

THE *CHARTER*'S IRREDEMIABLE REMEDIES PROVISION

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[While many of the key provisions of the landmark Charter of Human Rights and Responsibilities Act 2006 (Vic) are adapted from established overseas statutes, one is entirely unique to Victoria: s 39(1). Alas, s 39(1) — the Charter's remedies provision — is also entirely unsatisfactory. This article argues that the provision has an unclear purpose, does not mean what it says, has been interpreted in conflicting and unfortunate ways by leading commentators, and may both bar and permit a quite different set of remedies for Charter breaches than those that its drafters had in mind. The author argues that it should be replaced with the remedy provision recently adopted in the ACT.]

CONTENTS

I	Introduction.....	105
II	Origins	107
III	Effect.....	114
IV	Condition	118
V	Remedies.....	123
VI	Conclusion: The 39 Steps	128
VII	Postscript.....	130

I INTRODUCTION

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') is feted by many (and reviled by some) as one of the most dramatic legal developments in the State's history. Its signature effect is to place Victoria within a modern international tradition of express legal protection for human rights. To this end, nearly all of its major provisions are adapted from comparative documents: its rights from the *International Covenant on Civil and Political Rights*,¹ its core 'reasonable limits' test from South Africa's post-apartheid *Constitution*,² and, from the United Kingdom's *Human Rights Act*, its two core operative provisions.³ The latter two, as they appear in the *Charter*, are as follows:

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¹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). For a discussion of the influence that the *ICCPR* had on the *Charter*'s rights provisions, see George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 895–7.

² *Constitution of the Republic of South Africa* s 36(1). See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

³ *Human Rights Act 1998* (UK) c 42, ss 3(1), 6(1). The borrowings are not faithful. Section 32(1) of the *Charter* (which corresponds to s 3(1) of the UK Act) inserts the words 'consistently with

32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

38 Conduct of Public Authorities

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

However, there is one key provision of the *Charter* that is unique:

39 Legal Proceedings

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

Professor George Williams, a leading proponent of statutory bills of rights and Chair of the Human Rights Consultation Committee (‘Consultation Committee’) that recommended the *Charter*, singled out this provision as an exception to the *Charter*’s otherwise ‘clear language’.⁴ He observed that it is ‘a provision that can require multiple readings to yield a coherent meaning’.⁵ I disagree. Rather, anyone who thinks that they have found a coherent meaning in s 39(1) ought to read it a couple more times.

To date, s 39(1) has been mentioned just three times in the 70 or so cases that have referred to the *Charter*.⁶ This reflects both the embryonic state of *Charter* jurisprudence at the end of its first year of full operation and the position of s 39(1) as the last in a series of built-in obstacles to applying just one of the *Charter*’s operative provisions — the conduct obligation placed upon public authorities by s 38(1). Other obstacles include:

- the *Charter*’s notice requirement;⁷
- the *Charter*’s transitional provisions;⁸

their purpose’ and substitutes ‘interpreted’ for ‘read and given effect’. The last 16 words of s 38(1) of the *Charter* (which corresponds to s 6(1) of the UK Act) are also new.

⁴ Williams, above n 1, 894 fn 75.

⁵ *Ibid* 900.

⁶ Those three cases are *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (Unreported, Hollingworth J, 12 September 2008) [104]–[105] (‘*Sabet*’), *Director of Housing v IF* [2008] VCAT 2413 (Unreported, Member Nihill, 18 November 2008) [50] (‘*IF*’) and *Drummond v Telstra Corporation Ltd* [2008] VCAT 2630 (Unreported, Macnamara DP, 23 December 2008) [73]. The second case merely quoted the first. In the third, s 39 was mentioned by an (unrepresented) plaintiff but not by the Tribunal.

⁷ *Charter* s 35. See *R v Benbrika [No 20]* (2008) 18 VR 410, 416 (Bongiorno J).

⁸ *Charter* s 49. Section 49(3) restricts the obligations provision to events after 1 January 2008, while s 49(2) arguably goes further, barring litigants from raising such a breach in a proceeding that commenced before 1 January 2007: see generally Jeremy Gans, ‘Transition Trouble’ (2008) 82(7) *Law Institute Journal* 54.

- restrictions to the rights promoted by the *Charter*, both express and implied;⁹
- the *Charter*'s 'reasonable limits' provision;¹⁰
- restrictions to the *Charter*'s definition of 'public authority';¹¹ and
- defences to the *Charter*'s obligations provision.¹²

Nevertheless, Victoria's courts and tribunals will eventually have to come to grips with s 39(1). Also, other Australian jurisdictions — notably the Commonwealth in its current human rights consultation¹³ — will presumably need to decide whether or not they should enact a similar provision.¹⁴ This makes it important to attempt to puzzle out s 39(1)'s meaning in advance of these developments, if only to better signpost the numerous pitfalls and dead ends on the road ahead.

The analysis in this article will proceed in four stages. Part II will examine the tortured origins of the present provision. Part III will unpack s 39(1)'s overall effect. Part IV will examine what conditions the provision imposes on legal relief. Finally, Part V will explore the difficult question of what remedies s 39(1) makes available for breaches of the *Charter*'s obligations regime.

II ORIGINS

The history of s 39(1) mirrors the history of the *Charter* as a whole. Unlike many of the world's more famous human rights laws, the *Charter* was not forged after a war or drafted by a public gathering of visionaries and stakeholders. Rather, it was the product of a series of relatively short public papers and reports, as well as the usual behind-the-scenes refinement by unnamed drafters, much like any other major Victorian statute.

The *Charter* was first announced in 2004 by Victorian Attorney-General Rob Hulls as part of a so-called '*Justice Statement*', which mapped out the next

⁹ See Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 166–73.

¹⁰ *Charter* s 7(2). See Jeremy Gans, *Can Public Authorities Limit Rights?* (25 May 2008) Charterblog: Analysis of Victoria's *Charter of Human Rights* <<http://charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights/>>.

¹¹ *Charter* s 4; see especially ss 4(1)(j)–(k).

¹² *Charter* ss 38(2)–(4). Notably, s 38(2) relieves a public authority of any *Charter* obligations where another law leaves it with no reasonable option but to limit or fail to consider human rights.

¹³ See National Human Rights Consultation Committee, *Terms of Reference* (2008) National Human Rights Consultation <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference>.

¹⁴ Indeed, such contemplations have already happened in the ACT (albeit briefly), Western Australia (albeit by proxy, considering a similar draft provision) and Tasmania (albeit dryly noting that the provision is 'a little obscure'): Department of Justice and Community Safety (ACT), *Human Rights Act 2004: Twelve-Month Review — Report* (2006) 33; Consultation Committee for a Proposed Human Rights Act, Department of the Attorney-General (WA), *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007) 207; Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007) 38, 140–2.

decade of work by the Department of Justice.¹⁵ At that stage, the proposal was simply for a community consultation on protecting human rights.¹⁶ A short list of pros and cons for legal protection included (on the con side) the prospect that a new law ‘may create more litigation’, a spectre analysed as follows:

The introduction of the [*Canadian Charter of Rights and Freedoms*] has resulted in a significant workload for the Supreme Court of Canada in determining *Charter* rights. Whilst there is some evidence of increased appeals against government action under the UK and NZ statutory models, they have not significantly added to the workload of the courts.¹⁷

A year later, the community consultation was launched. Curiously, the Attorney-General simultaneously issued a ‘*Statement of Intent*’.¹⁸ Its purpose was

to provide the [Consultation] Committee and the community with an indication of the scope of the issues which the Government considers should form the basis for the [Consultation] Committee’s consideration and for submissions and comment from the community.¹⁹

This indication took the form of a ‘Preferred Human Rights Model’, which set out the law’s form, its name (already foreshadowed in the *Justice Statement*), its overseas inspirations, and the sources and content of the rights to be protected.²⁰ The Consultation Committee was instructed to make recommendations based on these preferences and the views of the Victorian community.²¹ Unsurprisingly, every single part of the *Statement of Intent* was mirrored by a recommendation in the Consultation Committee’s final report.²²

The origins of s 39(1) can be found in two brief passages of the government’s preferred model:

Role of the Courts

The courts have an important role to play in interpreting the law and enforcing rights and obligations. The Government’s approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation. It is through such mechanisms that acceptance and support of human rights will be promoted in the community.

¹⁵ Department of Justice (Vic), *New Directions for the Victorian Justice System 2004–2014: Attorney-General’s Justice Statement* (2004) 53–6 (‘*Justice Statement*’).

¹⁶ *Ibid* 53.

¹⁷ *Ibid* 56.

¹⁸ Department of Justice (Vic), *Human Rights in Victoria: Statement of Intent* (2005) (‘*Statement of Intent*’).

