Article 13 states that a person whose rights are violated has a right to ‘an effective remedy’.

First, the Court held that the Charter contained no provisions equivalent to arts 1 or 13 of the ECHR.99 With respect to art 13 of the ECHR, the Charter fails to provide specific, stand-alone remedies for breaches of human rights.100

94 Ibid 374 [627].
95 Ibid 221 [71].
96 (2011) 245 CLR 1, 37–8 [19]–[20], 49–50 [49]–[50] (French CJ), 83–7 [146], 89 [155], 90 [159] (Gummow J).
98 Ibid 246 [178], 248 [185]–[186] (Warren CJ), 325 [447], 327 [457] (Tate JA), 390 [665] (Santamaria JA).
99 Ibid 247–8 [184], 251 [197] (Warren CJ), 313 [411], 314 [415] (Tate JA) 382 [645] (Santamaria JA).
100 Ibid 247–8 [184] (Warren CJ), 314 [415] (Tate JA).
With respect to art 1 of the *ECHR*, public authorities are not in an analogous position to member states, which are required to ensure that rights and freedoms are protected in their jurisdictions.\(^\text{101}\)

Second, the Court observed\(^\text{102}\) that the European Court of Human Rights (‘ECtHR’) first recognised the implied right in *Assenov*.\(^\text{103}\) In *Assenov*, the ECtHR derived the implied right from art 3, ‘read in conjunction with the [s]tate’s general duty under Article 1 of the *Convention*’.\(^\text{104}\) The ECtHR also held that the right to an effective remedy under art 13 of the *ECHR* required ‘effective access for the complainant to the investigatory procedure’.\(^\text{105}\) The Court of Appeal concluded that the ECtHR had relied on the additional obligations of member states under arts 1 and 13 to derive the implied right.\(^\text{106}\)

Third, the Court held that although several more recent ECtHR decisions suggested the implied right derived solely from art 3 of the *ECHR*, these decisions were themselves based on the authority of *Assenov*.\(^\text{107}\)

The Court used the same reasoning to distinguish the *ICCPR* jurisprudence. Article 2(3) of the *ICCPR* confers a right to an effective remedy. The Human Rights Committee has relied on this provision, in conjunction with the right not to be subjected to torture or cruel, inhuman or degrading treatment under art 7 of the *ICCPR*, to imply the right to an effective investigation.\(^\text{108}\)

Finally, the Court considered the *UKHRA* case law on the implied right. The *UKHRA* protects the rights set out in the *ECHR*, which is attached as a schedule.\(^\text{109}\) While sch 1 includes *ECHR* art 3, it does not include arts 1 or 13.\(^\text{110}\) In the recent decision in *D v Commissioner of Police of the Metropolis*...
(‘D v Commissioner of Police’), the England and Wales Court of Appeal expressly rejected the claim that the implied right depended on art 1 of the ECHR.\textsuperscript{111}

However, the Court distinguished the English case law on a number of grounds. First, s 8(1) of the UKHRA authorises a court to grant a ‘just and appropriate’ remedy for an unlawful act by a public authority. This provision explained the absence of art 13 of the ECHR, because it embodied the right to a remedy for a breach of human rights.\textsuperscript{112} Further, this provision for a stand-alone remedy distinguished the UKHRA from the Charter.\textsuperscript{113}

Second, the absence of art 1 of the ECHR was explicable on the grounds that the UKHRA was itself enacted to satisfy the United Kingdom’s obligations under art 1.\textsuperscript{114} Therefore, it would be misguided to use the absence of art 1 to establish that the implied right under the UKHRA derived from art 3 alone.\textsuperscript{115}

Third, under s 2(1)(a) of the UKHRA, courts must take into account relevant decisions of the ECtHR.\textsuperscript{116} Australian courts are not similarly bound to follow the Strasbourg jurisprudence.\textsuperscript{117} The English courts had recognised the implied right in part out of a concern to avoid a ‘substantial mismatch’ between the scope of art 3 under the ECHR and under the UKHRA.\textsuperscript{118} To the extent that the English case law depended on the European jurisprudence, it was tainted by the same reliance on arts 1 and 13 of the ECHR.\textsuperscript{119} For these reasons, the Court held that the UKHRA case law was of limited use in construing s 10(b) of the Charter.\textsuperscript{120}

