

**IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
ADMINISTRATIVE DIVISION  
GENERAL LIST**

No G605 of 2008

**BETWEEN:**

**GARY KRACKE**

Applicant

and

**MENTAL HEALTH REVIEW BOARD & ORS**

Respondents

**HUMAN RIGHTS LAW RESOURCE CENTRE'S  
WRITTEN SUBMISSIONS**

1. For a period of approximately 15 months, from April 2007 until June 2008, the applicant, Gary Kracke, was subjected to compulsory medical treatment (namely, fortnightly injections of Risperdal Consta) without his consent, and without this treatment having been reviewed by the Mental Health Review Board (the **Board**) as required by the *Mental Health Act* 1986 (Vic).
2. The *Mental Health Act* establishes a regime for “involuntary treatment orders” (**ITOs**) and “community treatment orders” (**CTOs**), and prescribes time limits within which such orders (which are made by an authorised psychiatrist) “must” be reviewed by the Board. However the Act is silent as to the consequences of a failure to review the order within the time limits specified in the Act.
3. The issue of construction raised by this case is: what is the true construction of the provisions of the *Mental Health Act* requiring the Board to review ITOs and CTOs within specified time limits? Is the requirement obligatory, such that a failure by the Board to review an ITO or a CTO within the specified time results in the order expiring or being discharged?
4. The Human Rights Law Resource Centre (the **Centre**), which has been given leave to appear as amicus curiae, submits that a human rights compatible interpretation of the *Mental Health Act* should be adopted, either under s 32 of

the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) or pursuant to common law principles of construction. Adopting this approach, the better construction is that the times specified in the *Mental Health Act* are obligatory, such that a failure to review an ITO or CTO within the time limits specified in the Act results in the orders expiring or being discharged.

5. These submissions will address the following matters (and are structured under the following headings):
  - (1) the issue of statutory construction that arises in the proceeding and the competing constructions that have been advanced;
  - (2) the principles of construction involved in the application of s 32 of the *Charter*;
  - (3) the common law principles of construction that Acts should be interpreted consistently with international law and so as not to abrogate human rights or freedoms;
  - (4) the human rights that are relevant to the competing constructions, and particularly why the construction favoured by the applicant and the Centre is compatible with those rights;
  - (5) the status of the Tribunal and the Mental Health Review Board under the *Charter*; and
  - (6) the breaches of Mr Kracke's human rights that have occurred in this case and the desirability of making a declaration to that effect.

## **I THE CONSTRUCTION ISSUE**

6. As indicated above, the proceeding raises an issue of construction of the *Mental Health Act*. In the Centre's submission, the construction issue can be stated as follows:

*Are the time limits stated in ss 30(3)-(4) of the Mental Health Act obligatory, such that a failure to review an involuntary treatment order and a community treatment*

*order within the times specified in the Act, results in the expiry or discharge of these orders?*

7. The Centre submits that s 30 of the *Mental Health Act* should be construed as laying down obligatory time limits within which the treatment orders are to be reviewed. Failure to review within those times leads to the expiry or discharge of the order (the **Strict Compliance Construction**).
8. On the other hand, the Contradictor submits that delay in completing the reviews of the treatment orders by the Board, or even failure by the Board to conduct the reviews, does not have the consequence that the treatment orders expire or are discharged (the **Substantial Compliance Construction**).<sup>1</sup>
9. The Centre submits that this question of construction is to be resolved by application of the interpretative obligation in s 32 of the *Charter*. Alternatively, if s 32 is held not to apply to this case, then the common law principles of statutory construction lead to the same conclusion: the human rights compatible construction of s 30 of the *Mental Health Act* is the Strict Compliance Construction.

## **II PRINCIPLES OF CONSTRUCTION INVOLVED IN THE APPLICATION OF SECTION 32 OF THE CHARTER**

10. This proceeding potentially raises a number of important and (so far) unresolved issues regarding the scope and operation of s 32 of the *Charter*. In particular the following issues may arise:
  - (1) what is the scope of application of s 32 of the *Charter*? Is it applicable only to courts and tribunals?
  - (2) is it necessary first to construe a statutory provision absent s 32 of the *Charter*, to arrive at an “ordinary” construction of the provision, before considering s 32?

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<sup>1</sup> Contradictor’s Submissions at [87]-[88].

- (3) what is the relationship, if any, between s 7 and s 32 of the *Charter*? Does s 32 only come into play after the statutory provision has been measured against s 7?
  - (4) does the inclusion of the words “consistently with their purpose” in s 32 of the *Charter* have the effect that the interpretative obligation is more circumscribed than s 3 of the *Human Rights Act 1998* (UK)?
  - (5) what other principles apply to interpretation under s 32 of the *Charter*?
  - (6) does s 32 operate in this case? Does its application in this case involve any impermissible retroactivity?
11. We will address each of these issues in turn.
  12. The **first issue** raised above concerns the scope of application of the interpretative obligation in s 32 of the *Charter*. Specifically, is s 32 applicable only to courts and tribunals when they are interpreting legislation, or is the section a general provision concerning the interpretation of legislation applicable equally (for example) when a lawyer is advising a client or a citizen is interpreting legislation without a proceeding having been commenced? The issue arises because s 6(2)(b) of the *Charter* may be taken to suggest that the obligation in s 32 applies only to courts and tribunals.
  13. The better view is that s 32 is applicable generally to the interpretation of Victorian enactments and is not confined to interpretation by courts and tribunals. There is nothing in the terms of s 32 to suggest that it is confined to courts and tribunals; it is expressed as a general interpretative provision, conceptually similar to s 35 of the *Interpretation of Legislation Act 1984* (Vic) and s 15AA of the *Acts Interpretation Act 1901* (Cth). Those provisions are applicable to the interpretation of legislation generally, and are not limited to interpretation by courts and tribunals. Conceptually, it would be odd if a statutory provision had one interpretation outside of proceedings and another when interpreted by a court or tribunal.

14. This issue does not have any direct bearing in the present case, since the VCAT is a tribunal and is therefore subject to the interpretative obligation in s 32 in any event. However, the issue is of general conceptual significance, and will be material where a public authority which is not a court or tribunal (such as an authorised psychiatrist under the *Mental Health Act*) is required to interpret statutory provisions.
15. The **second issue** raised above is whether it is necessary first to construe a statutory provision apart from s 32, to arrive at its “ordinary” construction, before considering the interpretation of the provision in accordance with s 32. This approach has been adopted in a number of United Kingdom and New Zealand cases in relation to the comparable interpretative provisions in those jurisdictions.<sup>2</sup>
16. It is submitted that the approach described above should not be followed. Rather, interpretation of a statutory provision compatibly with human rights should be considered in the first instance, for the following reasons:
  - (1) First, it is compatible with the general approach to statutory construction which is adopted in Australia, which considers context in the first instance.<sup>3</sup> In Victoria, human rights now form part of the *context* in which a statutory provision is to be construed, hence it is inappropriate to put human rights to one side in the first instance when construing a provision.
  - (2) Secondly, this approach is consistent with the approach adopted in relation to other interpretation provisions, such as s 35 of the *Interpretation of Legislation Act* and s 15AA of the *Acts Interpretation Act*. In relation to those provisions, it is not the practice to construe a provision in accordance with non-statutory principles of interpretation, and then to consider the interpretation under s 35 or s 15AA. There is no good reason to adopt a different approach with s 32 of the *Charter*.