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

²² Human Rights Consultation Committee (‘Consultation Committee’), Department of Justice (Vic), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 22–3 (‘[t]he new law should be an ordinary Act of Parliament’), 32–3, 46 (‘*Charter* rights should be based on the *ICCPR*, and modified and adapted to the Victorian context’), 73–4 (‘[i]n regard to each Bill, the Attorney-General should present a Statement of Compatibility to Parliament’), 88 (‘Declarations of Incompatibility should not affect the validity of the Act or subordinate legislation’), 98 (the Victorian government should ‘implement and resource’ community education on human rights) (‘*Consultation Committee Report*’).

The [Consultation] Committee is therefore asked to focus on measures that would encourage continuing dialogue on human rights in the community and how they are balanced against each other.

Individual Rights of Action

Consistent with its focus on dispute prevention, the Government does not wish to create new individual causes of action based on human rights breaches.²³

While the first section is a broad statement of philosophy, largely concerned with the notion of rights protection through a 'human rights dialogue', the second single-sentence section is a preference for a specific legal approach. The connection between this approach and the 'dialogue' model is not clear, as individual litigation can play a crucial role in some versions of that model. Rather, the government's hostility to individual litigation can be seen as part of its broader preference (extending beyond human rights) for alternative dispute resolution or, perhaps, as an attempt to counter what would otherwise be a likely source of political opposition to a legislative human rights instrument.

While the Consultation Committee was faithful to the government's model, its final report nevertheless made significant further contributions through commentary on the issues addressed, translation of the government's model into recommendations and, most importantly, by presenting a draft of the final statute.

The Consultation Committee's analysis of the question of remedies commenced with a concession that the government's antipathy towards individual rights of action was not universally welcomed by the Victorian community. Some Victorians were concerned that it meant that there would be no remedies for rights breaches.²⁴ Later, noting sentiments from 'many organisations and individuals' that the *Charter* 'must have teeth',²⁵ the Consultation Committee resolved 'to find common ground on the issue of remedies.'²⁶ It did so by arguing that, alongside alternative dispute resolution,

[r]emedies that now exist under Victorian law should also be applied to work with the *Charter*. The best way to achieve this is to include an obligation on public authorities to observe *Charter* rights. This is consistent with the express terms of the United Kingdom *Human Rights Act 1998* and the *New Zealand Bill of Rights Act 1990* and what can be implied from the Australian Capital Territory *Human Rights Act 2004*.

Where this obligation is breached, the courts should have a limited form of review of the decision-making of government, like that already found under Victorian law. This is consistent with the *Statement of Intent* because it works within existing remedies. It also makes sense to people who believe that 'where there is a right, there must be a remedy'.²⁷

²³ *Statement of Intent*, above n 18.

²⁴ *Consultation Committee Report*, above n 22, 114.

²⁵ *Ibid* 117, quoting Charlo Grech, Submission No 92 to Consultation Committee, 9 July 2005, 1.

²⁶ *Consultation Committee Report*, above n 22, 117.

²⁷ *Ibid* 114.

This Consultation Committee's answer to the conundrum of remedies is that remedies do not need to be addressed in the *Charter* at all. Rather, by applying the label 'unlawful' to a public authority's breach of its human rights obligations — just as happens in the UK's *Human Rights Act 1998*²⁸ — the *Charter* can let non-*Charter* law supply all the remedies.

When a statute declares something to be unlawful, it automatically brings to bear a number of remedies for unlawfulness, notably the familiar remedies of administrative law — judicial review, prerogative writs and the like — not to mention a variety of collateral remedies.²⁹ Section 38(1) of the *Charter* — the *Charter's* obligations provision — is sufficient to make those remedies available under the *Charter*. So there is no need for any express remedies provision.

Alas, this sensible analysis in the report's 'summary' was substantially muddled by the specific recommendations that emerged in the report's body:

Recommendation 27

The *Charter* should not disturb any of the remedies that a person may be entitled to under the existing law.³⁰

Recommendation 30

A person who claims that a public authority has acted unlawfully by acting in a way that is incompatible with the *Charter* should be able to:

- apply to a court for judicial review of the decision of the public authority to act in the way it did; and
- apply to a court for a declaration that the act of the public authority was unlawful,

where the existing requirements for those proceedings are satisfied.³¹

These recommendations are noteworthy for all the wrong reasons.

First, each appears as a non sequitur to the Consultation Committee's discussion of other points: the potential for rights-compatible interpretation to provide some limited remedies for rights breaches³² and the need for the executive to consider rights in their decision-making.³³ Secondly, neither recommendation is especially clear, with many terms (such as 'not disturb', 'may be entitled', 'under the existing law', 'apply to a court', 'existing requirements', 'for those proceedings' and 'are satisfied') being open to widely varying interpretations. Finally, in light of the Committee's quite correct analysis of administrative law, neither recommendation appears to have a purpose. Indeed, they appear to be summaries

²⁸ *Human Rights Act 1998* (UK) c 42, s 6(1).

²⁹ *Consultation Committee Report*, above n 22, 118, 124–5. The Consultation Committee states (at 125):

The ability to apply for judicial review or a declaration of unlawfulness for failure to meet that obligation would mean that the traditionally narrow grounds of administrative law would be updated to give life to the enforcement of this new obligation.

See also Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 251–5; Evans and Evans, above n 9, 130–4.

³⁰ *Consultation Committee Report*, above n 22, 119.

³¹ *Ibid* 125.

³² *Ibid* 117–18.

³³ *Ibid* 123–5.

of the Committee's legal analysis, which demonstrated that no recommendations on remedies were required.

Only Recommendation 30 gets any semblance of a justification. In a passage where the Consultation Committee muses about the public law remedies of judicial review and declaration, they opine, without explanation, that '[i]t would be better to set out clearly in the *Charter* that those two avenues are available than to allow it to develop in an ad hoc way over time.'³⁴ As will be seen, this sentiment was discarded completely by the time the *Charter* was enacted.

Whatever the merits of the *Consultation Committee Report* and the recommendations, they were largely sidelined by the decision to append a *Draft Charter* to its report.³⁵ The report itself made little reference to the draft, and the draft lacked any annotations indicating its connection, if any, to the Consultation Committee's recommendations. Recommendations 27 and 30 — or perhaps just 30 — were apparently captured in the following draft provision:

40 Legal proceedings

- (1) If an act or decision of a public authority is made unlawful by this *Charter*, a person aggrieved by that act or decision may seek any relief or remedy, including —
 - (a) judicial review under the *Administrative Law Act 1978* or under Order 56 of Chapter I of the *Rules of the Supreme Court*; and
 - (b) a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence —
 where that relief or remedy would have been available had the act or decision been unlawful apart from this *Charter*.³⁶

As can be seen, this draft has numerous unwelcome changes:

- references to 'a court' are replaced with 'Legal proceedings' (and relegated to the provision's heading);
- the 'person who claims' has become 'a person aggrieved';
- 'should be able to ... apply' has become 'may seek' (the first appearance of what some now see as the key words of s 39(1));
- the two remedies listed in Recommendation 30 are now just examples of 'any relief or remedy', with the declaration remedy augmented with a concept of 'associated relief' that includes some non-public law remedies; and
- 'where the existing requirements for those proceedings are satisfied' has changed to a new phrase about whether a remedy 'would have been available ... apart from this *Charter*'.

None of these changes are explained and none of the key words are defined.

The conclusion of this unhappy saga is even less transparent. Six months after the *Consultation Committee Report*, the government introduced the Charter of

³⁴ Ibid 125.

³⁵ Consultation Committee, *Draft: Charter of Human Rights and Responsibilities*, appended to *Consultation Committee Report*, above n 22 ('*Draft Charter*').

³⁶ *Draft Charter*, above n 35, cl 40.

Human Rights and Responsibilities Bill 2006 (Vic) into the Parliament.³⁷ It included many changes and few explanations for them. Notably, the remedies provision appeared in its final form:

39 Legal proceedings

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

This rewrite reverses the order of the draft provision, dealing with the non-*Charter* condition before the *Charter* remedy. It also changes the Consultation Committee's proposed language as follows:

- 'apart from' has become 'otherwise than because of';
- 'would have been available' has been replaced with a second instance of 'may seek';
- 'had the act or decision been unlawful' is now 'in respect of an act or decision ... on the ground that the act or decision was unlawful'; and
- 'act or decision of a public authority is made unlawful by' has become 'on a ground of unlawfulness arising because of'.

Whatever the reason for the changes, plainness of language obviously is not one of them. Nor, it seems, does the purpose of the enacted s 39(1) have anything to do with the Consultation Committee's original view that the *Charter* should set out defined remedies in preference to allowing them to develop 'in an ad hoc way'.³⁸ To the contrary, s 39(1) has become completely general.

