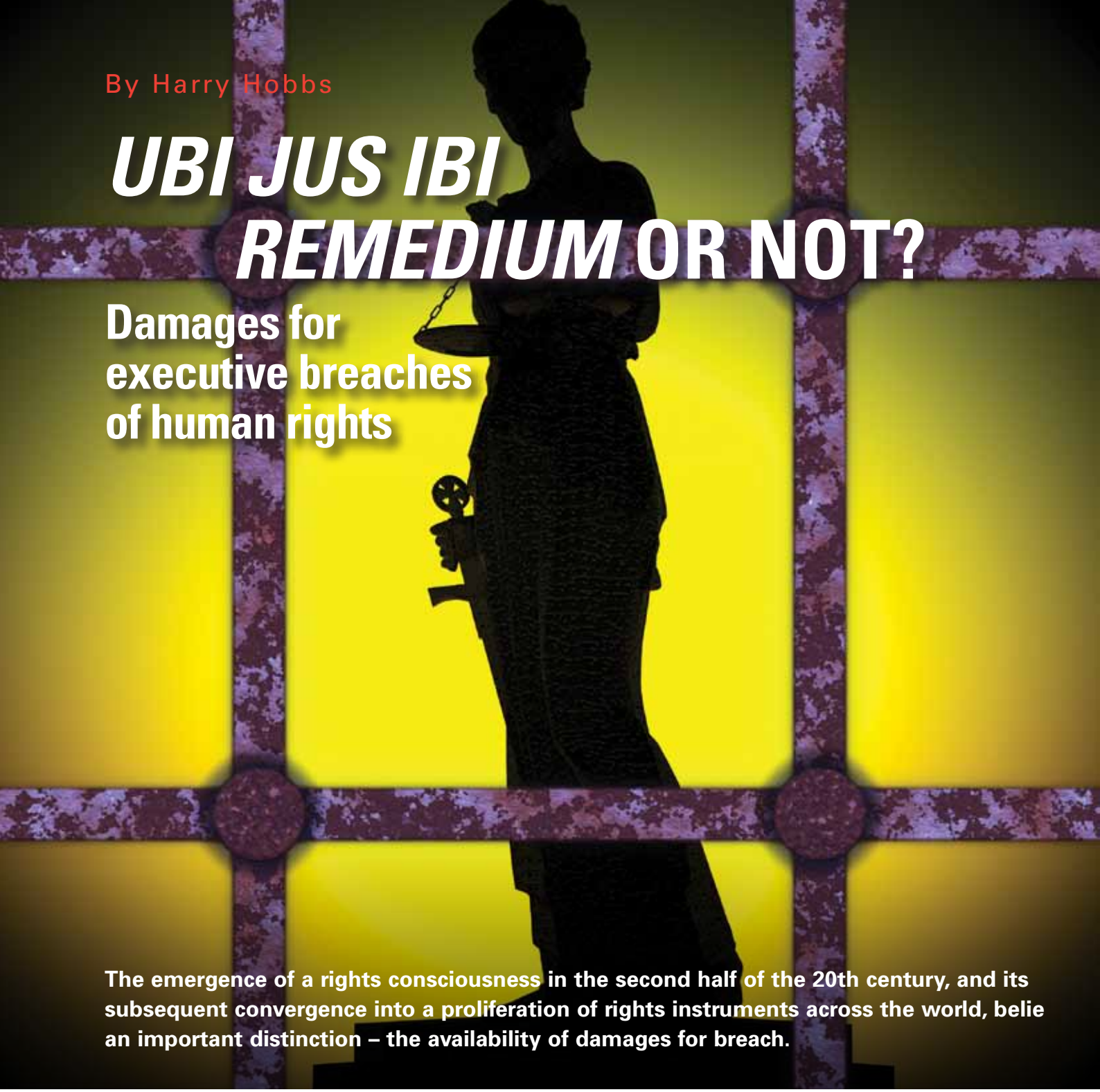

By Harry Hobbs

UBI JUS IBI REMEDIUM OR NOT?

Damages for executive breaches of human rights

The emergence of a rights consciousness in the second half of the 20th century, and its subsequent convergence into a proliferation of rights instruments across the world, belie an important distinction – the availability of damages for breach.