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<sup>2</sup> See, eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; [2004] UKHL 30; *Beaulane Properties Ltd v Palmer* [2006] Ch 79; [2005] EWHC 817 (Ch); *R v Hansen* [2007] 3 NZLR 1; [2007] NZSC 7.

<sup>3</sup> See *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby, Hayne JJ).

- (3) Thirdly, it is contrary to the purposes of the *Charter* in general, and s 32 in particular, for the non-*Charter* interpretation to be characterised as “ordinary” or “normal” and the *Charter* interpretation to be characterised (by implication) as “extraordinary” or “abnormal”. The *Charter* seeks to “establish a framework for the protection and promotion of human rights in Victoria”.<sup>4</sup> The purpose of s 32 is to establish a requirement that statutory provisions be interpreted in a way that is compatible with human rights.<sup>5</sup> Consistently with these purposes, the *Charter*-compatible interpretation should now be regarded as “ordinary” and “normal”.
- (4) Fourthly, to construe a provision according to “ordinary” principles requires giving the provision a meaning consistent with international instruments to which Australia is a party (see below). There is no good reason to favour recourse to that principle of construction before the rule of construction enacted by the Parliament itself.
17. In some cases it may be appropriate to refer to the non-*Charter* interpretation of a statutory provision (ie the interpretation that the provision would have putting s 32 of the *Charter* to one side). Where a statutory provision has been construed by a court before the commencement of s 32 of the *Charter*, it may be appropriate to start with the previous construction and then consider whether s 32 of the *Charter* results in a different construction.<sup>6</sup> However, where a statutory provision has not been the subject of previous judicial consideration, it is difficult to see any sound reason for construing the provision, first, without the *Charter*, and then considering whether s 32 of the *Charter* changes that interpretation.
18. Indeed, as with context, it is important to consider the human rights in the *Charter* in the first instance, because this is more likely to lead to the correct or preferable construction of the provision.
19. The **third issue** is: what is the relationship, if any, between s 7 and s 32 of the *Charter*? Does s 32 only come into play *after* the statutory provision has been

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<sup>4</sup> Explanatory Memorandum for Charter of Human Rights and Responsibilities Bill 2006, page 1.

<sup>5</sup> See s 1(2)(b) of the *Charter*.

<sup>6</sup> Eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; [2004] UKHL 30.

measured against s 7? This issue was the subject of detailed consideration, in relation to the corresponding provisions of the *New Zealand Bill of Rights Act 1990 (NZ BORA)*, in *R v Hansen*.<sup>7</sup> Briefly, Elias CJ expressed the view that s 5 of the NZ BORA (the provision corresponding to s 7 of the *Charter*) should not be considered before engaging in the process of interpretation under s 6 of the NZ BORA (the provision corresponding to s 32 of the *Charter*). Three members of the Court considered that s 5 had to be considered before considering the interpretative obligation in s 6; only if the relevant provision could not be justified under s 5, did one go on to consider whether the provision could be interpreted compatibly with human rights.

20. The view of Elias CJ in *Hansen* is to be preferred. Where it is alleged that a statutory provision limits human rights, it is not appropriate to consider, first, whether such limits can be justified under s 7, before considering whether it is possible to interpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the *Charter*; consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.
21. This interpretation is supported by the provenance and conceptual purpose of s 7. Section 7 is based on s 5 of the NZ BORA and s 36 of the *Constitution of the Republic of South Africa 1996*.<sup>8</sup> Those provisions were in turn based on s 1 of the *Canadian Charter of Rights and Freedoms* (forming part of the Constitution Act 1982), which provides: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. That provision allowed limited derogation from human rights in the context of a supreme law allowing for judicial review of legislation. Thus legislation which was “demonstrably justified in a free and

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<sup>7</sup> [2007] 3 NZLR 1; [2007] NZSC 7.

<sup>8</sup> Explanatory Memorandum for Charter of Human Rights and Responsibilities Bill, page 9.

democratic society” would survive challenge, with the onus lying on the State to make out the justification.<sup>9</sup>

22. In the context of the *Charter*, which provides for declarations of inconsistent interpretation rather than declarations of invalidity, s 7 provides a basis upon which a Court may decline to make a declaration of inconsistent interpretation (under s 36) even though a statutory provision limits human rights. For example, if the provisions of the *Mental Health Act* relating to ITOs and CTOs were challenged (putting to one side the issue arising in the present case relating to failure to conduct a review), no doubt the State would argue that these provisions were reasonable limits on human rights which were demonstrably justified in a free and democratic society, and therefore no declaration of inconsistent interpretation should be made.
23. The **fourth issue** raised above is whether the inclusion of the words “consistently with their purpose” in s 32 of the Charter has the effect that the interpretative obligation is more circumscribed than s 3 of the *Human Rights Act* 1998 (UK)?
24. The Centre submits, in summary, that s 32 of the *Charter* is as “strong” as s 3 of the *Human Rights Act*, and that the insertion of the words “consistently with their purpose” merely reflects the UK case law on s 3 of the *Human Rights Act* and does not require or suggest any different approach.
25. There is a good deal of similarity between the wording of s 32 of the *Charter* and the wording of s 3 of the *Human Rights Act*. In particular, s 32 commences with the phrase “[s]o far as it is possible to do so”, which is evidently borrowed from s 3 of the *Human Rights Act*. Had the Victorian Parliament intended to depart from the UK approach, it is likely that it would have chosen a more limited form of words.
26. While s 32 includes the words, “consistently with their purpose”, which do not appear in s 3 of the *Human Rights Act*, these words are consistent with and

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<sup>9</sup> See, eg, *R v Oakes* [1986] 1 SCR 103.

reflective of case law on s 3 of the UK Act. In *Ghaidan v Godin-Mendoza*, Lord Nicholls said:<sup>10</sup>

*Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. ...The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'.*

See also per Lord Rodger at [110], [121]-[122].

27. That the insertion of the words “consistently with their purpose” was intended to reflect the above case law (and not to depart from it) is indicated in the Report of the Consultation Committee which led directly to the enactment of the Charter.<sup>11</sup> The Report of the Consultation Committee was referred to in the Second Reading Speech of the Attorney-General in relation to the Bill which became the *Charter*.
28. The words “consistently with their purpose” in s 32 give rise to the question: at what level of abstraction is the purpose of a statutory provision to be identified? On this point, the Centre adopts the following observations and views of Evans & Evans:<sup>12</sup>

*A narrow construction [of the words “consistently with their purpose”] would identify the purpose of legislation as being to achieve exactly what it says, according to its plain and natural meaning ..., thus giving the most limited scope to the interpretation provision. A wider construction would identify the purpose of legislation as being to address some problem or mischief. This is the level of abstraction commonly identified in purpose or objects clauses. It is the level of abstraction at which courts operate when giving a ‘purposive’ interpretation to legislation ...It is the level of abstraction that is used in the modern contextual approach to statutory interpretation that ‘uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ..., one may discern the statute was intended to remedy’ ... Accordingly, in our view, it is the level of abstraction at which interpreters of legislation should approach their interpretative role under the Charter. To give*

<sup>10</sup> [2004] 2 AC 557; [2004] UKHL 30 at [33].