Only three of the key terms in s 39(1) are defined: 'act', 'public authority' and 'Charter'. The first two terms are tied to the definitions used in s 38(1). The latter, unsurprisingly defined to mean the *Charter of Human Rights and Responsibilities Act 2006* (Vic),³⁹ turns out to be very problematic when combined with the final textual change listed above. Intentionally or otherwise, that textual change breaks the previous express link between the *Charter*'s obligations provision in s 38(1) and the reliefs and remedies affected by s 39(1). Instead, s 39(1) now seems to be concerned with all reliefs and remedies provided for in the Act, including those flowing from its other operative provisions.⁴⁰ Such an extension of s 39(1) has no apparent rationale and is odd given that s 39(1)'s other terms still refer to acts and decisions of public authorities (which are not affected by the other operative provisions). These oddities can be avoided only

³⁷ The Charter of Human Rights and Responsibilities Bill 2006 (Vic) was introduced into the Legislative Assembly on 2 May 2006: Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 2006, 1109 (Rob Hulls, Attorney-General). The *Consultation Committee Report* was released in December 2005.

³⁸ *Consultation Committee Report*, above n 22, 125.

³⁹ *Charter* s 3.

⁴⁰ For example, reliefs and remedies flowing from *Charter* s 32 (the interpretation provision) and perhaps s 6(2)(b) (the human rights functions of courts and tribunals).

by reading the second reference to the 'Charter' as actually only referring to s 38.⁴¹

The fate of the Consultation Committee's two recommendations is especially strange. The Bill added the following new subsection to s 39 of the *Charter*:

- (2) This section does not affect any right that a person has, otherwise than because of this *Charter*, to seek any relief or remedy in respect of an act or decision of a public authority, including a right —
 - (a) to seek judicial review under the *Administrative Law Act 1978* or under Order 56 of Chapter I of the *Rules of the Supreme Court*; and
 - (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

This provision changes the language of *Draft Charter* cl 40, including a confusing reference to a 'right ... to seek any relief or remedy'. But what is really bizarre about it is that it has no relevance to the *Charter* at all. The only rights it is concerned with are those that a person has 'otherwise than because of this *Charter*'. It then helpfully tells us that non-*Charter* rights continue to be available under non-*Charter* law. It even lists specific examples of such non-*Charter* remedies, presumably in fidelity to Recommendation 30's rationale that remedies not be developed 'in an ad hoc way'.⁴² Why the *Charter* needs a provision on non-*Charter* remedies for breaches of non-*Charter* law — and why these needed to be either shielded from s 39(1) or enumerated in the *Charter* — is beyond me.⁴³

Section 39 is rounded off by two further subsections concerning the remedy of damages.⁴⁴ While these provisions also raise considerable difficulties,⁴⁵ they have the virtue of being about a specific remedy (rather than about all remedies), so whatever damage they do is relatively limited. They will not be discussed further here.

The present s 39(1) is best summarised as the product of a single sentence in the *Statement of Intent* being misheard, distorted and implemented without any

⁴¹ This reading is supported by s 39(1)'s position in a division titled 'Obligations on Public Authorities' and the *Charter's* Explanatory Memorandum, which says that s 39 'sets out guidance regarding legal proceedings that may be available in relation to an unlawful act or decision of a public authority': Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

⁴² *Consultation Committee Report*, above n 22, 125.

⁴³ Pound and Evans valiantly attempt to find an effect of s 39(2), arguing that it overcomes the possibility that s 39(1) might prevent someone from taking advantage of the fact that the *Charter's* interpretation rule (s 32) has rendered a public authority's actions ultra vires. Their argument is effectively that this situation would fall outside of s 39(1) because it would be neither 'arising because of this *Charter*' nor 'otherwise than because of this *Charter*': Pound and Evans, above n 29, 254. I tip my hat to them.

⁴⁴ *Charter* ss 39(3)–(4). These provisions state:

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

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

⁴⁵ See Evans and Evans, above n 9, 128–9.

apparent community support or expert rationale — in short, a game of Chinese whispers. That such a provision can be drafted is astonishing. That it was actually enacted is depressing. That it is now a key provision of a landmark Australian statute is simply embarrassing.

III EFFECT

Section 39(1) may well be nothing more than a garbled version of a throw-away line in a government publication, but that does not relieve courts and others of the burden of trying to apply it. As Williams notes, the 54 words of s 39(1) will have to be read repeatedly.⁴⁶

That task is not made any more palatable by s 39(1)'s convoluted structure. Notably, it starts with an 'if', but has no 'then', with that grammatical task instead carried by one of its three commas. There is no verb between the first two commas, meaning that the last one is the lucky comma. The structure of s 39(1) therefore is:

If [a particular condition about a person and a relief or remedy is satisfied, then] that person may seek that relief or remedy on a ground of unlawfulness arising because of this *Charter*.⁴⁷

A literal reading of s 39(1) is that it *permits* something (the final 18 words of the section) if a condition (the other 35 words of the section, excluding '[i]f') is satisfied. Reading s 39(1) as a permission is consistent with the Consultation Committee's starting analysis that the *Charter* gets its bite by borrowing others' 'teeth'.⁴⁸

The problem with this literal reading is that, as the Consultation Committee itself correctly argued, s 38(1)'s declaration that some conduct by public authorities is 'unlawful' is enough to make those non-*Charter* remedies available.⁴⁹ That s 39(1) is nothing more than a permission to do something already permitted receives some support from one sentence of the Explanatory Memorandum: '[c]ause 39 sets out *guidance* regarding legal proceedings that may be available in relation to an unlawful act or decision of a public authority.'⁵⁰

Of course, the 'guidance' is not actually helpful, given that the key concepts of 'relief' and 'remedy' are not defined. Indeed, the provision neglects to tell rights claimants who will be handing out these *Charter* boons. The sole clue is the section's title: 'Legal proceedings'. Oddly, the *Charter*'s application section, which assigns various functions to parts of the government, does not give courts or tribunals any functions under division 4 of part 3 (where s 39(1) sits).⁵¹

⁴⁶ Williams, above n 1, 900.

⁴⁷ *Charter* s 39(1).

⁴⁸ *Consultation Committee Report*, above n 22, 114.

⁴⁹ *Ibid* 117–18.

⁵⁰ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28 (emphasis added).

⁵¹ *Charter* s 6(2)(b). This provision instead confusingly gives courts and tribunals functions under part 2, which contains no operative provisions: see *R v Williams* (2007) 16 VR 168, 176–7

Nevertheless, if s 39(1) is only a guide, then that means that it can simply be ignored.

Alas, it is unlikely that s 39(1) means what it says. Whilst it is worded as a conditional permission, most commentators assume that it is also, indeed primarily, a conditional *prohibition*. That is, it blocks some remedies that would otherwise have been available for a breach of the *Charter* unless they satisfy whatever condition it imposes.

This reading follows mainly from the contrast between s 39(1) and the availability of remedies under other human rights laws. Most human rights laws contain either an express or implicit remedy that is only available for breaches of rights. Notably, the *Canadian Charter of Rights and Freedoms*, the *Constitution of the Republic of South Africa* and both the UK and ACT *Human Rights Acts* contain express provisions creating (or permitting the courts to create) a new remedy for breaches of their respective obligations regimes.⁵² It is clear enough that the Victorian government did not want a similar approach to apply to the *Charter* (either for the given reason of its preference for alternative dispute resolution, or for some other unstated political reason). However, simply omitting an express remedies provision would not be enough to banish the spectre of *Charter*-specific remedies. In New Zealand, where a broad remedies provision in an early draft was dropped from the Bill that became the *New Zealand Bill of Rights Act 1990* (NZ),⁵³ the courts nevertheless held that one was implicit.⁵⁴ Such a development could only have been prevented with certainty in Victoria by an express prohibition. That, it would seem, is the real purpose of s 39(1).

The reading of s 39(1) as a conditional prohibition has the notable virtue of giving the provision something to do. It has the further virtue of giving s 39(2) a semblance of a purpose, in that the subsection will now preserve non-*Charter* remedies from a provision that otherwise restricts remedies (albeit only *Charter* remedies). Additional support for the reading of s 39(1) as a prohibition appears in another portion of the Explanatory Memorandum:

This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under Part 2. In particular, the clause does not confer any entitlement to an award of damages arising from nothing more than a breach of a right protected under Part 2, nor are any

(King J). However, the gap may be filled by s 6(3), a savings provision for whatever s 6(2) missed.

⁵² *Canadian Charter of Rights and Freedoms* s 24(1) ('such remedy as the court considers appropriate and just in the circumstances'); *Constitution of the Republic of South Africa* s 38 ('the court may grant appropriate relief, including a declaration of rights'); *Human Rights Act 1998* (UK) c 42, s 8(1) ('the court ... may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'); *Human Rights Act 2004* (ACT) s 40C(4) ('[t]he Supreme Court may ... grant the relief it considers appropriate except damages').

⁵³ House of Representatives, Parliament of New Zealand, *A Bill of Rights for New Zealand: A White Paper* (1985) 15.