The question of whether individual compensation should be available for breaches by the executive is a live one. Yet, one could be forgiven for assuming that as far back as 1703, in *Ashby v White*, Chief Justice Holt definitively resolved it: 'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal…Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.'[1]

This article surveys four national and intra-national human rights instruments: the *Canadian Charter of Rights and Freedoms* 1982 (the *Canadian Charter*); the *New Zealand Bill of Rights Act* 1990 (*NZ BORA*); the *Victorian Charter of Human Rights and Responsibilities* 2006 (*Victorian Charter*); and the *Australian Capital Territory Human Rights Act* 2004 (*ACT HRA*), and examines their differing approaches to remedies for violations committed by the executive. Note, however, that this article focuses primarily on pecuniary compensation

as a personal remedy for breach, rather than other personal remedies such as declarative or injunctive relief, or broader constitutional remedies such as striking out or reading down of inconsistent legislative provisions. Damages are not always the best remedy for human rights violations but, as Lisa Tortell has demonstrated, money can serve important symbolic purposes providing clear vindication of rights and governmental admission of wrongdoing.[2] As such, in appropriate circumstances, damages *should* be available and *should* be awarded.

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Canadian Charter of Rights and Freedoms* is a constitutionally entrenched human rights instrument that guarantees an expansive list of fundamental freedoms. The *Charter* was borne partly out of frustration with an earlier legislative human rights framework, the 1960 *Canadian Bill of Rights*. This 1960 enactment was perceived to suffer two underlying flaws; first, as a federal statute it did not apply to provincial legislation, allowing the provinces to legislate contrary to the declared rights; and, second, as a simple, unentrenched Act of Parliament, the courts were wary of interpreting the provisions broadly.[3]

The court's extreme deference to parliamentary sovereignty at the expense of an impotent Bill of Rights was most clearly seen in the Supreme Court's decision of *Attorney-General of Canada v Lavell*.[4] This case concerned a provision under the *Indian Act* that revoked a woman's status as an Indigenous person under the Act if she married a non-Indigenous man but, significantly, did not have the same effect if an Indigenous man married a non-Indigenous woman. The claimants, Lavell and Bédard, argued that this (clearly discriminatory) section was in breach of s1(b) of the *Canadian Bill of Rights*, which guaranteed 'equality before the law'. By 5-4, the Supreme Court adopted a very narrow approach to s1(b) and the *Bill of Rights* more generally, with the plurality holding that equality before the law means nothing more than 'equality of treatment in the enforcement and application of the laws of Canada'.[5] Because this provision treated *all women equally* there was no discrimination. In a concurring judgment, Justice Pigeon went even further, reaffirming his belief that Parliament did not intend for the *Bill of Rights* to invalidate prior inconsistent legislation.[6]

Decisions such as *Lavell* provided impetus for a constitutionally entrenched and broadly interpreted *Charter*.[7] Most significant in this respect is the inclusion of an explicit restitutionary provision. Section 24(1) reads:

> 'Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

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The important words in this section are 'such remedy as the court considers appropriate and just in the circumstances'. This phrase gives the court wide ambit to tailor particular orders to the appellant, ranging from declaratory relief, equitable injunctions and even pecuniary compensation. Significantly, the Supreme Court has held that the purpose behind s24(1) 'is to provide responsive and effective remedies', and as such it should be given a 'generous and purposive interpretation'.[8]

The *Charter* was given perhaps its most generous and purposive interpretation in the 2010 case of *City of Vancouver and the Province of British Columbia v Ward*,[9] a case that enshrined the right to pecuniary compensation for violations by the executive. In 2002, police arrested Alan Ward near the site of a public speech by then-prime minister, Jean Chrétien. Mr Ward was wrongly suspected of intending to throw a pie at the prime minister. He was strip-searched and his car impounded. Mr Ward sued, alleging breach of his right to be free from unreasonable search and seizure (guaranteed under s8 of the *Charter*). The trial judge agreed and awarded damages of $5,000 for the strip-search and $100 for the impounding of the car. This case eventually made its way to the Supreme Court, which overturned the $100 award but unanimously upheld the $5,000 compensation for the unreasonable strip-search. In determining whether damages were an appropriate remedy, the Court affirmed its earlier decision in *Doucet-Boudreau*. In that earlier case, a majority of the Court examined what constitutes an appropriate and just remedy under the *Charter*:

> 'An appropriate and just remedy…is one that meaningfully vindicates the rights and freedoms of the claimants.'[10]

The wide scope given to the interpretation of the *Charter* reflects a realignment in attitudes towards parliamentary sovereignty and the role of the judiciary in Canada. The once all-powerful doctrine of parliamentary sovereignty has been weakened by the emerging acceptance of judicial review as an appropriate and necessary bulwark for the protection of human rights. However, the acceptance that damages may be an appropriate remedy for breaches of human rights cannot simply be attributed to this broader theoretical realignment, but rather a simple truth: when the executive fails in its duty, pecuniary compensation may be necessary for vindication.

THE NEW ZEALAND *BILL OF RIGHTS ACT*

The *NZ BORA* came into force on 25 September 1990. Although it was modelled on the *Canadian Charter*, it differs in two significant respects; it does not contain any provisions providing for compensation or remedies for breaches of the Act, and it is not constitutionally entrenched. In this sense, it bears a striking resemblance to the 1960 Canadian *Bill of Rights*, rather than the 1982 *Charter*. Judicial interpretation, however, has given it a greater operation than its earlier Canadian cousin.

In 1985, the NZ government released a White Paper canvassing ideas for a Bill of Rights.[11] This White Paper contained two noteworthy features: (1) a remedial provision modelled on s24(1) of the *Canadian Charter*; and (2) that the Bill would be enacted as 'supreme law'.[12] Clause 25, the remedial provision, read:

> 'Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

Academic commentary has noted that there was considerable opposition to the proposed Bill, although much of it focused on its proposed status as supreme law and its consequent weakening of parliamentary sovereignty, rather than its remedial provision.[13] Nevertheless, its final passage through Parliament was assured only after clause 25 was excised and s4, which ensured its status as an ordinary statute, was added. Significantly, this means that the NZ courts cannot strike down legislation as inconsistent with rights enshrined under the Act, though they can (and often do) give statutes a generous reading so as to remain consistent with it.

The removal of clause 25 was presumed to negate any judicial activism. Indeed, the prime minister, Sir Geoffrey Palmer, reassured Parliament that the Bill 'creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is in issue.'[14] Palmer's exhortations, however, have proven incorrect and the courts have significantly expanded the scope of the Act to provide personal remedies for executive violations. The most significant of these extensions occurred in *Simpson v Attorney-General*, also known as *Baigent's Case*.[15] Although there had been judicial murmurings about the absence of remedies in earlier cases,[16] in *Baigent's Case* the Court of Appeal took the extraordinary step of simply introducing a right to compensation for breach.

Baigent's Case concerned an action of trespass by the police. In the course of executing an arrest warrant against the premises of Troy O'Brien, the police arrived at a house owned by Mrs Baigent, a woman 'who had no connection with Mr O'Brien'.[17] Mrs Baigent's son answered the door and when questioned, gave his identity to the detective. He also telephoned his sister (a Wellington barrister) who reiterated that the police had the wrong house. During this telephone conversation it was alleged that the detective had said to the sister, "We often get it wrong, but while we are here we will have a look around anyway."[18] Mrs Baigent commenced civil proceedings in the High Court against the attorney-general on a number of grounds, including violation of s21 of the *NZ BORA*, which reads; 'everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise'. The Master of the High Court struck out all claims (citing statutory immunities in relation to the s21 cause of action), and the High Court dismissed an application for judicial review. The Court of Appeal, however (New Zealand's highest court in 1994), reversed the decisions and upheld Mrs Baigent's appeal, remitting the matter to the High Court with an amended statement of claim.