<sup>11</sup> *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee* (2005), pages 82-83. Cf *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 at [77]-[78]. See also s 1(2)(b) which states simply that a primary purpose of the Charter is to protect and promote human rights by “ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights”.

<sup>12</sup> Evans & Evans, *Australian Bills of Rights – The Law of the Victorian Charter and ACT Human Rights Act* (2008), page 96.

*primacy to the purpose of parliament and then to define that purpose in a manner that requires a very conservative and literal approach to the legislation ... would gut the interpretation provisions of much of their force and limit the capacity of the Australian human rights Acts to protect human rights.*

29. The **fifth issue** raised above is: what other principles apply to interpretation under s 32 of the *Charter*? It is submitted that the following principles, developed in relation to s 3 of the *Human Rights Act*,<sup>13</sup> can be transposed to s 32 of the *Charter* as follows:

- (1) The s 32 duty is not dependent upon ambiguity in the legislation being interpreted.<sup>14</sup>
- (2) The application of s 32 should not depend critically upon the particular words adopted by the parliamentary draftsman in the statutory provision under consideration.<sup>15</sup>
- (3) The mere fact that the language under consideration is inconsistent with a human rights compatible meaning does not make a human rights compatible interpretation under s 32 impossible.<sup>16</sup>
- (4) However, the s 32 interpretation must be compatible with the “underlying thrust” of the legislation being construed.<sup>17</sup>
- (5) The court should not embark on considering matters calling for legislative deliberation.<sup>18</sup>
- (6) The interpretative obligation in s 32 may involve reading in and reading down words in legislation.<sup>19</sup>

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<sup>13</sup> See *Beaulane Properties Ltd v Palmer* [2006] Ch 79; [2005] EWHC 817 (Ch) in relation to subparagraphs (1) to (5) of this paragraph.

<sup>14</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; [2004] UKHL 30 at [29] per Lord Nicholls; [44] per Lord Steyn; [67] per Lord Millett.

<sup>15</sup> *Ghaidan* at [31] per Lord Nicholls; see also at [41] per Lord Steyn.

<sup>16</sup> *Ghaidan* at [32] per Lord Nicholls; see also at [39], [50] per Lord Steyn; [67] per Lord Millett; [110]-[111] per Lord Rodger.

<sup>17</sup> *Ghaidan* at [33] per Lord Nicholls; see also at [108], [121]-[122] per Lord Rodger.

<sup>18</sup> *Ghaidan* at [33] per Lord Nicholls; see also at [110] per Lord Rodger.

<sup>19</sup> As to reading down see, eg, *Brooker v Police* [2007] 3 NZLR 91. As to reading in see, eg, *R v A (No 2)* [2002] 1 AC 45.

30. The **sixth issue** concerns the operation of s 32 in this case and, in particular, whether its application involves any impermissible retroactivity.
31. Two points should be noted at the outset. First, the *Charter* provides that it “extends and applies to all Acts, whether passed before or after the commencement of Part 2 [1 January 2007]”.<sup>20</sup> Thus the fact that the *Mental Health Act* predates the *Charter* is no bar to the application of the interpretative obligation. Secondly, the transitional provisions provide that the *Charter* “does not affect proceedings commenced or concluded before the commencement of Part 2 [1 January 2007]”. As the present proceeding was commenced in mid-2008, the proceeding does not fall into the class of case where application of the *Charter* is excluded.
32. The Centre’s primary submission in relation to “retrospectivity” is that, as at least some of the relevant events occurred after 1 January 2008 (when the interpretative obligation in s 32 commenced), application of s 32 in this case (at least to those events) does not involve any element of retrospectivity. This is so even if a determination of rights and liabilities arising out of those event is to some extent informed by events occurring before 1 January 2008.
33. Further or alternatively, if and to the extent that application of the interpretative obligation in this case involves an element of retroactivity, that should not stand in the way of the interpretative obligation applying here.
34. In *Wilson v First County Trust Ltd (No 2)*,<sup>21</sup> the House of Lords affirmed that “the true principle” underlying the presumption against retrospectivity is:<sup>22</sup>

*that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them.*

The *Charter* was enacted after *Wilson v First County Trust Ltd (No 2)*, which is a prominent House of Lords decision on retrospectivity. Had the Victorian Parliament intended to depart from the principles expressed in *Wilson*, it would have been easy to have made this plain by specifying that in no case would the

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<sup>20</sup> Section 49(1). See also s 1(2)(b).

<sup>21</sup> [2004] 1 AC 816 at 852.

<sup>22</sup> [2004] 1 AC 816 at 831 (Lord Nicholls), 851 (Lord Hope), 879-883 (Lord Rodger).

interpretative obligation in s 32 apply to past acts or events. Further, if the *Charter* can have no application to past events, there would have been no need to specify, in s 49(2), that the *Charter* does not apply to proceedings commenced before 1 January 2007.<sup>23</sup>

35. When assessing “unfairness”, it is relevant to consider the effect on any accrued or vested rights<sup>24</sup> and pending proceedings.<sup>25</sup> When considering accrued rights, differences between private law and public law matters are important.<sup>26</sup>
36. Here, none of the Board, the authorised psychiatrist and the mental health service had accrued or vested rights in any relevant sense. There being no accrued or vested rights and no issue about pending proceedings – and hence no unfairness – there is no impediment to s 32 being retrospective in operation.

### **III COMMON LAW PRINCIPLES OF INTERPRETATION**

37. Further, or in the alternative, if it were to be held (contrary to the submissions above in relation to retrospectivity) that the *Charter* does not apply in this case, it would nevertheless be appropriate, using common law principles of interpretation, to interpret the *Mental Health Act* consistently with international instruments to which Australia is a party, in particular, in this case, the *International Covenant on Civil and Political Rights (ICCPR)*, and to interpret the Act so as not to abrogate human rights and freedoms.
38. It is accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.<sup>27</sup>
39. Further, many Judges have accepted the proposition that, at least in the case of ambiguity, courts should favour a construction that is in conformity and not in

<sup>23</sup> The relevant date would, instead, have been 1 January 2008.

<sup>24</sup> [2004] 1 AC 816 at 832 (Lord Nicholls).

<sup>25</sup> [2004] 1 AC 816 at 886 (Lord Rodger).

<sup>26</sup> See Evans & Evans, *Australian Bills of Rights* (2008) at [3.24].