Having distinguished the international materials, the Court held that there were no grounds for the implication of a right to an effective investigation from s 10(b). Warren CJ noted that the Charter provides expressly for

\begin{itemize}
\item \textsuperscript{112} Bare (2015) 326 ALR 198, 247–8 [184] (Warren CJ).
\item \textsuperscript{113} Ibid 247–8 [184]–[185] (Warren CJ), 322 [437] (Tate JA).
\item \textsuperscript{114} Ibid 252 [201], 254 [207] (Warren CJ), citing D v Commissioner of Police [2016] QB 161, 181–2 [17]; see also ibid at 321 [434]–[435] (Tate JA), 385–6 [653]–[654], 389 [663] (Santamaria JA).
\item \textsuperscript{115} Bare (2015) 326 ALR 198, 252 [201] (Warren CJ).
\item \textsuperscript{116} Ibid 253 [204] (Warren CJ), 321–2 [436], 324 [442]–[443] (Tate JA), 386 [655], 390 [665] (Santamaria JA).
\item \textsuperscript{117} Ibid 247–8 [184] (Warren CJ), 324 [443], 325 [447] (Tate JA), 386 [656] (Santamaria IA).
\item \textsuperscript{118} D v Commissioner of Police [2016] QB 161, 181 [16] (Laws LJ), quoted in ibid 324 [445] (Tate JA), 389 [662] (Santamaria IA).
\item \textsuperscript{119} Bare (2015) 326 ALR 198, 252–3 [202]–[205], 255 [213] (Warren CJ), 321–2 [436], 324 [444] (Tate JA), 388–9 [661], 390 [665] (Santamaria JA).
\item \textsuperscript{120} Ibid 255–6 [213]–[214] (Warren CJ), 325 [447] (Tate JA), 390 [665] (Santamaria JA).
\end{itemize}
procedural rights in certain circumstances.\textsuperscript{121} Her Honour inferred from this that the legislature ‘did not intend to provide procedural protections for all rights.’\textsuperscript{122} Warren CJ and Santamaria JA held that recognising the implied right would amount to reading words into the Charter.\textsuperscript{123} Courts may only read in words in limited circumstances, which were not satisfied in this case.\textsuperscript{124} To similar effect, Tate JA concluded that the question of a right to an effective investigation is ‘a matter for the legislature to decide.’\textsuperscript{125}

\textbf{C. Analysis}

\textit{Bare} sends a warning to litigators who seek to use international materials to shed light on the scope of Charter rights. The Court’s reasoning raises several points which will have significant consequences for future Charter litigation.

The first point is that the Court endorsed an expansive reading of the cautionary comments in \textit{Momcilovic}.\textsuperscript{126} In \textit{Momcilovic}, French CJ and Gummow J were concerned about the use of international materials to construe the Charter’s operative provisions — ss 7(2), 32(1) and 36 — given Australia’s distinctive constitutional setting.\textsuperscript{127} With respect, this is clearly correct. Australia’s constitutional principles, such as the \textsc{kable} doctrine,\textsuperscript{128} are relevant to the construction of s 32(1) of the Charter in a way that distinguishes it from its \textit{UKHRA} counterpart.\textsuperscript{129} But this argument has little relevance to the content of Charter rights. Whether s 10(b) contains an implied right to an effective investigation does not raise questions about the role of courts in Australia’s constitutional setting.

Warren CJ recognised this distinction, but held that the comments in \textit{Momcilovic}\textsuperscript{130} applied ‘equally to the interpretation of the scope of rights