⁵⁴ *Simpson v A-G (NZ)* [1994] 3 NZLR 667, 676–8 (Cooke P), 691–2 (Casey J), 698–703 (Hardie Boys J), 711–13 (Gault J), 717–18 (McKay J) ('*Baigent's Case*').

damages to be awarded referable to the breach of a right protected under Part 2. The unavailability of damages is *further* reinforced by sub-clause (3).⁵⁵

The first sentence of this passage of course mimics the *Statement of Intent* (albeit with the word ‘or’ inserted between ‘new’ and ‘independent/individual’, arguably broadening the government’s anti-litigation stance).⁵⁶ The latter sentences, directed to the ban on damages in s 39(3), are significant in describing the explicit ban as ‘further’ reinforcing what is presumably an implicit one in, presumably, s 39(1).

The downside of reading s 39(1) as actually doing something is that it becomes necessary to work out what that something is. This requires reading its literal permissive words as some sort of restriction. The simplest way to achieve this trick is to insert the word ‘only’ at the very start of the section. However, this simple insertion creates a further puzzle: for each term in s 39(1), would the ‘only’ qualify the condition or the prohibition? Or, to put it in substantive terms, should s 39(1)’s permissive terms be re-read as prohibitions (the linguistically obvious choice) or as qualifications on that prohibition (the choice that best respects the permissive form of the provision)?

These questions are not esoteric as the resulting ambiguities translate directly into practical questions that will have to be resolved at some point. Here are the troubling terms and their related quandaries:⁵⁷

- ‘person’: Does s 39(1) only limit when a ‘person’ can seek a relief or remedy, or does it bar all reliefs or remedies *unless* a ‘person’ is seeking one? For example, can the Victorian Equal Opportunity and Human Rights Commission or a corporation seek a *Charter* remedy?⁵⁸
- ‘seek’: Does s 39(1) only regulate attempts to ‘seek’ a remedy, or does it bar all reliefs or remedies *unless* they are sought? For example, can a court grant a remedy for a *Charter* breach of its own motion?⁵⁹

⁵⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28 (emphasis added).

⁵⁶ *Statement of Intent*, above n 18.

⁵⁷ Another ambiguity may flow from s 39(1)’s title: ‘Legal proceedings’. In the main *Charter* case to date (which concerned a professional discipline hearing), Hollingworth J was willing to read down an otherwise unambiguous right (in that case the right to be presumed innocent until proven guilty under s 25(1) of the *Charter*) in light of the heading to the section containing the right (which was titled ‘[r]ights in criminal proceedings’): *Sabet* [2008] VSC 346 (Unreported, Hollingworth J, 12 September 2008) [134]–[139]. Doing the same with s 39(1) would raise the question: does s 39(1) only limit the reliefs or remedies that can be sought in ‘[l]egal proceedings’, or does it bar all reliefs or remedies other than in legal proceedings? Depending on the meaning of ‘relief’, this could have implications, say, for a government department’s ability to remedy human rights breaches using its own powers.

⁵⁸ Corporations do not have rights under the *Charter* as s 6(1) restricts *Charter* rights to human beings. However, it is possible that they may be able to benefit indirectly from the rights of individuals, for example when a general statute is re-read to be compatible with individuals’ rights (*contra General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 80 (Warren CJ, Vincent and Kellam JJA)) or when a public authority changes a general policy to be compatible with human rights (*contra Bank of Cyprus Australia Ltd v Registrar of Titles* [2008] VSC 327 (Unreported, Whelan J, 13 August 2008) [33]).

⁵⁹ See *Kortel v Mirik* [2008] VSC 103 (Unreported, Bell J, 4 April 2008) [5], [12].

- ‘relief or remedy’: Does s 39(1) only limit ‘relief’ and ‘remedies’, or does it bar a court or tribunal from doing *anything other than* giving a relief or remedy (whatever they may be)? For example, can a court discipline a public authority for a *Charter* breach, even if that discipline does not relieve or remedy the breach?
- ‘ground of unlawfulness’: Does s 39(1) only limit relief or remedies on the ‘ground of unlawfulness’, or does it bar a court from giving any remedy *other than* a remedy on the ground of unlawfulness? For example, can a court give a remedy like bail, which is not triggered by unlawfulness?⁶⁰
- ‘arising because of this *Charter*’: Assuming the word ‘Charter’ here is read to mean s 38,⁶¹ does s 39(1) only regulate remedies for breaches of s 38, or does it prevent the court from giving any *Charter* remedies *other than* those that arise out of a breach of s 38(1)? For example, can a court give remedies that arise from its ‘functions under Part 2’⁶² without satisfying s 39(1)?

Depending on how the above questions are resolved, the effect of s 39(1) could vary widely. Given its least restrictive meaning, s 39(1) may only place a *conditional bar* on a court or tribunal giving a relief or remedy sought by a person on a ground of unlawfulness arising out of s 38(1). At its most restrictive, *it may prevent* a court or tribunal from responding to a breach of any provision of the *Charter* *except* when a person seeks a relief or remedy on a ground of unlawfulness arising out of s 38(1) in a legal proceeding (and the condition in s 39(1) is satisfied). Or it could mean *anything* between these extremes.

Prohibitions drafted as if they are permissions — and the resulting complications — are not unique to the *Charter*.⁶³ But the inherent linguistic ambiguity in s 39(1) is especially dangerous because of the murkiness of its origins.⁶⁴ The combination of unclear progeny and unclear language means that the only way forward is for successive courts to clarify the effect of each term in s 39(1) in (most likely) a piecemeal fashion, either unwittingly, ad hoc or in conjunction with a post facto divination of the true purpose of s 39(1).

In short, s 39(1) has all the signs of being Victoria’s equivalent to the *Australian Constitution*’s notorious s 92. Given the *Charter*’s lacklustre first year in Victoria’s courts, it is hard to imagine s 39(1)’s *Cole v Whitfield* emerging anytime soon.⁶⁵

⁶⁰ See below Part V for further discussion of this issue.

⁶¹ See above Part II for further discussion of this issue.

⁶² *Charter* s 6(2)(b). See *R v Williams* (2007) 16 VR 168, 177 (King J).

⁶³ See, eg, Jeremy Gans, ‘The Quiet Devolution: How the Model Criminal Code Officers’ Committee Botched New South Wales’s DNA Law’ (2002) 14 *Current Issues in Criminal Justice* 210, 215–16, discussing Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill and the Proposed National DNA Database* (1999). This Model Bill was widely enacted across Australia.

⁶⁴ See above Part II.

⁶⁵ (1988) 165 CLR 360, 383–5 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). There were ‘approximately 140 decisions of [the High] Court and of the Privy Council which [had] attempted to illuminate the meaning and operation of [s 92]’ before the High Court dramatically reinterpreted the section, resolving some of its ambiguities and provid-

IV CONDITION

The difficult question of what exactly s 39(1) prohibits can be mostly side-stepped if an intelligible meaning can be given to the condition attached to that prohibition:

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, [*then something is not prohibited*].⁶⁶

The clause ‘otherwise than because of this *Charter*’ indicates that *Charter* remedies become available — and probably only become available — if the world outside of the *Charter* permits or causes something first. The precise nature of that non-*Charter* condition has been the subject of considerable debate amongst *Charter* commentators.

Much of the debate revolves around the words ‘may seek’. As noted above, those words appeared late in the series of contortions that led to s 39(1), first emerging in the Consultation Committee’s *Draft Charter*.⁶⁷ Moreover, they only made their way into the ‘condition’ portion of s 39(1) when the *Charter* was introduced into Parliament, replacing the phrase ‘would have been available’ in the earlier draft. Nevertheless, a number of commentators, including Victoria’s Solicitor-General,⁶⁸ regard them as crucial (albeit ambiguous).

Alistair Pound and Kylie Evans, in their excellent annotation to the *Charter*, set out four possible conditions that ‘may seek’ may impose on anyone hoping to obtain a remedy for a breach of the *Charter*.⁶⁹ Their analysis can be paraphrased as giving ‘may seek’ the following possible meanings:

- ‘gets’: Before claimants can obtain relief for a *Charter* breach, they have to first obtain relief for a non-*Charter* breach;⁷⁰
- ‘almost gets’: Before claimants can obtain relief for a *Charter* breach, they have to first make an arguable claim for relief for a non-*Charter* breach (though the claim does not have to succeed);⁷¹
- ‘genuinely tries to get’: Before claimants can obtain relief for a *Charter* breach, they have to first make a bona fide attempt to obtain relief for a non-*Charter* breach (though the claim can be a hopeless one);⁷² or
- ‘could try to get if they wanted to’: Before claimants can obtain relief for a *Charter* breach, they have to first have standing to obtain relief for a

ing a measure of certainty in its application: at 385. See generally Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 139–83.

⁶⁶ *Charter* s 39(1) (emphasis added).

⁶⁷ *Draft Charter*, above n 35, cl 40.