<sup>27</sup> *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] (Gummow and Hayne JJ).

conflict with Australia's international obligations.<sup>28</sup> It has been said that in this context there are strong reasons for rejecting a narrow conception of ambiguity.<sup>29</sup> The proposition expressed earlier in this paragraph is applicable to the construction of State as well as Commonwealth legislation, for it may be assumed, in the absence of clear words to the contrary, that the State Parliament intended to legislate in conformity with, and not contrary to, Australia's international obligations. In *Royal Women's Hospital v Medical Practitioners Board of Victoria*, Maxwell P expressed the proposition in terms of State as well as Commonwealth legislation.<sup>30</sup>

40. There is, additionally, the well-accepted principle that legislation should be construed so as not to abrogate human rights and freedoms, unless such an intention is clearly manifested by unambiguous language.<sup>31</sup>

#### **IV THE RIGHTS ENGAGED AND THE HUMAN RIGHTS COMPATIBLE CONSTRUCTION**

41. The object of the task of construction, then, is to arrive at the human rights compatible construction of s 30 of the *Mental Health Act*. In this case, the issue is whether the Strict Compliance Construction or Substantial Compliance Construction is the one that is compatible with relevant human rights.
42. The essential difference between the competing constructions concerns the legislative safeguards surrounding the making and continuation of compulsory medical treatment orders. That is, whilst the treatment orders themselves and the treatment they authorise certainly raise human rights issues, the question is whether a failure to adhere to legislative safeguards (and, particularly, the

<sup>28</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J), 304 (Gaudron J); *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 39 [75] (Maxwell P); *Tomasevic v Travaglini* (2007) 17 VR 100 at 113-114 [72]-[73] (Bell J). See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (Brennan, Deane, Dawson JJ).

<sup>29</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).

<sup>30</sup> (2006) 15 VR 22 at 39 [75].

<sup>31</sup> See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19] (Gleeson CJ).

independent review with which the Board is charged) magnifies and exacerbates those issues.

43. In the Centre's submission, the following human rights must be considered in order to determine which of the competing constructions is compatible with human rights:
- A. a person's right not be subjected to medical treatment without his or her full, free and informed consent (*Charter*, s 10(c));
  - B. a person's right not to have his or her privacy unlawfully or arbitrarily interfered with (*Charter*, s 13(a));
  - C. a person's right not to be treated in a cruel, inhuman or degrading way (*Charter*, s10(b));
  - D. a person's right to move freely within Victoria (*Charter*, s 12);
  - E. a person's right to liberty and the right not to be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law (*Charter*, s 21(1), (3)); and
  - F. the right of a party to a civil proceeding to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing (*Charter*, s 24(1)).
44. When analysing and construing the scope and content of those rights, the following principles should be adopted:
- (1) the *Charter* rights are modelled largely on civil and political rights enshrined in the ICCPR and contained in other human rights instruments and so comparative jurisprudence on the scope and content of the rights is highly relevant;<sup>32</sup>
  - (2) the Preamble recites that the *Charter* is founded on particular principles including that human rights are essential in a democratic society. Those

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<sup>32</sup> See *Charter*, s 32(2).

principles support a liberal and beneficial construction of the scope and content of the rights;<sup>33</sup>

- (3) the *Charter* rights should be interpreted and applied in manner which renders them “practical and effective, not theoretical and illusory”;<sup>34</sup>
- (4) properly construed, the rights may impose both positive and negative obligations on public authorities;<sup>35</sup> and
- (5) human rights are interdependent and indivisible and should be construed so as to complement and reinforce each other.<sup>36</sup>

#### **A PROTECTION FROM SUBJECTION TO MEDICAL TREATMENT WITHOUT FULL, FREE AND INFORMED CONSENT**

- 45. Section 10(c) of the *Charter* enacts a person’s right not to be subjected to medical treatment without his or her full, free and informed consent. This right is based on the values of human dignity, autonomy and physical and mental integrity.<sup>37</sup>
- 46. The *Charter* “expands” the right under art 7 of the ICCPR by including a prohibition against medical *treatment* without consent.<sup>38</sup>
- 47. The requirement for informed consent provides both substantive and procedural protections<sup>39</sup> and “it ensures that subjects are treated with dignity and that they

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<sup>33</sup> See, eg, *Hunter v Southam Inc* [1984] 2 SCR 145.

<sup>34</sup> *Goodwin v United Kingdom*, application no 28957/95, 11 July 2002 at [74] (ECtHR).

<sup>35</sup> See, eg, Human Rights Committee, *General Comment 3* (1981); *Storck v Germany*, application no 61603/00 (16 June 2005) at [103], [150] (ECtHR).

<sup>36</sup> See, eg, *Dubois v R* [1985] 2 SCR 350.

<sup>37</sup> See, eg, the Statement of Compatibility to the Public Health and Wellbeing Bill 2008 (Vic) (*Parliamentary Debates*, Legislative Assembly, 8 May 2008 at 1710 (Mr Andrews)); Statement of Compatibility to the Mental Health (Treatment and Care) Amendment Bill 2005 (ACT) at page 2 and the authorities cited below at n 57-58.

<sup>38</sup> Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 at page 11.

<sup>39</sup> M Bishop and S Woolman, “Freedom and Security of the Person” in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds), *Constitutional Law of South Africa* at 40-95.

retain the capacity to make decisions that may be contrary to the desire or the interests of the persons offering them a form of therapeutic treatment”.<sup>40</sup>

48. The *Charter* right is consistent with the *Principles for the protection of persons with mental illness* that were adopted by the UN General Assembly (the **MI Principles**<sup>41</sup>) which provide that “no treatment shall be given to a patient without his or her informed consent”. The MI Principles also make provision for the limited circumstances in which treatment may be given without a patient’s informed consent. In such cases, the patient must be an involuntary patient and there must be a review of that status by a review body. By Principle 17, the review body “shall periodically review” the cases of involuntary patients.
49. This *Charter* right is also consistent with the *United Nations Convention of the Rights of Persons with Disabilities*.<sup>42</sup> Article 12 of the Convention recognizes that persons with disabilities (which includes persons with mental impairments<sup>43</sup>) enjoy legal capacity on an equal basis with others.<sup>44</sup> It also provides that all measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse. The provision of medical treatment without consent is a measure that relates to exercise of legal capacity. Article 12 of the *Disabilities Convention* requires those safeguards to be proportional and tailored to the person’s circumstances and to be subject to regular review by an independent authority.
50. The Joint Committee on Human Rights of the UK Parliament has said, relying on *Storck v Germany*,<sup>45</sup> that in cases involving compulsory medical treatment the UK Government has a positive obligation “to provide effective supervision and review of treatment without consent”.<sup>46</sup> To be “effective”, those safeguards

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<sup>40</sup> M Bishop and S Woolman, “Freedom and Security of the Person” in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds), *Constitutional Law of South Africa* at 40-95.

<sup>41</sup> *Principles for the protection of persons with mental illness and the improvement of mental health care*, adopted by GA Resolution 46/119 of 17 December 1991.

<sup>42</sup> Australia ratified the Convention on 17 July 2008.

<sup>43</sup> *Disabilities Convention*, art 1(2).

<sup>44</sup> *Disabilities Convention*, art 12(2).