\begin{itemize}
  \item \textsuperscript{121} Ibid 246 [180], citing Charter ss 21(4)–(5).
  \item \textsuperscript{122} \textit{Bare} (2015) 326 ALR 198, 247 [181].
  \item \textsuperscript{123} Ibid 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA).
  \item \textsuperscript{124} Ibid 243 [164] n 112, 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA). For a discussion of these circumstances see Jones v Wrotham Park Settled Estates [1980] AC 74, 105–6 (Lord Diplock); DPP (Vic) v Leys (2012) 44 VR 1, 15–39 [45]–[111].
  \item \textsuperscript{125} \textit{Bare} (2015) 326 ALR 198, 327 [457].
  \item \textsuperscript{126} (2011) 245 CLR 1.
  \item \textsuperscript{127} Ibid 37–8 [19]–[20], 48–9 [47], 49–50 [49]–[50] (French CJ), 83–7 [146], 89–90 [155]–[159] (Gummow J).
  \item \textsuperscript{128} \textsc{kable} v DPP (NSW) (1996) 189 CLR 51.
  \item \textsuperscript{129} Ibid 83–7 [146] (Gummow J).
  \item \textsuperscript{130} (2011) 245 CLR 1
\end{itemize}
within the Charter.\textsuperscript{131} The Court in Bare thus went beyond Momcilovic, adopting a general caution towards the use of international materials in construing the Charter. Consequently, litigators must be careful in drawing on international materials which in turn refer to provisions that are not present in the Charter. Bare suggests their interpretive value will be limited.

This approach contrasts with the positive reception of international materials in several earlier Charter cases. In Castles v Secretary, Department of Justice (‘Castles’), for instance, Emerton J stated that recourse to international materials was ‘a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world’.\textsuperscript{132}

The second point is that, in interpreting the scope of s 10(b), the Court departed from or ignored several accepted principles of statutory construction. A domestic statute which implements a treaty provision should be construed according to the meaning of the treaty provision in international law,\textsuperscript{133} rather than by technical rules of domestic law.\textsuperscript{134} As Dawson J noted in Applicant A v Minister for Immigration and Ethnic Affairs (‘Applicant A’), [b]y transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty.\textsuperscript{135} Only Tate JA recognised this principle in Bare,\textsuperscript{136} and it played little role in her Honour’s analysis.

The Charter is clearly intended to implement into Victorian law the rights set out in the ICCPR.\textsuperscript{137} Section 10(b) of the Charter is virtually identical to art 7 of the ICCPR. The Explanatory Memorandum confirms that s 10(b) ‘is

\textsuperscript{131} Bare (2015) 326 ALR 198, 247 [182].

\textsuperscript{132} (2010) 28 VR 141, 161 [70], quoted in Patrick’s Case (2011) 39 VR 373, 392 [71] (Bell J).


\textsuperscript{135} (1997) 190 CLR 225, 239.

\textsuperscript{136} (2015) 326 ALR 198, 311 [399].

\textsuperscript{137} Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1, 8; Momcilovic (2011) 245 CLR 1, 202 [520] (Crennan and Kiefel JJ), 244–5 [672] (Bell J); Victoria Police Toll Enforcement v Taha (2013) VSCA 37 (4 March 2013) [199] (Tate JA).
modelled on article 7'. This supports the conclusion that the legislature intended for s 10(b) to be interpreted in accordance with the same principles, and to have the same content, as art 7.

Having distinguished the international materials, Warren CJ and Santamaria JA rejected the implied right on the grounds that the common law rules for reading words into a statute were not satisfied. However, these rigid rules are ill-suited to the interpretation of the Charter, which gives domestic effect to international human rights law. The very nature of human rights means that their scope cannot be determined by reference to the text alone. As Emerton J noted in Castles, the Charter rights are, essentially, statements of principle and have to be given content. Bare's arguments did not amount to reading words into s 10(b), but merely defining its scope and content.

Rather than applying these technical rules, courts should construe the Charter according to the principles for the interpretation of international human rights instruments. One such principle is that a human rights instrument should be interpreted so as to make its protections practical and effective ('the principle of effectiveness'). This reflects the purpose of such instruments: to protect individual human beings. In Patrick's Case, Bell J

139 See Bare (2015) 326 ALR 198, 246 [179], 247 [181] (Warren CJ), 390 [667]–[668] (Santamaria JA).
140 Morrison (2002) 210 CLR 274, 279 [16]; Gamlen (1980) 147 CLR 142, 159 (Mason and Wilson JJ); see also the concurring judgments at 149 (Gibbs J), 168 (Aickin J).
144 Loizidou (1995) 310 Eur Court HR (ser A) 27 [72].
applied this principle when construing the scope of the right to property under s 20 of the Charter.145