The Court of Appeal judges reasoned that the fact that the *NZ BORA* did not contain an express clause about remedies was 'probably not of much consequence',[19] nor an

'impediment to the Court's ability to "develop the possibilities of judicial remedy"'.[20] Indeed, Justice Casey considered that 'it would be wrong to conclude' that the absence of a remedies provision demonstrated 'that Parliament did not intend there to be any remedy for those whose rights have been infringed'.[21] Justice McKay agreed, finding it:

> '[D]ifficult to comprehend…that Parliament should solemnly confer certain rights which are not intended to be enforceable either by prosecution or civil remedy, and can therefore be denied or infringed with impunity. Such a right would exist only in name, but it would be a misnomer to call it a right, as it would be without substance.'[22]

It is important to be clear here; *Baigent's Case* has not established a principle that pecuniary compensation for breaches of the *NZ BORA* is available as of right. Rather, a claimant will be awarded damages only if the court finds that compensation is both an appropriate and effective remedy. Indeed, the primary reason that compensation was awarded in *Baigent's Case* is because the usual remedy for violations of unreasonable search and seizure – the exclusion of evidence – was clearly inappropriate in the circumstances: Mrs Baigent faced no charges![23] This is strikingly similar to the Canadian decision of *Ward*, discussed above – interestingly, though, in both cases a declaration that the individual's rights had been violated was considered by the courts to be insufficient: only pecuniary compensation could meaningfully vindicate the rights of the claimants.

THE *VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES* AND THE *AUSTRALIAN CAPITAL TERRITORY HUMAN RIGHTS ACT*

In contrast to the *Canadian Charter* and the *NZ BORA*, the Australian jurisdictions' human rights protections and personal remedial provisions are decidedly limited. Neither the *Victorian Charter* nor the *ACT HRA* permit compensation for violations of the recognised rights (excepting compensation for wrongful conviction under s23 of the *ACT HRA*) and, similar to the *NZ BORA*, neither legislative instrument is constitutionally entrenched, or provides courts with the power to strike down inconsistent legislation.

Both Acts are clear from the outset – pecuniary compensation will not be available. Under s40C of the *ACT HRA*, a victim of an alleged contravention may bring an action against the public authority in the Supreme Court. However, the Court's remedial powers are constrained, governed by s40C(4): 'the Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages'. The *Victorian Charter* is no different. Section 39 governs individual legal proceedings arising from executive breaches. Subsection (3) explicitly rules out pecuniary compensation, providing that 'a person is not entitled to be awarded any damages of a breach of this *Charter*'. Although judicial interpretation led to the introduction of pecuniary compensation for breach in both Canada and New Zealand, the clear words of the *ACT HRA* >>

and the *Victorian Charter* constrains judicial activism here to a much greater extent.

The reason for the restrictive approach towards damages (and judicial remedies more broadly) is a theoretical one – that is, rather than leaving responsibility for the protection of human rights to the judiciary alone, the major focus of the *Victorian Charter* and *ACT HRA* is preserving a balance between the legislature, executive and the judiciary.[24] Whether, in effect, a balance exists is another question.

The *ACT HRA* and the *Victorian Charter* conceptualise widespread rights consciousness and a well-developed rights-based dialogue across the legislature, public service and wider community more generally, as the best guarantee for the protection of human rights. In this regard, both the *Victorian Charter* and the *ACT HRA* require all Bills that come before Parliament to include a 'statement of compatibility' which clearly notes whether the Bill is consistent with human rights, and if not, how not.[25] Significantly, however, failure to include a statement of compatibility does not affect the validity of the law.[26] The weakness of this dialogue model is exemplified further by the interplay between ss31 and 32 of the *Victorian Charter*.

The relationship between ss31 and 32 illustrates the Charter's extreme deference to parliamentary sovereignty. While s32 requires all courts, tribunals, public servants and others who interpret and apply the law, to interpret all legislation in a way consistent with human rights, s31 permits the Victorian Parliament to 'override' the operation of the Charter by making an express declaration to that effect. Even though s31(4) states that it is Parliament's intention that this override provision be used only in 'exceptional circumstances', it is not at all clear when a circumstance may be 'exceptional'. The *ACT HRA* also includes a provision requiring that all Territory laws be interpreted 'in a way that is compatible with human rights'.[27] However, it does not include an override provision enabling the Parliament to actively ignore the enshrined rights.