<sup>45</sup> *Storck v Germany*, application no 61603/00 (16 June 2005) at [103], [150] (ECtHR).

<sup>46</sup> See Joint Committee on Human Rights, *Legislative Scrutiny: Mental Health Bill*, Fourth Report of Session 2006-2007 (4 February 2007) at [66], [97].

must account for the vulnerability of mentally-ill persons,<sup>47</sup> their inability (in some cases) to complain about how they were being affected by the treatment and their position of powerlessness and inferiority.<sup>48</sup>

51. In England, the Code of Practice for the imposition of community treatment orders under the *Mental Health Act 1983* (UK) provides:

*Compulsory administration of treatment which would otherwise require consent is invariably an infringement of Article 8 of the Convention. Such a breach can be justified where it is in accordance with law, and it is proportionate to a legitimate aim (in this case, the reduction of the risk posed by a person's mental disorder and the improvement of their health).*

52. It can readily be seen that the provision of safeguards, and particularly supervision and review by an independent authority, is critical to those limited circumstances in which medical treatment may be given without consent. The Substantial Compliance Construction allows for the complete failure of that independent review by the Board.<sup>49</sup> On the other hand, the Strict Compliance Construction emphasises the importance of having appropriate and effective independent review by the Board.

## **B PRIVACY**

53. The *Charter* protects a person's right not to have his or her privacy unlawfully or arbitrarily interfered with (s 13(a)). The values of autonomy and physical and mental integrity underlie this right.<sup>50</sup>
54. The right in the ICCPR upon which this right is modelled obliges states to provide adequate protection to privacy.<sup>51</sup>
55. In the European Court of Human Rights (the **European Court**), it has been held that "a decision imposing a medical intervention in defiance of the subject's will would give rise to an interference with respect for his or her private life, and in

<sup>47</sup> *Renolde v France*, application no 5608/05 (18 October 2008) at [114] (ECtHR).

<sup>48</sup> *Herczegfalvy v Austria*, application no 10533/83 (24 September 1992) at [82] (ECtHR).

<sup>49</sup> See Contradictor's Submissions at [87].

<sup>50</sup> See, eg, *R (Wilkinson) v Broadmoor Hospital* [2001] EWCA Civ 1545 at [30].

<sup>51</sup> UN Human Rights Committee, *General Comment 16* (1988) at [11].

particular his or her right to physical integrity”.<sup>52</sup> Such an interference will necessarily limit art 8.<sup>53</sup> To similar effect is the jurisprudence of the Human Rights Committee which has said that:<sup>54</sup>

*To subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his honour or reputation.*

56. The Human Rights Committee has also stated that the concept of unlawful and arbitrary interference is intended to guarantee that even interference by law should be in accordance with the provisions, aims and the objectives of the ICCPR and should be reasonable and proportionate to the end sought and necessary in the circumstances.<sup>55</sup>
57. Adopting the Strict Compliance Construction emphasises the importance of an independent determination by the Board that the medical treatment is reasonable and proportionate in the circumstances. That, after all, is precisely the purpose of having the Board review the s 8 criteria.
58. On the other hand, the Substantial Compliance Construction accepts that there may be delayed review (or no review) by the independent Board of the reasonableness and proportionality of treatment.
59. The right to privacy only receives effective protection on the Strict Compliance Construction.

## **C PROTECTION FROM CRUEL, INHUMAN OR DEGRADING TREATMENT**

60. Section 10(b) of the *Charter* protects a person from being treated or punished in a cruel, inhuman or degrading way. This right is closely related to both the right to protection from subjection to medical treatment without consent and the right

<sup>52</sup> *Juhnke v Turkey*, application no 52515/99, 13 May 2008 at [71] (ECtHR).

<sup>53</sup> Article 8 of the European Convention is expressed in terms different to the *Charter*. It refers to a “right to respect for his private life”, thus framing the right in positive terms and using the words “private life”. Nothing turns on these differences in this case as the interference relied upon falls within both a positive right and a negative right. Further, the scope of “privacy” is certainly broad enough to include a person’s physical integrity.

<sup>54</sup> *MG v Germany*, communication no 1482/2006, 2 September 2008 UN Doc CCPR/C/93/D/1482/2006 at [10.1] (UN HRC).

<sup>55</sup> UN Human Rights Committee, *General Comment 16* (1988) at [4]-[5].

to privacy. The right is specifically protected in art 7 of the ICCPR and the importance of the right is confirmed by the fact that state parties to the ICCPR are not permitted to derogate from the right.<sup>56</sup>

61. This right is based on the values of human dignity,<sup>57</sup> autonomy and physical and mental integrity.<sup>58</sup> As Ackermann J of the Constitutional Court of South Africa said in *S v Dodo*:<sup>59</sup>

*While it is not easy to distinguish between the three concepts “cruel”, “inhuman” and “degrading”, the impairment of human dignity, in some form and to some degree, must be involved in all three. One should not lose sight of the fact that the right relates, in part at least, to freedom.*

62. The right protects patients in medical institutions from infliction of physical pain or mental suffering.<sup>60</sup>
63. The term “treated” is a broad one. In Canada, it is accepted that any act which involves the exercise of state control over an individual amounts to treatment.<sup>61</sup> Treatment that is degrading involves an assault on the dignity and physical integrity of an individual which humiliates and debases.<sup>62</sup> The absence of intention to cause actual humiliation or debasement is not decisive, nor is the inability of the individual to point to any ill affects.<sup>63</sup>
64. Although a “minimum level of severity”<sup>64</sup> is required in order to engage the right, that level of severity must be assessed not only by reference to the inherent nature of the treatment but also by reference to “whether in the circumstances of a particular individual the application of a normally

<sup>56</sup> UN Human Rights Committee, *General Comment 20* (1992) at [3].

<sup>57</sup> UN Human Rights Committee, *General Comment 20* (1992) at [2]; Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) at [10.4.1]

<sup>58</sup> UN Human Rights Committee, *General Comment 20* (1992) at [2].

<sup>59</sup> (2001) (3) SA 382 (CC) at [35].

<sup>60</sup> UN Human Rights Committee, *General Comment 20* (1992) at [5].

<sup>61</sup> *Rodriguez v British Columbia* [1993] 3 SCR 519 at 611-612.

<sup>62</sup> *Ireland v United Kingdom*, application no 5310/71 (18 January 1978) at [167] (ECtHR); *Becciev v Moldova*, application no 9190/03 (4 October 2005) at [39].

<sup>63</sup> *Becciev v Moldova*, application no 9190/03 (4 October 2005) at [39] (ECtHR); *Keenan v United Kingdom*, application no 27229/95 (3 April 2001) at [113] (ECtHR).