Applied to ss 10(b) and 38(1) of the Charter, the principle of effectiveness supports the implication of a right to an effective investigation. Sections 10(b) and 38(1) prohibit public authorities from acting incompatibly with a person’s right not to be treated in a cruel, inhuman or degrading way. The prohibition would be rendered ineffective without an independent procedure to review credible allegations of serious mistreatment by public authorities.146

With respect, it is difficult to sustain Warren CJ’s comment that the Charter ‘does not speak in the broad terms of protection that are outlined in Art 1 of the ECHR.’147 In D v Commissioner of Police, Laws LJ held that the obligation on public authorities to act compatibly with human rights under s 6(1) of the UKHRA is analogous to art 1 of the ECHR.148 A similar argument can be made with respect to the Charter. Section 38(1) of the Charter mirrors s 6(1) of the UKHRA. It is a key mechanism by which the Charter pursues its purpose of promoting and protecting human rights.149 Moreover, s 3(1) of the Charter defines ‘act’ to include ‘a failure to act’. The Charter thus contemplates that the obligations of public authorities extend to taking positive action to secure human rights. Finally, s 6(1) of the Charter states that ‘[a]ll persons have the human rights set out in Part 2’. The preamble recognises that the enjoyment of those human rights is ‘essential in a democratic and inclusive society’.150

This interpretive approach arguably prevailed in the Charter case law prior to Bare. Judges have stressed repeatedly that Charter rights should be construed ‘in the broadest possible way.’151 Only then does s 7(2) operate to

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145 (2011) 39 VR 373, 396 [89].
146 See Assenov [1998] VIII Eur Court HR 3264, 3290 [102].
147 Bare (2015) 326 ALR 198, 248 [184]; see also at 313 [411] (Tate JA), 382 [645] (Santamaria JA).
149 Charter s 1(2)(c); Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).
150 Charter Preamble (emphasis added). Recourse to a preamble is permissible to shed light on statutory purpose and object: Wacando v Commonwealth (1981) 148 CLR 1, 23 (Mason J).
permit limitations on rights in pursuit of other societal goals. This principle reflects the legislative intent of the Charter 'that individuals should receive the full benefit of its protection.' When applied to s 10(b), it supports the implication of a right to an effective investigation.

This construction is supported by another principle of statutory interpretation: that so far as their text allows, state and federal statutes should be interpreted to conform to Australia's international obligations ('the principle of consistency'). There is uncertainty over the extent to which the statutory text must be ambiguous before the principle of consistency applies. But, in any case, the obligation imposed by ss 10(b) and 38(1) — a public authority must act compatibly with a person's right not to be 'treated or punished in a cruel, inhuman or degrading way' — is relevantly ambiguous, in that its meaning is doubtful.

Australia has agreed to be bound by the ICCPR, including the art 7 obligation to provide an effective investigation of credible allegations of cruel, inhuman or degrading treatment. The recognition of an implied right to an effective investigation in s 10(b) of the Charter would better conform with Australia's international obligations. However, no member of the Court in Bare referred to this principle when construing s 10(b).

Thus, on ordinary principles of statutory construction, Charter rights should be construed as broadly as possible, in accordance with their meaning in international law and Australia’s international obligations. These principles favour an implied right to an effective investigation. More importantly, it is difficult to reconcile these principles with the Court’s narrow interpretive approach in Bare. Litigators must take care in their use of international materials in the future. Judges may now follow the narrow approach in Bare when interpreting the scope of Charter rights.

VI The Proper Consideration Issue

A The Court’s Reasoning

Bare\textsuperscript{157} presented the first opportunity for the Court of Appeal to confirm what is required under s 38(1) of the Charter for a public authority to give ‘proper consideration’ to human rights when making a decision.

Despite their finding on the implied right issue, Tate JA and Santamaria JA were still required to decide whether the delegate gave proper consideration to Bare’s express rights under ss 8(3) and 10(b) of the Charter. Warren CJ did not need to resolve this issue, because of her Honour’s conclusion that the privative clause ousted review of the delegate’s decision, but nonetheless made detailed comments in obiter.\textsuperscript{158}

The Court unanimously endorsed Emerton J’s approach to proper consideration in Castles.\textsuperscript{159} As restated in Bare, the Castles approach has four elements. First, the decision-maker must understand in general terms which of the rights of the person affected by the decision may be relevant.\textsuperscript{160} Second, the decision-maker must seriously turn his or her mind to the possible impact of the decision on a person’s human rights and its implications for the

\textsuperscript{157} (2015) 326 ALR 198.