⁶⁸ Pamela Tate, ‘A Practical Introduction to the *Charter of Human Rights and Responsibilities*’ (Speech delivered at the Seminar Program of the Victorian Government Solicitor’s Office, Melbourne, 29 March 2007) 15 <<http://www.hrlrc.org.au/files/Z7ZP35LVSS/Tate%20-%20Practical%20Guide%20to%20Charter.pdf>>.

⁶⁹ Pound and Evans, above n 29, 249–50.

⁷⁰ *Ibid* 250.

⁷¹ *Ibid*.

⁷² *Ibid*.

non-*Charter* breach (though they do not actually have to make the claim).⁷³

No-one likes the first option, as it renders the *Charter* otiose — if a claimant already has a remedy for unlawful action by a public authority, what is the point of having another (especially as s 39(3) rules out additional damages for the *Charter* breach)? This option was also implicitly rejected by Hollingworth J in *Sabet v Medical Practitioners Board of Victoria* ('*Sabet*') (the major Supreme Court *Charter* claim to date) because she was willing to consider *Sabet*'s *Charter* claim against the Medical Practitioners Board's decision to suspend his practice⁷⁴ despite having already rejected his non-*Charter* claim against that same decision.⁷⁵

In a briefing paper on the *Charter*, Pamela Tate, Victoria's Solicitor-General and legal adviser to the Consultation Committee, preferred the second option:

[Section 39(1)] does not mean that he or she must be able successfully to impugn the decision or conduct of the public authority on that independent ground but one would expect that the independent non-*Charter* ground must be such as to survive a strike-out application.⁷⁶

However, barrister Ron Merkel counters Tate's view with an argument in support of the third option based on an analogy with accrued federal jurisdiction (where a federal law argument that is merely non-colourable can trigger all the consequences that flow from Chapter III of the *Australian Constitution*).⁷⁷

These middle options are apparently preferred over the final option because they are seen as more faithful to the Victorian government's distaste for 'new individual causes of action based on human rights breaches.'⁷⁸ The idea that every *Charter* remedy must be piggy-backed onto an actual (rather than a hypothetical) non-*Charter* action gains support from yet another part of the Explanatory Memorandum's discussion of s 39(1):

Sub-clause (1) provides that if a person has a right to seek relief or a remedy otherwise than because of this *Charter*, founded on the unlawfulness of some conduct by a public authority, then any unlawfulness generated by this *Charter* (as set out in clause 38) may be a *further* ground in the cause of action.⁷⁹

This passage seems to assume that there must already be a legal proceeding on foot, brought by the plaintiff, that raises a non-*Charter* ground, before any *Charter* ground can be pursued.

⁷³ Ibid 249.

⁷⁴ [2008] VSC 346 (Unreported, Hollingworth J, 12 September 2008) [104]–[105].

⁷⁵ Ibid [58], [75], [80], [101].

⁷⁶ Tate, above n 68, 15.

⁷⁷ Ron Merkel, *Memorandum of Advice on the Interpretation and Application of s 39 of the Charter of Human Rights and Responsibilities Act 2006 (Vic)* (2007) 4–6 <<http://www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/articles-materials-and-commentary-on-victorian-charter/>>. See also Pound and Evans, above n 29, 250.

⁷⁸ *Statement of Intent*, above n 18.

⁷⁹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28 (emphasis altered).

However, there are also some significant objections to this reading of s 39(1). A requirement that a person actually commence non-*Charter* litigation before they can seek a *Charter* remedy seems to be at odds with the government's concern to *prevent* litigation: '[t]he Government's approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation.'⁸⁰

For example, in *Sabet* the plaintiff claimed that the Medical Practitioners Board had infringed his *Charter* right to be presumed innocent.⁸¹ Presumably because of s 39(1), Sabet pursued this argument alongside a complex administrative law claim against the Board's decision. About a third of Hollingworth J's lengthy reasons for judgment (and presumably a fair chunk of the hearing) was devoted to this quite hopeless action.⁸² Surely the government could not have intended that such a pointless dilation of *Charter* proceedings be mandatory.

Moreover, each of Pound and Evans's options seem to assume that all litigation in which rights claims are made will be initiated by rights claimants. This is not surprising, given their (and Tate's and Merkel's) public law background. Indeed, Merkel makes this aside about s 39(1):

The sub-section's concern with 'unlawful' acts or decisions of a public authority suggests that its primary, but not exclusive, concern is with public or administrative law remedies. That view is supported by the particular focus in s 39(1) [sic — s 39(2)] on remedies that are most likely to arise in the areas of public or administrative law and in the requirement of 'unlawfulness' in relation to acts or decisions of a public authority.⁸³

But this claimed operation is at odds with two of the most common contexts for human rights claims: civil law and criminal law. It is an odds-on chance (in the first instance) and a certainty (in the second) that the potential rights claimants are defendants to an action initiated by someone else. It makes no sense to condition a *defensive* rights claim on a claimant's own ability or willingness to initiate a legal proceeding.

For example, consider one possible change to Victorian law resulting from the *Charter*. Under the previous common law, there was no right to privacy, so everyone was free to look through private windows (so long as they did not enter that person's land to do so). Now, as a result of ss 13(a) and 38(1), Victorian public authorities arguably cannot look through any individual's windows without a warrant or similar express legal authority.⁸⁴ It is not hard to imagine this legal change being relied upon *defensively* in any number of proceedings, including:

⁸⁰ *Statement of Intent*, above n 18.

⁸¹ [2008] VSC 346 (Unreported, Hollingworth J, 12 September 2008) [3].

⁸² *Ibid* [42]–[101].

⁸³ Merkel, above n 77, 3.

⁸⁴ This is the combined effect of s 13(a) of the *Charter*, which gives natural persons a right 'not to have his or her ... home ... *unlawfully* ... interfered with' (emphasis added), and s 38(1), which bars acts by public authorities that are 'incompatible with a human right' (subject to defences in ss 38(2)–(4)).

- a tenant resisting eviction by arguing that a public landlord's decision to terminate the lease was the result of what the landlord saw through the tenant's window;
- a criminal defendant objecting to police evidence by arguing that it was discovered by illegally looking through someone's window; or
- an objector in a planning appeal complaining that approval of the proposal would allow the applicant to look onto the objector's property.⁸⁵

While these claims may or may not be meritorious, it is obvious that the best place to resolve them is, respectively, in the particular eviction proceeding, criminal trial and planning appeal in question. But, according to Tate, Merkel and Pound and Evans, the tenant, defendant and objector in each case would first have to bring a 'claim' against the public authority, presumably in a quite different proceeding. That is, a defensive claim would be predicated on the respondent 'seeking' a new, offensive claim. Moreover, whether the initial claim was defensive or offensive, each claim would have to allege that the public authority had breached a non-*Charter* law (for example, the tort of nuisance or the crime of stalking). Such allegations would be both pejorative and complex to resolve.

In the one case to date that appears to have applied s 39(1) to reject a *Charter* claim, a version of Merkel's 'public law' approach was adopted, without any consideration of its disastrous consequences. In *Director of Housing v IF* ('IF'), the government plaintiff was trying to advance a process under the *Residential Tenancies Act 1997* (Vic) that could eventually lead to the defendant's eviction from public housing.⁸⁶ The defendant argued unsuccessfully that the plaintiff's 'breach of duty notice' did not comply with the relevant provision of the Act (in part relying on the *Charter's* interpretation regime).⁸⁷ As a fallback, the defendant also argued that the plaintiff, a public authority under the *Charter*,⁸⁸ had issued the notice in breach of the *Charter's* obligations regime.⁸⁹ VCAT Member Nihill, citing a discussion of s 39(1) from *Sabet*,⁹⁰ held that she had no power to deal with any such breach:

After careful reflection, I do not consider that I have the jurisdiction to go behind the application made by the landlord, and review whether or not the landlord acted in a *Charter* compatible way in reaching the decision to make the application. In relation to this proceeding, in this jurisdiction, I can only make decisions about the provisions of the *Residential Tenancies Act 1997* and the *Victorian Civil and Administrative Tribunal Act 1998*. The *Residential Tenancies Act 1997* is very detailed. It provides jurisdiction for a wide range of decisions about residential tenancies, boarding house residencies, and caravan park

⁸⁵ This unlikely sounding claim has already been made: *Kilkenny v Frankston City Council* [2008] VCAT 2561 (Unreported, Member Cimino, 17 December 2008) [15].

⁸⁶ [2008] VCAT 2413 (Unreported, Member Nihill, 18 November 2008) [2]–[5].

⁸⁷ *Ibid* [21], [35].

⁸⁸ *Ibid* [49].

⁸⁹ *Ibid* [7], [48].