<sup>64</sup> See *Ireland v United Kingdom*, application no 5310/71 (18 January 1978) at [162] (ECtHR); *Labita v Italy*, application no 26772/95 (6 April 2000) at [120] (ECtHR).

proportionate or acceptable treatment would be cruel, degrading or disproportionately severe”.<sup>65</sup> In short, the assessment of severity is contextual.<sup>66</sup>

65. All of the circumstances of the case are relevant to that assessment, including the duration of the treatment, its physical and mental effects and the age, sex and health of the victim.<sup>67</sup>
66. As the Human Rights Council’s Special Rapporteur on Torture recently noted in a thematic report on disability and mental disorder:<sup>68</sup>

*Forced and non-consensual administration of psychiatric drugs, and in particular neuroleptics, for the treatment of a mental condition needs to be closely scrutinised. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual’s health may constitute a form of torture or ill-treatment.*

67. In England, the Code of Practice for the imposition of community treatment orders under the *Mental Health Act 1983* (UK) provides:<sup>69</sup>

*Compulsory treatment is capable of being inhuman treatment (or in extreme cases even torture) contrary to Article 3 of the Convention, if its effect on the person concerned reaches a sufficient level of severity. However, it will not be a breach if it is convincingly shown to be a medical necessity.*

The *Code* further states that “scrupulous adherence” to the legislation will ensure that compulsory treatment is not contrary to the Convention.

68. Although the English cases might at first suggest that the compulsory administration of medical treatment will rarely violate the right to protection from cruel, inhuman or degrading treatment,<sup>70</sup> the precise issue presented by the competing constructions in this case has not been considered. That is, if statutory safeguards and review procedures are not complied with, will the right be breached?

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<sup>65</sup> Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) at [10.1.3].

<sup>66</sup> *Taunoa v Attorney-General* [2007] NZSC 70 at [91] (Elias CJ).

<sup>67</sup> *Dybeku v Albania*, application no 41153/06, 18 December 2007 at [36].

<sup>68</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment*, 28 July 2008, A/63/175 at [63].

<sup>69</sup> UK Department of Health, *Code of Practice: Mental Health Act 1983*, 7 May 2008 at [23.40].

<sup>70</sup> See, eg, *R (PS) v Dr G and Dr W* [2003] EWHC 2335 (Admin).

69. What is required of the State under s 10(b) of the *Charter* is that it provide “protection from” cruel, inhuman or degrading treatment. Those words in the section heading confirm that the section imposes a positive duty on the State to afford protection.<sup>71</sup> The State is required to take positive measures to prevent the breach of the right.<sup>72</sup> The European Court has confirmed that the state must “exercise supervision and control” over decisions about detention and treatment, especially treatment without consent.<sup>73</sup>
70. The question whether compulsory treatment is cruel, inhuman or degrading because of the breach of a legislative safeguard or the ineffectiveness of review procedures can be considered in four ways:
- (1) whether the treatment is disproportionate;
  - (2) whether the safeguards in the legislation have been given full effect;
  - (3) whether medical necessity for the treatment has been convincingly demonstrated; and
  - (4) whether the treatment is arbitrary in the sense that it is not imposed by law.

This is not an assessment of whether a limitation on the right is justifiable, but whether the denial of legislative safeguards or the ineffectiveness of review procedures leads to the compulsory treatment being cruel, inhuman or degrading.

71. **First**, the *Mental Health Act* requires proportionality between the person’s mental illness and the involuntary treatment.<sup>74</sup> That proportionality is achieved, in large measure, by the review procedures. As the Constitutional Court of South Africa observed in *S v Dodo* in a criminal context, “mere disproportionality between the offence and the period of imprisonment would

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<sup>71</sup> UN Human Rights Committee, *General Comment 20* (1992) at [2].

<sup>72</sup> UN Human Rights Committee, *General Comment 20* (1992) at [8].

<sup>73</sup> *Storck v Germany*, application no 61603/00 (16 June 2005) at [103], [150] (ECtHR). See also Joint Committee on Human Rights, *Legislative Scrutiny: Mental Health Bill*, Fourth Report of Session 2006-2007 (4 February 2007) at [66], [69], [93]-[98].

<sup>74</sup> *Mental Health Act 1986*, s 8.

also tend to treat the offender as a means to an end, thereby denying the offender’s humanity”.<sup>75</sup> A failure to conduct a review entails a failure to review the proportionality of the treatment.

72. **Second**, the House of Lords has recognised that the inclusion of safeguards within a policy of seclusion or confinement at a mental health facility is relevant to the question of whether the policy amounts to breach of the equivalent of s 10(b) of the *Charter*.<sup>76</sup> Thus, where the policy contains safeguards and is “properly operated” or given “full effect”, it would not expose patients to a significant risk of treatment prohibited by s 10(b). But those safeguards must be meaningful. As the European Court said in *HL v United Kingdom*, “the very purpose of procedural safeguards is to protect individuals against any ‘misjudgments and professional lapses’”.<sup>77</sup> And, the availability of safeguards should not depend on the good-will of the Board.<sup>78</sup> So, where safeguards are improperly operated or not given full effect, patients are exposed to the risk of cruel, inhuman or degrading treatment.
73. **Third**, the European Court, whilst recognising that treatment that is a medical necessity cannot be regarded as inhuman or degrading, nevertheless requires that “medical necessity has been convincingly shown to exist”.<sup>79</sup> That is precisely the Board’s statutory task when considering whether the s 8(1) criteria apply to the patient. Moreover, the European Court requires satisfaction that “the procedural guarantees for the decision” to give treatment have been complied with.<sup>80</sup> Again, failure to conduct the review means it cannot be said that medical necessity has been shown to exist.
74. **Fourth**, arbitrary treatment may amount to degrading treatment. The most important consideration when assessing arbitrariness is whether the treatment was authorised by law.<sup>81</sup>

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<sup>75</sup> *S v Dodo* (2001) (3) SA 382 (CC) at [35].

<sup>76</sup> *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 at 191 (Lord Bingham), at 208 (Lord Hope).

<sup>77</sup> *HL v United Kingdom*, application no 45508/99 (5 October 2004) at [121] (ECtHR).

<sup>78</sup> Compare *Rakevich v Russia*, application no 58973/00, 28 October 2003 at [44] (ECtHR).

<sup>79</sup> *Herczegfalvy v Austria*, application no 10533/83 (24 September 1992) (ECtHR).

<sup>80</sup> *Ciorap v Moldova*, application no 12066/02 (19 June 2007) at [76] (ECtHR).

<sup>81</sup> *Taunoa v Attorney-General* [2007] NZSC 70 at [87]; *R v Smith* [1987] 1 SCR 1045 at [101].

75. Taking into account the four matters discussed above, the Substantial Compliance Construction marginalises or even ignores the safeguards and procedures that are directed to ensuring that compulsory and non-consensual medical treatment is proportionate, not based on a professional misjudgement or lapse, justified by medical necessity and in accordance with law. In the absence of the safeguard constituted by independent review, there is a breach of the right not to be treated in a cruel, inhuman or degrading way. On the other hand, the Strict Compliance Construction supports and protects those safeguards and procedures, and therefore is compatible with the right not to be treated in a cruel, inhuman or degrading way.