\textsuperscript{158} Ibid 256–9 [216]–[231].

\textsuperscript{159} (2010) 28 VR 141, 184 [185]–[186]. The Court of Appeal endorsed this approach at ibid 257 [221] (Warren CJ), 273–5 [277]–[279] (Tate JA), 343–4 [534]–[535] (Santamaria JA). The Castles approach had previously been endorsed in several other first instance decisions: Patrick’s Case (2011) 39 VR 373, 442 [311] (Bell J); Giotopoulos v Director of Housing [2011] VSC 20 (7 February 2011) [90] (Emerton J); XX [2014] VSC 564 (17 December 2014) [115]–[119] (McDonald J).

\textsuperscript{160} Bare (2015) 326 ALR 198, 257 [223] (Warren CJ), 278–9 [293]–[295] (Tate JA), 344–5 [538] (Santamaria JA).
person.161 Third, the decision-maker must identify the countervailing interests or obligations.162 Finally, the decision-maker must balance competing private and public interests as part of the exercise of justification.163

All three judges held that the delegate failed to satisfy these requirements when he decided not to investigate Bare’s complaint.164 In his letter to Bare’s solicitor, the delegate stated that he had considered the OPI file and correspondence, the seriousness of the allegations and Bare’s reference to s 10 of the Charter.165 These statements did not, however, constitute proper consideration of Bare’s human rights.166 The delegate’s reasons ‘amounted to nothing more than a recitation of the Charter as a mantra’.167

The delegate did not demonstrate that he understood Bare’s relevant rights.168 It was necessary for him to consider whether the police officers’ behaviour, if true, would constitute cruel, inhuman or degrading treatment, or a denial of equal protection of the law.169 But he did not even mention Bare’s equal protection right.170 The OPI file had noted the ‘racial nature of the attack’, but the mere mention by the delegate that he had reviewed the file did not constitute proper consideration of this right.171 The delegate also failed to seriously turn his mind to the possible impact of his decision on Bare’s rights.172 Finally, the delegate did not identify countervailing interests or obligations, or weigh them against Bare’s interest in an OPI investigation.173

161 Ibid 257 [221]–[222] (Warren CJ), 277 [288]–[289], 279 [296] (Tate JA), 344–5 [538], 345 [541] (Santamaria JA).
162 Ibid 257 [221], 257–8 [224] (Warren CJ), 277 [288]–[289], 279 [296], 280 [298] (Tate JA), 344 [536], 344–5 [538] (Santamaria JA).
163 Ibid 257 [221], (Warren CJ), 277 [288]–[289], 279 [296], 280 [298] (Tate JA), 352 [559] (Santamaria JA).
164 Ibid 257–8 [221]–[224] (Warren CJ), 281 [301] (Tate JA), 345 [539] (Santamaria JA).
165 Ibid 271–2 [273].
166 Ibid 257 [222] (Warren CJ), 278–9 [293] (Tate JA).
167 Ibid 279 [293] (Tate JA); see also at 257 [222] (Warren CJ).
168 Ibid 257 [222]–[223] (Warren CJ), 278–9 [293]–[295] (Tate JA), 345 [539] (Santamaria JA).
169 Ibid 278–9 [293], 279 [295], 280 [298] (Tate JA).
170 Ibid 257 [223] (Warren CJ), 279 [295] (Tate JA), 345 [539] (Santamaria JA).
171 See ibid 257 [223] (Warren CJ), 279 [295] (Tate JA).
172 Ibid 257 [221]–[222] (Warren CJ), 279–80 [296]–[298] (Tate JA), 345 [539] (Santamaria JA).
173 Ibid 257 [221] (Warren CJ), 279 [296] (Tate JA), 345 [539], [541] (Santamaria JA).
These countervailing interests might have included resource constraints or departmental priorities.174

B Analysis

A number of important points emerge from the Court’s approach to the proper consideration issue. The Court’s finding of a breach of the procedural obligation under s 38(1) is itself significant. This is only the third time that a court has upheld a claim that a public authority failed to give proper consideration to human rights when making a decision.175