⁹⁰ [2008] VSC 346 (Unreported, Hollingworth J, 12 September 2008) [104].

residencies. It makes no distinction between private and public tenancies. It does not provide for the review of decisions made under the *Housing Act 1983* by the Director of Housing. Any challenge to the decisions of the Director of Housing made under the *Housing Act* would need, I think, to be brought in a different jurisdiction. The conduct of government bodies in the exercise of their decision making power is reviewable under the *Administrative Law Act 1978*.⁹¹

If this is correct, then it carries the dramatic implication that tenants who want to resist an eviction notice on the basis that the public authority landlord acted in a manner incompatible with human rights — a not-uncommon scenario — will have to commence proceedings of their own in the Supreme Court, rather than resolving the matter in the Residential Tenancies List of VCAT. It is hard to conceive of a greater setback to the Victorian government's 'focus on dispute prevention'.⁹²

Fortunately, there is a way out of this morass. What all of the above approaches have in common is that they treat the condition in s 39(1) in general — and 'may seek' in particular — as concerned with a legal *proceeding*. However, apart from its title, s 39(1) actually makes no reference to legal proceedings (or, for that matter, to courts or tribunals). Rather, the condition is all about a 'person', a 'relief or remedy' and an unlawful 'act or decision of a public authority'. And, as already observed, it posits the situation that exists 'otherwise than because of *this Charter*'.⁹³

The *Charter* is not a legal proceeding — it is a law. So I argue that s 39(1)'s condition is not about the state of any legal proceeding, real or hypothetical, but about the state of the law (in particular, the state of non-*Charter* law). Recall that the words 'may seek' were an unexplained replacement of the words 'would have been *available*'. The word 'available' is concerned with whether the law provides for a particular remedy, not whether a particular person takes (or even could take) a procedural step towards getting that remedy.

So, the condition in s 39(1) is directed to the question of whether or not a remedy would have been legally available to a particular person in the event of unlawful conduct of a particular sort by a particular public authority. If this question is answered in the affirmative, then s 39(1) makes that same remedy available to that particular person in respect of conduct of that particular sort by that public authority if that conduct happens to breach the *Charter*'s obligations regime. As Carolyn Evans and Simon Evans put it, s 39(1) permits the *Charter* 'to supply an element of unlawfulness required by some other law in order to obtain relief'.⁹⁴

On this approach, a rights claimant does not need to make, want to make, or come close to being able to make a non-*Charter* claim in order to make a *Charter* claim. There does not have to be any actual or even possible breaches of the non-*Charter* law by the public authority. Nor does the claimant have to have

⁹¹ *IF* [2008] VCAT 2413 (Unreported, Member Nihill, 18 November 2008) [50] (citations omitted).

⁹² *Statement of Intent*, above n 18.

⁹³ *Charter* s 39(1) (emphasis added).

⁹⁴ Evans and Evans, above n 9, 126.

any standing derived from non-*Charter* law. Rather, the condition to s 39(1) poses a question about the legal avenues that would have been available to the claimant under the *hypothetical* scenario that the public authority's act or decision had broken a non-*Charter* law. Would the plaintiff be able to seek a remedy? If so, then the plaintiff can use that same remedy to get relief for a breach of the *Charter* occasioned by that same act or decision by that public authority. That may be by starting a new proceeding. Or it may be a collateral remedy in an existing proceeding. It does not matter.

In the case of *IF*, the defendant should at least have been able to utilise any and all remedies in the *Residential Tenancies Act 1997* (Vic) that allowed a tenant relief for unlawful behaviour by a landlord.⁹⁵ Indeed, although clearly controversial, it might even be argued that the terms of s 39(1) permit VCAT to pick up remedies that are usually only available in non-VCAT proceedings, such as remedies under the *Administrative Law Act 1978* (Vic). (Such an argument would proceed on the basis that s 39(1)'s hypothetical condition is satisfied so long as the relief or remedy is available somewhere. Nothing in the provision refers to any particular proceeding. That being said, this approach is at odds with the wording of the Consultation Committee's Recommendation 30 — which refers to 'where the existing requirements for those proceedings are satisfied'⁹⁶ — and may well lead to forum shopping. A similar concern arises under the notion of accrued federal jurisdiction, favoured by Merkel.)

My (and Carolyn Evans and Simon Evans's) approach is, I submit, entirely consistent with the government's concern that the *Charter* not 'create new individual causes of action'.⁹⁷ The key is the word 'create', which surely fits more easily with a bar on new laws, rather than new proceedings. This approach may, of course, mean that proceedings will be initiated that would never have started but for the *Charter*. But surely that is preferable to the approaches of Pound and Evans, Tate, and Merkel, which would require alleged victims of rights breaches to make unnecessary non-*Charter* arguments (and, in the case of respondents, to initiate unnecessary new proceedings) each and every time they wish to make a *Charter* claim.

V REMEDIES

The *Charter*'s very first beneficiary was Echuca's Kelly Gray.⁹⁸ In *Re Gray*, Bongiorno J found that Gray's *Charter* rights had been breached because he was likely to spend more time on remand awaiting his trial than he would receive as

⁹⁵ *Residential Tenancies Act 1997* (Vic) ss 452, 472. See also s 507A, which picks up the remedies under the *Fair Trading Act 1999* (Vic). I am grateful to Lee Hansen who, whilst commenting on a post on Charterblog, pointed these out: Lee Hansen, 'Comment' on Jeremy Gans, *The Charter vs Eviction* (12 July 2008) Charterblog: Analysis of Victoria's *Charter of Human Rights* <<http://charterblog.wordpress.com/2008/07/12/the-charter-vs-eviction/#comments>>.

⁹⁶ *Consultation Committee Report*, above n 22, 125 (emphasis added).

⁹⁷ *Statement of Intent*, above n 18 (emphasis added).

⁹⁸ *Re Gray* [2008] VSC 4 (Unreported, Bongiorno J, 16 January 2008).

punishment for the crime alleged.⁹⁹ Even more boldly, Bongiorno J held that this breach of rights must have a remedy:

That a person may serve more time on remand than his ultimate sentence is a significant matter on any consideration of bail at common law. It is of even greater significance now in light of the existence of the *Charter* and the provisions to which I have referred. If the *Charter* in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the *Charter* must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in Custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its *Charter* obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail — at least the only remedy short of a permanent stay of proceedings.¹⁰⁰

There is much that is debateable about this analysis. Not every breach of rights is necessarily wrong,¹⁰¹ and not every wrong is unlawful.¹⁰² Furthermore, not every unlawfulness either should¹⁰³ or can be remedied. The latter point follows from s 39(1), which only allows limited remedies for *Charter* breaches. The question is, which remedies are allowed?

As has been discussed above, the answer to this question is both murky and complex. It is murky in part because s 39(1) is obscurely worded and, in particular, the key terms ‘relief’ and ‘remedy’ are undefined. It is complex because the answer depends on the operation of non-*Charter* law and, in particular, it depends on parsing the condition in s 39(1) to work out which matters have to be considered in the non-*Charter* hypothetical and which can be ignored.¹⁰⁴

But there is a further complication from the words of s 39(1):

If, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority *on the ground that the act or decision was unlawful*, that person may seek that relief or remedy *on a ground of unlawfulness* arising because of this *Charter*.¹⁰⁵

⁹⁹ Ibid [10]. His Honour relied upon the right of arrested persons to be released if not brought to trial without unreasonable delay under *Charter* s 21(5)(c) and the guarantee of trial without unreasonable delay under s 25(2)(c).

¹⁰⁰ *Re Gray* [2008] VSC 4 (Unreported, Bongiorno J, 16 January 2008) [12] (citations omitted).

¹⁰¹ *Charter* s 7(2) provides for reasonable limits on all rights, though it is unclear whether this section qualifies s 38(1): see Gans, *Can Public Authorities Limit Rights?*, above n 10.

¹⁰² *Charter* s 38(1) only places obligations on public authorities, and the remainder of the section contains defences, including compliance with contrary lawful authority: s 38(2). See also the transitional limitation under *Charter* s 49(3).

¹⁰³ See *Re Dickson* [2008] VSC 516 (Unreported, Lasry J, 26 November 2008) [12]–[19], [22]. See also *DPP (Cth) v Barbaro* [2009] VSCA 26 (Unreported, Maxwell P, Vincent and Kellam JJA, 3 March 2009) [41].

¹⁰⁴ Oscar Roos, ‘Dancing with a Gorilla?: The Ever Present Force of the *Charter of Human Rights and Responsibilities*’ (2008) 82(2) *Law Institute Journal* 46. See above Part IV.

¹⁰⁵ *Charter* s 39(1) (emphasis added).

As its origins indicate,¹⁰⁶ and as Merkel has argued,¹⁰⁷ s 39(1)'s drafters seemed to have public law remedies — notably injunctions and declarations — in mind. Both these remedies are, of course, available 'on a ground of unlawfulness'. While this does not mean that s 39(1) only permits public law remedies, it is clear that the only available remedies are ones that can be described as on a 'ground' of 'unlawfulness'. I argue that these words (both undefined, naturally) may mean that remedies available for *Charter* breaches are both much narrower and much wider than many assume.