#### **D FREE MOVEMENT**

76. Section 12 of the *Charter* protects a person's right to move freely within Victoria and to enter and leave it. The important value of liberty underpins the right.
77. The purpose of the right is to allow a person to move freely within the State and "to decide where they want to be at any given time".<sup>82</sup>
78. The Human Rights Committee has accepted that restrictions on movement may be constituted by, *inter alia*, a requirement to report to authorities 3 times per week.<sup>83</sup> Similarly, the European Court has accepted that a requirement to report to authorities may also constitute a breach of the right.<sup>84</sup>
79. That the right to freedom of movement is engaged by the making of orders under mental health legislation is confirmed by the decision of the Ontario Consent and Capacity Board in *CA's Case*.<sup>85</sup>

*Taking away a person's right to freedom of movement, even if (or perhaps because) that person suffers mental disorder and may therefore be dangerous to self or*

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<sup>82</sup> Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) at [16.4.3]; UN Human Rights Committee, *General Comment 27* (1999) at [5].

<sup>83</sup> *Celep v Sweden*, communication no 456/1991, UN Doc CCPR/C/51/D/456/1991 at [9.2] (UN HRC).

<sup>84</sup> *Raimondo v Italy*, application no 12954/87, 22 February 1994 at [39] (ECtHR).

<sup>85</sup> 2003 CanLII 16717 (On CCB), 12 July 2003.

*others, is lawful only if it is done strictly according to the defined procedure of the legislation.*

80. On the Strict Compliance Construction, an independent review of a CTO must take place within 8 weeks. That independent review does not nullify the restriction on movement, but it does ensure that it is strictly in accordance with law. On the other hand, on the Substantial Compliance Construction, the restriction on the patient's rights continues until such time as the Board completes its review. That is an undefined and potentially indeterminate period of time. It follows that the Strict Compliance Construction impinges least on the right to freedom of movement.

## **E LIBERTY**

81. Section 21(1) of the *Charter* protects the right to liberty. Additionally, s 21(2) provides that a person must not be subjected to arbitrary detention. And, s 21(3) provides that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
82. The critical questions concern the meaning of "liberty" and "detention".
83. Under the *Mental Health Act*, a person subject to an involuntary treatment order (who is not also subject to a community treatment order) is to be detained in an approved mental health service: s 12AC(4)(a). It is the community treatment order that allows a person to receive treatment while not detained: s 14(2). In that sense, the community treatment order "suspends" the liability to detention. That "suspension" is confirmed by s 14D of the *Mental Health Act* which confirms that the revocation of a community treatment order means that a person remains an involuntary patient and is taken to be absent without leave from an approved mental health service. The effect of that deeming is to make the person liable to be apprehended and returned to the approved mental health service to be detained: s 43.

84. As the Joint Committee on Human Rights said of the UK Mental Health Bill, “a CTO patient is not discharged from detention: authority to detain is suspended for the duration of the CTO.”<sup>86</sup>
85. Although some jurisdictions adopt a construction of the right that requires actual physical detention in order to engage the right,<sup>87</sup> the better view (adopting a broad and beneficial interpretation of the right) is that the right is engaged in the situations recognized by the Supreme Court of Canada in *R v Therens* ie situations in which someone “assumes control over the movement of a person by demand or direction which may have significant legal consequences”.<sup>88</sup>
86. The decision in *R v Therens* was followed in New Zealand in the case of *Re S* which concerned a man who had been detained in hospital under the NZ *Mental Health Act* but was then granted leave of absence and resided in his own home. The court had no difficulty accepting that he was detained for the purposes of s 22 of the NZ BORA.<sup>89</sup>
87. It also accords with the decision of the United States Supreme Court in *Jones v Cunningham*,<sup>90</sup> in which the court held that a prisoner on parole was subject to restraints on his liberty and thus “in custody” so as to attract the remedy of *habeas corpus*.
88. On both of the competing constructions, the treatment orders lead to infringements of the right to liberty. The critical difference is that whilst on the Strict Compliance Construction, the independent Board must review and affirm the CTO that gives rise to that infringement within 8 weeks, on the Substantial Compliance Construction there is no defined period within which that review will occur. The delay or failure of independent review by the Board extends and magnifies the infringement of the right to liberty and so cannot be the

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<sup>86</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Mental Health Bill*, Fourth Report of Session 2006-2007 (4 February 2007) at [51].

<sup>87</sup> See, eg, *Celepi v Sweden*, communication no 456/1991, 2 August 1994 at [10] (HRC); *Guzzardi v Italy*, application no 7367/76 at [92] (ECtHR).

<sup>88</sup> *R v Therens* [1985] 1 SCR 613 at 642.

<sup>89</sup> *Re S* [1992] 1 NZLR 363. See also *Re WS* [2007] CanLII 50504 (On CCB), referred to by the Victorian Equal Opportunity and Human Rights Commission in their Submissions at [42].

<sup>90</sup> 371 US 236 (1963).

construction that is compatible with human rights for the purposes of s 32 of the *Charter*.

## **F RIGHT TO A FAIR HEARING**

89. Section 24 of the *Charter* protects the right to a fair hearing. It provides:

*A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

90. That right is modelled on art 14(1) of the ICCPR. It is also reflected in the MI Principles. Principles 16 and 17 require the admission or retention of a person as an involuntary patient to be reviewed by a “review body”. The review body shall be “a judicial or other independent and impartial body established by domestic law”. Initial reviews are to take place “as soon as possible” and thereafter the review body “shall periodically review” the cases of involuntary patients.

91. As the Human Rights Committee observed in its General Comment on the right to equality before the law and a fair hearing, what is protected by the right to a fair hearing “is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights”.<sup>91</sup> The concept of what is protected by the right includes “areas of administrative law”.

92. Consistently with the purpose of the *Charter*, a broad construction should be given to the phrase “a party to a civil proceeding”. The right makes plain that proceedings before tribunals fall within its ambit and it cannot be doubted that in enacting the *Charter*, the Parliament was well aware that tribunals in Victoria exercise both judicial power and administrative power. Had Parliament intended to exclude administrative decisions from the right, it would have been expected to say so expressly. Thus, the reference in s 24 to criminal proceedings and civil proceedings should be read as encompassing all types of matters that come before courts and tribunals. That is all the more so in light of

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<sup>91</sup> UN Human Rights Committee, *General Comment 32* (1997) at [16].

the fact that “the issues before Mental Health Review Tribunals are probably the most important issues decided by any tribunals. The Tribunals make decisions as to the compulsory detention and treatment, and thus the liberty, of the individual”.<sup>92</sup>

93. The right should be held to apply to all tribunals established by statute that are bound to determine the rights and obligations of those who invoke their processes.
94. An important element of the right to a fair hearing is expeditious proceedings.<sup>93</sup> The European Court has held that the factors to be considered in determining whether a delayed hearing breaches the right include (a) the type and complexity of the case; (b) the conduct and diligence of the parties; and (c) the conduct and diligence of the court.<sup>94</sup>
95. In a mental health case, the acts or omissions of the applicant have a special character. As the Human Rights Committee said in *Fijalkowska* in relation to Poland’s claim that a mentally ill patient was legally capable:<sup>95</sup>

*the Committee finds it difficult to reconcile the State party’s view that although the author was recognised, in accordance with the Act, to suffer from deteriorating mental health and inability to provide for her basic needs, she was at the same time considered to be legally capable of acting on her own behalf. ... [The Committee] considers that as the author suffered from diminished capacity that might have affected her ability to take part effectively in the proceedings herself, the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings.*

Although that comment was made in the context of considering the right to liberty, the general proposition stated by the Committee is equally applicable (if not more applicable) to the right to a fair hearing.