Bare confirms that the Charter can be a powerful tool for ensuring that human rights are taken into account by government decision-makers. The three judgments examine in detail what s 38(1) requires of a public authority when making a decision that may affect human rights. Importantly, Warren CJ and Tate JA held that a public authority cannot skirt its s 38(1) obligations on the basis of a purported lack of expertise. In his letter to Bare’s solicitor, the delegate stated expressly that he was not qualified to assess Bare’s argument regarding the implied right under s 10(b).176 Warren CJ and Tate JA held that this response was inadequate. Even though the implied right did not exist, the delegate should have considered Bare’s argument on this point.177 Tate JA held that the delegate should have sought legal advice if necessary.178 He could not evade his obligations under s 38(1) on the basis that he was not qualified to assess Bare’s interpretation of the Charter.179

Several elements of the procedural obligation remain unclear, however. The first is the true significance of the word ‘proper’. According to Tate JA, the procedural obligation is more stringent than the common law obligation to take into account relevant considerations.180 Where relevant matters are only implied by the statute, the common law requires merely that a decision-maker

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174 Ibid 344–5 [538] (Santamaria JA).
175 The two other instances are DPP (Vic) v KW [2011] VCC (2 May 2011) [150]–[151] (Judge Mullaly); Burgess v Director of Housing [2014] VSC 648 (17 December 2014) [216]–[218] (Macaulay J) (‘Burgess’).
176 Bare (2015) 326 ALR 198, 205 [20].
178 Ibid 280 [298].
179 Ibid 279–80 [297].
180 Ibid 273 [275]–[276]. Santamaria JA found it unnecessary to decide this question: at 343 [533] n 480.
'call his own attention to the matters which he is bound to consider'.181 If the statute refers expressly to those matters, the decision-maker must make them 'a fundamental and focal element in the decision-making process.'182 Tate JA held that the procedural obligation is stricter than either of these standards.183 It requires the decision-maker to actively weigh the person's relevant rights against broader public interests and obligations.184 Tate JA adopted this construction to give full meaning and effect to the word 'proper' in s 38(1) of the Charter.185 It appears to pick up the colloquial meaning of 'proper' as 'complete or thorough'.186

On Tate JA's interpretation, the Charter has introduced a new, more intensive standard of judicial review. This is consistent with Emerton J's comments in Castles that, under the Charter, judges may assess 'the balance which the decision-maker has struck' and 'the relative weight accorded to interests and considerations'.187 Under the common law, this is generally the decision-maker's domain.188 But it is unclear how this more intensive standard applies to different decision-makers. The case law has been limited to public officials with the capacity, time and resources to undertake the evaluative process required by Castles.189 The content of the procedural obligation in an emergency, where a public authority is making decisions quickly, has not been considered.190 The word 'proper' can also mean 'adapted or appropriate to the purpose or circumstances'.191 On this basis, and by analogy to the common

182 Insurance Australia Ltd v Motor Accidents Authority (NSW) [2007] NSWCA 314 (8 November 2007) [40] (Spigelman CJ), cited in Bare (2015) 326 ALR 198, 273 [275] (Tate JA).
183 Bare (2015) 326 ALR 198, 273 [275]–[276].
184 Ibid 277 [287]–[289], 279 [296], 280 [298]–[299] (Tate JA).
185 Ibid 273 [276], 277 [287], 280 [299].
190 Courts have emphasised the flexibility of the procedural obligation: see, eg, Castles (2010) 28 VR 141, 184 [185] (Emerton J); Patrick’s Case (2011) 39 VR 373, 442 [311] (Bell J)
191 Macquarie Dictionary, above n 186, 948.
law rules of procedural fairness, the procedural obligation might wax and wane depending on the circumstances.192

The second point of uncertainty is the word ‘relevant’.193 Previous decisions have held that a particular right is relevant where it is reasonably foreseeable that the decision might limit or interfere with the right.194 For example, in Castles, the Secretary of the Department of Justice had to decide whether to issue Ms Castles with a permit to leave prison and access in vitro fertilisation treatment.195 Not issuing the permit would limit Ms Castles’ right to humane treatment while in detention under s 22(1) of the Charter.196 Therefore, this right was relevant to the Secretary’s decision.197

It is unclear how Bare’s express rights under ss 8(3) and 10(b) of the Charter met this test of relevance. Santamaria JA merely stated that it was ‘obvious’ that those rights were relevant.198 Warren CJ and Tate JA suggested that, if the delegate decided not to investigate Bare’s complaint, this would ‘continue to interfere with’199 or ‘further aggravate the interference with’200 Bare’s rights. But this proposition seems difficult to reconcile with their Honours’ finding on the implied right issue. If Bare had no Charter right to an independent investigation, a decision not to investigate could not interfere with his Charter rights.