The narrowness emerges because many legal remedies are for things other than unlawfulness. Administrative law gets its teeth via its quite broad definition of unlawfulness, deeming all manner of flaws in decision-making — denial of natural justice, over- or under-inclusive considerations, unreasonableness, etc — to be illegal. But other areas of law take a different route, providing direct remedies for misfortunes such as unfairness, impropriety, unreliability, miscarriage of justice, oppression, inconvenience and so forth, whether or not there has been a breach of any law.

In my own field of criminal justice, there is one well-known remedy that is available on a ground of unlawfulness: the public policy discretion allowing a court to exclude illegally obtained evidence.¹⁰⁸ However, there are plenty of other remedies that do not seem to fit the terms of s 39(1):

- the remedy of a stay of proceedings, which is available if the proceeding would be unfair (as opposed to quashing the proceedings, which is what you do when they are unlawful);¹⁰⁹
- the remedy of bail, which is available if the balance of competing interests (presumption of innocence, securing attendance at court and the like) favours letting a remandee go free until a trial (as opposed to habeas corpus for unlawful detention);¹¹⁰
- many exclusionary rules and discretions in evidence law, including exclusion of admissions as unfair or unreliable,¹¹¹ exclusion of evidence as improperly obtained¹¹² and various discretions that operate within exceptions to evidence law rules¹¹³ (as opposed to the discretion to exclude illegally obtained evidence); and

¹⁰⁶ See above Part II.

¹⁰⁷ Merkel, above n 77, 3.

¹⁰⁸ *Evidence Act 2008* (Vic) s 138 (in relation to contraventions of Australian law). This public policy discretion is, however, subject to a set of discretionary considerations that rarely lead to the exclusion of significant evidence.

¹⁰⁹ See Pound and Evans, above n 29, 252.

¹¹⁰ See, eg, *Bail Act 1977* (Vic) s 4.

¹¹¹ *Evidence Act 2008* (Vic) ss 85, 90, 135, 137.

¹¹² *Evidence Act 2008* (Vic) ss 84, 138.

¹¹³ See, eg, *Evidence Act 2008* (Vic) ss 66(2A), 67(4)–(5).

- the appeal remedies for ‘miscarriage of justice’ (as opposed to error of law).¹¹⁴

The difficulty with s 39(1) is that none of these remedies can be described as being obtainable ‘on a ground of unlawfulness’. To the contrary, they neither require any proof that someone acted unlawfully nor are they necessarily available solely on the basis that someone acted unlawfully. So, if unlawfulness is neither a necessary nor a sufficient condition for a remedy, then that remedy is unavailable for breaches of the *Charter*. As a consequence, Bongiorno J’s view that both a stay of proceedings and bail are available as remedies for a breach of the *Charter* is wrong. Rather, Gray’s options are limited to remedies for unlawfulness, such as habeas corpus (assuming the other obstacles to his claim could also be overcome).

The narrow range of remedies apparently allowed by s 39(1) could, perhaps, be defended as reflecting the decision to follow the UK’s *Human Rights Act* in characterising breaches of human rights as ‘unlawful’,¹¹⁵ rather than some other pejorative for which the law happens to provide a remedy. But it seems more likely that the references to unlawfulness in s 39(1) are really a product of the drafters’ lack of familiarity with how the non-public law world deals with the problem of unlawfulness. In criminal law, for example, there are so many rules that it is inevitable that a criminal proceeding will be tainted by some sort of unlawfulness. That is why the courts instead focus on questions of fairness. But that does not mean that unlawfulness is irrelevant. Rather, while rarely a ‘ground’ for a remedy, unlawfulness is nevertheless a significant factor or ‘yardstick’ in determining whether the proceedings meet some other standard, like fairness.¹¹⁶

In 2007, Weinberg CJ applied this approach in *R v McNeill [No 1]* to decide whether a criminal defendant had a remedy under Norfolk Island’s *Evidence Act 2004* for claimed breaches of the *New Zealand Bill of Rights Act 1990* (NZ) after he was arrested in New Zealand.¹¹⁷ Although the judge found that there were no breaches,¹¹⁸ his alternative analysis considered whether such breaches might sound in a variety of evidence law remedies, including strong remedies for unreliability, unfairness, prejudice and impropriety.¹¹⁹ This was possible because there was no s 39(1) artificially limiting the remedies that were available for breaches of the defendant’s rights under New Zealand law. Bizarrely, the terms of s 39(1) may well mean that a Victorian will have more remedies available to them in a Victorian court for breaches of their rights under another jurisdiction’s human rights law (such as the ACT’s) than for breaches of their rights under

¹¹⁴ See *Criminal Procedure Act 2009* (Vic) ss 276, 369(4), repealing *Crimes Act 1958* (Vic) s 568(1) and in doing so abolishing error of law as a ground of criminal appeal.

¹¹⁵ *Human Rights Act 1998* (UK) c 42, s 6(1).

¹¹⁶ See generally Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 473.

¹¹⁷ (2007) 209 FLR 124, 155–7 (Supreme Court of Norfolk Island) (*‘McNeill’*).

¹¹⁸ *Ibid* 157–8, 160–1, 162–3.

¹¹⁹ *Ibid* 163–6 (unreliability), 167–9 (unfairness), 169–70 (prejudice), 171–5 (impropriety).

Victoria's *Charter*. Indeed, non-Victorian courts may be able to provide more remedies for breaches of the *Charter* than a Victorian court could offer!

The consequences of s 39(1)'s public law fixation are not all grim. The section may also make available to *Charter* claimants some remedies that would not otherwise have been available. This is because many of the law's remedies for 'unlawfulness' are actually remedies for breaches of particular laws (rather than the generic unlawfulness that is familiar in administrative law). For example, many of the remedies in the *Residential Tenancies Act 1997* (Vic) are for breaches of tenancy law (namely, breaches of the terms of a tenancy contract or the terms of that particular Act or other consumer protection statutes). However, s 39(1) does not distinguish between particular sorts of unlawfulness and unlawfulness in general. Rather, it distinguishes only between *Charter* unlawfulness and unlawfulness 'otherwise than because of this *Charter*'. Thus, the literal effect of s 39(1) is that, if there is a remedy for a very narrow sort of unlawfulness by a public authority, then that remedy is also available for a breach of s 38(1) by that public authority.

As an example, consider the following remedy that the *Crimes Act 1958* (Vic) provides for the illegal retention of fingerprints:¹²⁰

- 464Q(1) Evidence in respect of fingerprints taken from a person is inadmissible as part of the prosecution case in proceedings against that person for an offence if ...
- (b) the fingerprints or any record, copy or photograph of them should have been but have not been destroyed as required by section 464O or 464P.

The terms of s 464Q(1)(b) are, of course, specifically about breaches of ss 464O and 464P (which contain various narrow rules about destroying fingerprint records). However, that is enough to satisfy the condition of s 39(1), which merely asks whether the remedy may be sought by a person on the ground that an act of a public authority was unlawful 'otherwise than because of this *Charter*'. The result is that, if the otherwise lawful retention of a particular person's fingerprints proves to be a breach of s 38(1) — something that is quite plausible in light of a recent ruling of the European Court of Human Rights¹²¹ — then s 464Q(1)(b) will be available to remedy that breach. That would be quite a remarkable result, because s 464Q(1)(b) requires mandatory exclusion of the evidence and, therefore, is a much stronger remedy than evidence law's discretionary remedy for unlawfulness. Similar, if less eye-opening, results would flow in other contexts, for example by making the many flexible remedies available

¹²⁰ *Crimes Act 1958* (Vic) s 464Q.

¹²¹ *S v United Kingdom*, Application Nos 30562/04 and 30566/04 (Unreported, European Court of Human Rights, Grand Chamber, 4 December 2008) [125], holding that blanket retention of fingerprints and DNA from people who are never convicted of an offence is incompatible with the right to privacy under art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

for breaches of tenancy law by landlords available to tenants when their landlord is a public authority who has breached the *Charter*.¹²²

It must be conceded that both the narrow and wide consequences of the ‘ground of unlawfulness’ terminology were obviously not contemplated by the drafters of s 39(1). Thus, Pound and Evans responded to my argument about the narrowness of s 39(1) as follows:

It is at least arguable that the concept of a ‘ground of unlawfulness’ in s 39(1) can be read purposively so as to include remedies which, although not ultimately turning on a question of unlawfulness, embrace unlawfulness as a relevant factor in the exercise of the discretion.¹²³

Presumably, they would make a similar response to my ‘wider’ argument.

But the problem with this response is that it rests on the claim that it is possible to discern and precisely state a ‘purpose’ of s 39(1). As this article has argued, it is highly doubtful that the government, the drafters or the Parliament turned their mind to the application of s 39(1) to remedies outside of the traditional public law remedies. But this lack of imagination and foresight cannot be equated with purpose. Rather, for better or for worse, the courts either will have to rely on the words of s 39(1) — which support the arguments I have made in this section — or will have to somehow generalise the drafters’ intentions with respect to public law remedies (whatever they may be) to the much broader and varied world of non-public law remedies. This is not an enviable task.