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<sup>92</sup> *R (KB) v Mental Health Review Tribunal* [2002] EWHC 639 (Admin) at [32].

<sup>93</sup> *Fei v Columbia*, communication no 514/92, UN Doc CCPR/C/53/D/514/1992 at [8.4] (UN HRC).

<sup>94</sup> *Pelissier & Sassi v France*, application no 25444/94 (25 March 1999) at [67] (ECtHR). See also *R (KB) v Mental Health Review Tribunal* [2002] EWHC 639 (Admin) at [31].

<sup>95</sup> *Fijalkowska v Poland*, communication no 1061/2002, UN Doc CCPR/C/84/D/1061/2002 at [8.3].

96. In England, delays in reviews of decisions by the Mental Health Review Tribunal are considered by reference to the right to liberty and the right to a fair hearing. In *R (KB) v Mental Health Review Tribunal*, the court noted that:<sup>96</sup>

*delays in tribunal hearings may result in the unjustified detention of patients who, if their cases had been considered earlier, would have been discharged. Even when discharge is not directed, the delay prolongs the period of uncertainty for the patient.*

This observation applies equally in relation to unjustified treatment.

97. In that case, the Court held that repeated adjournments of review applications amounted to a breach of the right to speedy review of deprivations of liberty. It should be noted that the Act did not specify a time within which the application for review was to be heard.<sup>97</sup>
98. In *C's Case*, the UK Court of Appeal found an administrative practice of listing reviews of decisions under the *Mental Health Act* for hearing 8 weeks after the receipt of the application was a breach of the European Convention. The Court considered that such an administrative practice made no effort to see that individual applications were heard as soon as reasonably practicable. The Master of the Rolls recognised that in some cases the patient may well seek an independent psychiatric assessment and that those cases may well require 8 weeks preparation for the hearing, but many cases could be reviewed within a shorter time.<sup>98</sup>
99. Under the Substantial Compliance Construction, there is no set time within which a patient's review or appeal of a CTO may be heard. That delay leads to uncertainty for the patient and the denial of an expeditious hearing. On the other hand, the Strict Compliance Construction obliges the Board to review a CTO within 8 weeks. Even though that timeframe marks the outer boundary of what may constitute a speedy hearing, it nevertheless satisfies the right to a fair hearing and is thus compatible with the right.

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<sup>96</sup> [2002] EWHC 639 (Admin) at [8].

<sup>97</sup> [2002] EWHC 639 (Admin) at [27].

<sup>98</sup> *R (C) v London South and West Region Mental Health Review Tribunal* [2002] 1 WLR 176 at [57], [64].

**G CONCLUSION ON THE INTERPRETATION OF SECTION 30 OF THE MENTAL HEALTH ACT**

100. Whether construed according to s 32 of the *Charter* or the common law principles of interpretation described above, the Strict Compliance Construction is to be preferred over the Substantial Compliance Construction.
101. The very nature of involuntary treatment orders and community treatment orders is that they involve limitations on the human rights analysed above. Greater limitations would be imposed on those rights in the absence of legislative safeguards and the review and supervision procedures contained in the *Mental Health Act*. As the jurisprudence described above indicates, an important consideration in determining whether the relevant rights have been breached in compulsory medical treatment cases, is the presence or absence of independent, effective and timely review procedures.
102. To construe s 30 of the *Mental Health Act* in a way that does not make the time limits obligatory and that leads to no consequences for non-compliance, would marginalise the safeguards and review and supervision procedures, and would therefore be incompatible with the human rights discussed above.
103. The words “consistently with their purpose” in s 32 of the *Charter* do not present any difficulty for the adoption of the Strict Compliance Construction, for this construction is wholly consistent with the purposes of the *Mental Health Act*.<sup>99</sup>

**V THE STATUS OF THE TRIBUNAL AND THE BOARD UNDER THE CHARTER**

104. The VCAT is a “tribunal” within the meaning of the *Charter* and so the *Charter* applies to it as such.
105. Further, when the VCAT is exercising its merits review jurisdiction (as in this case), it is also a “public authority” for the purposes of the *Charter* and the *Charter* applies to it as such. Although the definition of “public authority” in

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<sup>99</sup> See *Mental Health Act*, s 4; *Wilson v Metal Health Review Board* [2000] VSC 404 at [29]-[32].

s 4(1) of the *Charter prima facie* excludes a tribunal (s 4(1)(j)), there is an exception to this where the tribunal is “acting in an administrative capacity”. Properly construed, the expression “acting in an administrative capacity” refers to a body exercising administrative power, as that concept is understood in distinction from “judicial power” and “legislative power”. When the VCAT is exercising its merits review jurisdiction, it is “acting in an administrative capacity” and is a “public authority” for the purposes of the *Charter*.<sup>100</sup>

106. When the Mental Health Review Board is exercising its statutory functions of reviewing community treatment orders and involuntary treatment orders, it is a “tribunal” within the meaning of the *Charter* (in particular: it is a body of persons established by statute; it is obliged to observe the rules of natural justice; it hears proceedings and makes decisions and in so doing acts in a judicial manner; legal members must have the same qualifications as members of the judiciary and all members have immunity in the performance of their duties).
107. Further, when the Mental Health Review Board is exercising its statutory functions of reviewing community treatment orders and the involuntary treatment orders, it is also a “public authority” for the purposes of the *Charter*. As the making of its decisions involves the exercise of administrative power, it falls within the exception in s 4(1)(j) of the *Charter*.

## **VI THE BREACHES OF MR KRACKE’S HUMAN RIGHTS**

108. In the present case, as the involuntary treatment order was not reviewed by the Board within 12 months of 19 April 2006, the involuntary order expired. Further, as the February 2007 extension of the community treatment order was not reviewed by the Board within 8 weeks (or at all), the community treatment order expired, and the community treatment order could not be the subject of a further extension in January 2008.

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<sup>100</sup> See *Sabet v Medical Practitioners Board* [2008] VSC 346 at [111]-[127].

109. Since April 2007, Mr Kracke has been subjected to compulsory medical treatment without his consent, in the absence of a valid treatment order, and (until June 2008) in the absence of review by the Board as required by the *Mental Health Act*. In the circumstances, Mr Kracke's rights under ss 10(c), 13(a), 10(b), 12, 21 and 24(1) of the *Charter*, each of which has been discussed above, have been breached.
110. Those breaches of Mr Kracke's human rights are serious. Real and effective protection of Mr Kracke's rights supports the making of a declaration that his rights have been breached.<sup>101</sup>

**Dated:** 7 November 2008

MARK MOSHINSKY

CHRIS YOUNG

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<sup>101</sup> *Victorian Civil and Administrative Tribunal Act 1998*, s 124.