The ss 8(3) and 10(b) rights might have been relevant to the delegate’s decision in a different, indirect way. If Bare’s allegations were true, the relevant police officers were an ongoing threat to public safety.201 Their conduct also raised the possibility of a systemic issue in the police force.202 A decision not to investigate might thus interfere with the general public’s enjoyment of these

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193 I am grateful to one of the anonymous referees for pressing me on this point.
194 See, eg, Castles (2010) 28 VR 141, 166 [94], 172–3 [123]–[124], 182 [173], 183 [178] (Emerton J); Patrick’s Case (2011) 39 VR 373, 423–4 [229]–[231] (Bell J). In the more recent decision of De Bruyn v Victorian Institute of Forensic Mental Health [2016] VSC 111 (22 March 2016) [102], Riordan J took the same approach: ‘Human rights will be relevant if the proposed decision will apparently limit such rights.’
195 Ibid 166–70 [93]–[113], 182 [173] (Emerton J).
196 Ibid 183 [178].
197 Ibid 257 [221] (Warren CJ).
198 Bare (2015) 326 ALR 198, 344 [538].
199 Ibid 257 [221] (Warren CJ).
200 Ibid 279 [296] (Tate JA).
201 See ibid 257 [221] (Warren CJ).
202 Ibid 257 [223].
rights in the future. But this argument conflicts with the Court’s emphasis that the delegate failed to give proper consideration to Bare’s relevant rights.203

Warren CJ and Tate JA held that, even though the implied right did not exist, the delegate should have considered Bare’s argument on this point.204 Again, it is unclear how the implied right was relevant within the meaning of s 38(1), given the Court’s conclusion that it was not a ‘human right’ for the purposes of the Charter.205

Future decisions must clarify the test for relevance under s 38(1) of the Charter. Otherwise, public authorities will be uncertain about which rights to consider as part of the evaluative Castles approach.

VII THE REMEDY ISSUE

A Background

The final issue addressed by Tate JA and Santamaria JA was whether Bare was entitled to a remedy. Warren CJ was not required to address this issue, given her Honour’s other findings.

As noted in Part IV above, the precise operation of the Charter’s remedial scheme is unclear. To seek relief for Charter unlawfulness, a person must establish that, independently of the Charter, he or she ‘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’.206 The courts have not yet decided between the ‘abstract availability’ and the ‘factual availability’ interpretations of s 39(1).207

B Tate JA and Santamaria JA’s Reasoning

Tate JA and Santamaria JA held that Bare was entitled to an order in the nature of certiorari quashing the delegate’s unlawful decision. This conclusion flowed from the following propositions. First, the delegate’s letter to Bare’s solicitor showed that his decision was made without giving proper considera-

203 Ibid 257 [222] (Warren CJ), 278–9 [293]–[296] (Tate JA), 345 [539] (Santamaria JA).
206 Charter s 39(1).
207 See Bare (2015) 326 ALR 198, 309–10 [394]–[396] (Tate JA); Moshinsky, above n 72, 96.
tion to Bare’s relevant human rights. Second, by operation of s 38(1), this decision was unlawful. Third, certiorari will lie to quash an error of law that appears on the face of the record, whether or not the error is jurisdictional. Fourth, according to the Administrative Law Act, ‘the record’ includes the reasons, oral or written, of any ‘tribunal or inferior court’. A ‘tribunal’ is a decision-maker required by law to observe ‘one or more of the rules of natural justice’. Fifth, the delegate was a ‘tribunal’, because he was required by law to observe at least one of the rules of natural justice. Therefore, the delegate’s error of law lay on the face of the record, and his decision was open to be quashed by certiorari. The Court also made declarations to that effect, and Bare’s matter was remitted to the Independent Broad-Based Anti-Corruption Commission for it to make a fresh decision.