VI CONCLUSION: THE 39 STEPS

The steps for a court or tribunal attempting to apply s 39(1) of the *Charter* appear to be the following:

- 1 Identify: (a) a relief or remedy wanted by (b) any person because (c) a public authority’s (d) act or decision was (e) unlawful under s 38(1).
- 2 Examine non-*Charter* law and identify: (a) a relief or remedy that would have been available to (b) that person if (c) that public authority’s (d) act or decision had been (e) unlawful under any non-*Charter* law.
- 3 If such a relief or remedy exists, determine if all the other conditions of its exercise (other than unlawfulness) are satisfied. If so, provide that relief or remedy to the person.
- 4 If the conditions are not satisfied, do not provide the relief or remedy.
- 5 Cross your fingers.

The final step is, of course, essential, because not a single one of the 54 words of s 39(1), nor its purpose or structure, is free of significant ambiguity.

The dire nature of this conclusion is reduced by the availability of other operative provisions in the *Charter*. Even if s 39(1) has rendered the *Charter*’s

¹²² I am grateful to Lee Hansen on Charterblog for this suggestion: see Hansen, above n 95.

¹²³ Pound and Evans, above n 29, 253, citing an argument made in passing in a conference paper, since published as Jeremy Gans, ‘Evidence Law under Victoria’s *Charter*: Responsibilities and Remedies — Part 2’ (2008) 19 *Public Law Review* 285, 297–300.

obligations regime somewhat unworkable, Victorians' human rights may still be promoted by the statute's 'dialogue' mechanisms.¹²⁴ Indeed, an especially keen Victorian judge may even try to use s 32(1)'s interpretation rule to fix s 39(1)'s inadequacies, although that course would face significant obstacles.¹²⁵ But the possibility that there might still be workable *Charter* remedies *in spite of* s 39(1) does not make that provision's contribution to the world of human rights law any less egregious.

The footnotes to Williams's essay on the *Charter* contain an apology and explanation for the inadequacies of s 39(1). He states that the section's lack of 'clear language'

reflects the need for the *Victorian Charter of Rights* to give rise to remedies as well as the preference expressed by the Government in its *Statement of Intent* that: 'the Government does not wish to create new individual causes of action based on human rights breaches'.¹²⁶

Of the ensuing 'awkward drafting', Williams notes:

No blame can be attributed to the drafters. The provision went through many versions, but this was the best that the collective wisdom of a number of people, including myself, could produce.¹²⁷

It is not clear that this mixture of humility and politeness should be accepted. For example, one need only look to the draft charter prepared during the Western Australian human rights consultation — with Williams as legal adviser — to see a version of s 39(1) that avoids most of the structural flaws identified earlier in this article and at least some of the limitations identified in Part V of this article.¹²⁸ If other jurisdictions are minded to enact a version of s 39(1), then they would be well advised to look to Western Australia, or collect more wisdom, or rely on a greater number of people, or spend more time redrafting. By no means should anyone contemplate settling for the 'best' efforts of Victoria's drafters.

That being said, Williams is correct to place the ultimate blame on the government's poorly explained objection to 'new individual causes of action'. Opposition to 'new' remedies is a quite peculiar (not to mention revealing)

¹²⁴ For example, the 'interpretation provision' (*Charter* s 32), the use of declarations of inconsistent interpretation (*Charter* ss 36–7) and the tabling of statements of compatibility in relation to Bills introduced into Parliament (*Charter* s 28).

¹²⁵ See *Charter* s 3, defining 'statutory provision' to include a provision of the *Charter*. The most notable obstacles are the absence of a right to a remedy in the *Charter*'s list of human rights and the need for s 39(1) to be reinterpreted 'consistently with its purpose', whatever that may be.

¹²⁶ Williams, above n 1, 894 fn 75 (citations omitted).

¹²⁷ *Ibid* 900 fn 93.

¹²⁸ Consultation Committee for a Proposed Human Rights Act, above n 14, appendix B. Note, in particular, the excellent cl 29(2), which specifies that '[a] breach of a human right does not create any enforceable right or any cause of action, except to the extent provided by [the remedies provision]'. That provision, cl 41(1), is much more clearly expressed than s 39(1), both in structure and in many of its terms, although it unfortunately still contains the 'ground of unlawfulness' constraint (ameliorated, to an extent, by a reference to 'grounds that include any unlawfulness', although only in the permissive part of the section). Unfortunately, recent developments in Western Australian politics have made it highly unlikely that cl 41(1) — or any part of that excellent draft — will ever be enacted.

stance to take while introducing a supposedly bold groundbreaking law. Moreover, there is no reason to think that such an approach would achieve the government's purported 'focus on dispute resolution'. As was observed in the *Justice Statement* that began Victoria's course to its *Charter*, the availability of a broad remedies power in the UK and New Zealand has not led to an explosion of litigation.¹²⁹ Arguably, it is s 39(1)'s divergence from these overseas models — by trying to marry two very different areas of law: human rights law and traditional remedies — that is most likely to produce all manner of 'new individual' legal disputes that will have to play out, one way or another, in litigation. Disputes of that sort are likely to only be finally settled (if at all) in the Supreme Court, the Court of Appeal or the High Court.

The ultimate cause of s 39(1)'s flaws is that the drafters of the *Charter*'s remedies provision were given an impossible task of forcing the new wine of human rights law into the old bottle of remedies law. As the government repeatedly states, the appropriate goal of a litigation system is not 'alternative' dispute resolution, but rather 'appropriate' dispute resolution.¹³⁰ Surely that is best achieved through 'appropriate' remedies, as provided for in the remedies provisions of the human rights laws of Canada, South Africa, the UK and, most recently, the following provision from the ACT:

The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers *appropriate* except damages.¹³¹

Compare this to s 39(1):

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

Which provision do you think is more likely to 'promote dialogue, education, discussion and good practice rather than litigation'?¹³²

VII POSTSCRIPT

After this article was accepted for publication, VCAT delivered its long-awaited ruling in *Kracke v Mental Health Review Board*.¹³³ The case made history as the first to grant a formal *Charter* remedy, in the form of an order stating that the Board (a public authority) breached Kracke's *Charter* right to a

¹²⁹ *Justice Statement*, above n 15, 56.

¹³⁰ See, eg, Department of Justice (Vic), *Attorney-General's Justice Statement 2: October 2008 — The Next Chapter* (2008) 39–40.

¹³¹ *Human Rights Act 2004* (ACT) s 40C(4) (emphasis added), as amended by *Human Rights Amendment Act 2008* (ACT) s 7. The new provision commenced operation on 1 January 2009: *Human Rights Amendment Act 2008* (ACT) s 2(1). See also *Canadian Charter of Rights and Freedoms* s 24(1); *Constitution of the Republic of South Africa* s 38; *Human Rights Act 1998* (UK) c 42, s 8(1).

¹³² *Statement of Intent*, above n 18.

¹³³ [2009] VCAT 646 (Unreported, Bell P, 23 April 2009).

fair (and timely) hearing of a statutory review of orders relating to the treatment of his mental illness.

Bell P's reasons are lengthy — some 75 000 words — and involve very many difficult *Charter* provisions, so this is not the occasion for a full analysis. Nevertheless, three aspects of the judgment are worth noting here:

- First, despite actually granting a *Charter* remedy, the President says virtually nothing at all about the *Charter*'s remedies provision. He mentions s 39(1) twice, but both times only in passing.¹³⁴ The second reference implied (without explanation) that the provision extends the remedies that otherwise would be available. For reasons addressed in this article, that is an unlikely reading.
- Secondly, the remedy Kracke was granted is about as mild a *Charter* remedy as could be imagined. Not only was it a mere declaration, but it concerned conduct that was already unlawful under non-*Charter* law (as the Board had failed to conduct reviews within the timeline set in its own statute).¹³⁵ Even on its most restrictive interpretation, s 39(1) provides few barriers to such empty remedies.
- Finally, in his only substantive ruling on remedies, Bell P sternly rejected an argument that VCAT's jurisdiction to review the Board's decision-making did not extend to remedying the Board's breaches of the *Charter*.¹³⁶ His bold ruling that VCAT (and all other Victorian courts and tribunals) must be a one-stop shop for *Charter* matters was made without reference to either s 39(1) or to Member Nihill's completely contrary ruling in *IF*.¹³⁷

¹³⁴ Ibid [356] fn 487, [801].

¹³⁵ Ibid [698]–[704], [826]–[828].

¹³⁶ Ibid [793]–[794].

¹³⁷ [2008] VCAT 2413 (Unreported, Member Nihill, 18 November 2008) [50].