Nevertheless, the explicit exclusion of the possibility for damages for breaches of human rights under the *ACT HRA* and *Victorian Charter* is curious, and raises the question: what is the function of damages? Damages are designed to compensate claimants, vindicate their rights and/or deter abusers. While declarative relief may often have the potential to achieve these aims, in certain circumstances it will neither be appropriate nor effective. Something stronger will be required. Pecuniary compensation, the 'tangible confirmation of responsibility'[28] is needed.

CONCLUSION

Human rights instruments throughout the world differ in their handling of pecuniary compensation for breach. This is curious. Whether society believes rights protection is best guaranteed by a balance between the legislature, executive and the judiciary; a strong sovereign parliament; or perhaps a weightier judiciary with powers to strike down inconsistent legislation, the question of the appropriateness of damages should be clear. Both the NZ Court of Appeal and the Canadian Supreme Court certainly agreed, and after a number of years they finally cast aside the timidity of their respective legislatures to ensure that, in appropriate circumstances, claimants may receive damages for violations of their rights. Declarative relief was not seen to go far enough. Indeed, in this respect it is worth remembering the words of President Cooke of the NZ Court of Appeal in *Baigent's Case*:

> 'It is necessary to be alert in NZ to the danger that both the courts and Parliament at times may give, or at least be asked to give, lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions.'[29]

Australians should also be alert to this danger, and our legislatures should acknowledge that pecuniary compensation for breach of executive acts gives real service to claimants. The explicit exclusion of the availability of damages under the *Victorian Charter* and the *ACT HRA* is unfortunate. Surely anything that assists in the meaningful vindication of individual rights should not be shied away from? ■

Notes: **1** (1703) 90 ER 1188 at 1189. **2** Lisa Tortell, *Monetary remedies for breach of human rights: A comparative study* (Hart Publishing, 2006) at 1. **3** Indeed, the Supreme Court declared only one piece of legislation inoperative under the *Bill of Rights*. See *R v Drybones* [1970] SCR 282. **4** [1974] SCR 1349. **5** *Ibid* at 1373 (Fauteux CJ, and Martland, Judson and Ritchie JJ). **6** *Ibid* at 1390. **7** Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (Irwin Law, 4th ed, 2009) at 17. **8** *Doucet-Boudreau v Nova Scotia* [2003] 3 SCR 3 at 5, 6, 24, 38 and 51. **9** [2010] 2 SCR 28. **10** *Doucet-Boudreau v Nova Scotia* [2003] 3 SCR 3 at 37. **11** Geoffrey Palmer, 'A Bill of Rights for New Zealand: A White Paper' (1985) *Appendix to the Journal of the House of Representatives*, Volume I A6. **12** *Ibid* at [10.184]. **13** See, for example, the commentaries quoted in Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 7. **14** 510 NZPD 3450 (1990). **15** (1994) 3 NZLR 667 at 667. **16** See, for example, *R v Goodwin* [1993] 2 NZLR 153 at 191 (Justice Richardson) and *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 266 (President Cooke). **17** *Simpson v Attorney-General* (1994) 3 NZLR 667 at 667. **18** *Ibid*. **19** *Ibid* at 676 (President Cooke). **20** *Ibid* at 691 (Justice Casey) quoting the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3(b). **21** *Ibid* at 691 (Justice Casey). See also, at 718, Justice McKay who held that the absence of a remedies clause 'does not show an intention that there should be no remedy, but rather that Parliament was content to leave it to the courts to provide the remedy'. **22** *Ibid* at 718 (Justice McKay). **23** Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 817. **24** Carolyn Evans, 'Responsibility for rights: The ACT *Human Rights Act*' (2004) 32 *Federal Law Review* 291 at 291. See also George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 27 *Melbourne University Law Review* 880. **25** *Human Rights Act* 2004 (ACT) s37; *Charter of Human Rights and Responsibilities* 2006 (Vic) s28. **26** *Human Rights Act* 2004 (ACT) s39; *Charter of Human Rights and Responsibilities* 2006 (Vic) s29. **27** *Human Rights Act* 2004 (ACT) s30. **28** Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) at 51. **29** *Baigent's Case* (1994) 3 NZLR 667 at 676 (President Cooke).

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