Tate JA and Santamaria JA did not refer to s 39(1) of the Charter in their analysis of the remedy issue. Their Honours appeared to apply the ‘factual availability’ interpretation. At first instance, Bare sought relief on several common law grounds, in addition to his Charter grounds. Williams J rejected Bare’s common law grounds, and they were not raised in the Court of Appeal. This was apparently sufficient to satisfy the condition in s 39(1) of the Charter.

Given the confusion surrounding the Charter’s remedial scheme, it would have been of assistance if Tate JA and Santamaria JA had set out clearly how s 39(1) entitled Bare to the relief he sought. As noted in Part IV above, Santamaria JA implicitly rejected the ‘abstract availability’ interpretation in

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208 Bare (2015) 326 ALR 198, 278–81 [293]–[301] (Tate JA), 344–5 [538]–[541], 351–2 [558] (Santamaria JA).
209 See above Part VI.
210 Bare (2015) 326 ALR 198, 289 [328] (Tate JA), 352 [560] (Santamaria JA).
211 Administrative Law Act s 10.
212 Ibid s 2 (definition of ‘tribunal’).
213 Bare (2015) 326 ALR 198, 289 [328] (Tate JA), 353 [564]–[566] (Santamaria JA).
214 Ibid 289–90 [328]–[329] (Tate JA).
215 Ibid 290 [329] (Tate JA), 354 [569] (Santamaria JA). The Independent Broad-Based Anti-Corruption Commission is the successor to the OPI: see ibid 200 [1] n 1 (Warren CJ).
216 Ibid 289–90 [328]–[329], 328 [460]–[463] (Tate JA), 352–4 [560]–[569] (Santamaria JA).
217 Small [2013] VSC 129 (25 March 2013) [38].
218 Ibid [170]–[185].
219 Bare (2015) 326 ALR 198, 220–1 [71].
his Honour’s analysis of the jurisdictional error issue.220 Tate JA declined to decide whether that interpretation was open.221

C Analysis

The outcome in Bare illustrates the potential for litigators to harness the Administrative Law Act when bringing claims under the Charter. First, the Administrative Law Act permits a court to examine a wider range of material to see whether a public authority has failed to give proper consideration to human rights in making a decision. Provided that the public authority is required to observe the rules of procedural fairness,222 its reasons are incorporated into the record for the purposes of any application for judicial review.223 Without the Administrative Law Act, the record would be restricted to the documents which initiated the proceedings and the tribunal’s order.224 If a public authority’s reasons show that it failed to give proper consideration to human rights, then certiorari is available (subject to s 39(1)) to remove the legal consequences of the decision.225

Second, the Administrative Law Act confers on any person affected by a tribunal’s decision a right to request a statement of reasons.226 Litigators might then use a statement of reasons, as in Bare, as a springboard for review for Charter unlawfulness.

As noted above, the decision in Bare did not clarify the precise operation of s 39(1). This continuing uncertainty may be resolved by Parliament, following the Victorian Government’s 2015 Review of the Charter.227 The Review recommended that s 39 be amended to permit judicial review on Charter grounds alone.228 The Victorian Government has responded

220 Ibid 373 [625].
221 Ibid 310 [396]–[397].
222 Administrative Law Act s 2 (definition of ‘tribunal’).
226 Administrative Law Act s 8.
228 Ibid 133.
(somewhat cryptically) that this recommendation is ‘supported in principle, but remains under further consideration’. The future of s 39 hangs in the balance.

VIII Conclusion

Bare is one of the most significant decisions in the Charter’s brief history. The decision has important implications for litigators seeking to use the Charter to hold public authorities to account for human rights breaches. On the positive side, Bare demonstrates the Charter’s power to have a normative influence on the behaviour of government decision-makers, by requiring them to give proper consideration to human rights. The decision also highlights how the Charter can be used in concert with the Administrative Law Act to bolster claims for judicial review on human rights grounds. On the negative side, the Court of Appeal sounded a warning to those seeking to use international law in Charter litigation. If Victorian human rights law is to keep pace with its international counterparts, litigators will need to be astute in their use of international materials in future.
