

# AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW

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## INTRODUCTION TO SPECIAL ISSUE

**Special Issue on the Charter** – *Justice Pamela Tate* ..... 3

## ARTICLES

**Administrative Decision-Making under Victoria’s Charter** – *Janina Boughey and Adam Fletcher*

Two recent cases have shed considerable light on what administrative decision-makers must do to comply with their human rights obligations under Victoria’s *Charter of Human Rights and Responsibilities Act 2006* (Vic). This clarity is long overdue and much needed both for those who believe their rights have been unlawfully impinged and for public authorities themselves, who need to understand the precise scope of the powers they exercise. However, we argue that these developments also serve to highlight the lack of effective, appropriate, affordable and independent oversight of public authorities’ compliance with their Charter obligations. .... 10

**How Does the Charter Affect Discretions? The Limits of s 38(1) and Beyond** – *Bruce Chen*

This article examines how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), a statutory bill of rights, affects discretions conferred on decision-makers. Section 38(1) of the Charter, which imposes substantive and procedural obligations on public authorities, is the immediately obvious avenue for challenging the exercise of discretions on Charter grounds. But as this article outlines, there are limitations to the operation of s 38(1). Nevertheless, the Charter may have more than one trick up its sleeve. This article analyses the possibilities as to whether the interpretive obligation under s 32(1) of the Charter, and the application provision in s 6(2)(b), might independently limit the scope of discretions or their exercise. As this article demonstrates, how the Charter does or potentially can affect discretions gives rise to complex and interrelated issues. .... 28

**Judicial Review and the Charter** – *Mark Aronson*

It is difficult to characterise court action seeking relief or remedies for government breaches of Charter rights. The Act’s remedies section is a model of obscurity. It provides no new remedies, and probably bans damages for breach. It may even require joinder of Charter and non-Charter causes of action. It does not ban judicial review’s remedies, whose key concepts in non-Charter contexts are jurisdictional error, nullity, and invalidity. In Charter contexts, however, those terms are almost always a distraction. Judicial determinations of Charter breaches are more direct than supervisory. Further, nullity or invalidity are the usual outcomes of judicial review’s remedies, and their premise is the governing law’s meaning. It is improbable in the extreme to impose such a meaning upon the Charter. The real limitation on remedies lies not in the remedies section itself, but in the Act’s failure to empower ongoing court oversight of government responses to judicial declarations of systemic rights violations. .... 52

**Judicial Review and Human Rights – Matthew Groves**

Judicial review and human rights claims have a superficial similarity because each involves the review of public decisions by references to freestanding principles. This article argues that there are deep differences between the two forms of redress and many causes for those differences. One is Australia’s distinctly procedural conception of judicial review. The constitutional justifications given for that procedural focus suggest that judicial review grounds will struggle to encompass adequate consideration of rights as a ground of review. A procedural focus in judicial review enables courts to consider whether rights were considered by officials but perhaps not whether they were considered adequately. This article explains how these problems are not clarified, and may in fact be made even less clear, by the remedial provisions of the *Charter of Human Rights and Responsibilities 2006* (Vic). This article considers possible amendments to judicial review and human rights statutes to lessen the uncertain status of the consideration of rights within judicial review. ....

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