

Chapter 5

Charter Remedies

*The Hon Justice Mark Moshinsky**

I Introduction

One aspect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) which has caused difficulty in practice and been the subject of adverse comment is the remedies provision in s 39.¹ In a detailed study of the provision, Professor Gans described it as ‘irremediable’.² In *Director of Housing v Sudi*,³ Weinberg JA said that s 39 ‘is drafted in terms that are convoluted and extraordinarily difficult to follow’. Part of the difficulty with s 39 is that it has an operation which is both conditional and supplementary.⁴ It contains a condition which must be satisfied before a person can seek relief or a remedy on a ground of unlawfulness arising because of the Charter (namely, that the person may seek relief or a remedy in respect of the relevant act or decision otherwise than because of the Charter, on the ground that the act or decision was unlawful); once the condition is satisfied, the provision enables the person to rely on a supplementary ground of unlawfulness, namely unlawfulness arising because of the Charter.

In contrast, the remedies provision in the *Human Rights Act 2004* (ACT) (the ACT Charter) is a model of simplicity and clarity. Section 40C of that Act, which was introduced with effect from 1 January 2009, and which follows much more closely the comparable provision in the *Human Rights Act 1998* (UK), enables a person to start a proceeding in the Supreme Court against a public authority where the person claims that the public authority has acted in contravention of s 40B of the Act (described below) and the person alleges that he or she is or would be a victim of the contravention. The section also provides that the person may rely on the person’s rights under the Act in other legal proceedings. The Supreme Court may grant the relief it considers appropriate except damages: s 40C(4). Thus s 40C creates a right of action for contravention of the relevant provision of the Act and confirms that a person may rely on rights under the Act in other legal proceedings.

* I would like to thank my associate, Mr Huw Whitwell, for his assistance.

1 It should be noted that this remedies provision relates only to the acts or decisions of public authorities.

2 J Gans, ‘The Charter’s Irremediable Remedies Provision’ (2009) 33 *Melbourne University Law Review* 105.

3 (2011) 33 VR 559 at [214].

4 See *Director of Housing v Sudi* (2011) 33 VR 559 at [96] (Maxwell P); *PJB v Melbourne Health* (2011) 39 VR 373 at [296]–[297] (Bell J).

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