

**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  
FURTHER SUPPLEMENTARY WRITTEN SUBMISSIONS**

1. The VCAT has the power to make a declaration that Mr Kracke's human rights under the *Charter* were violated as a result of the Board's failure to review the ITO within 12 months and each CTO extension within 8 weeks as required by the *Mental Health Act*. As a result of the failure by the Board to conduct these reviews, Mr Kracke was subjected to medical treatment without his consent in breach of s 10(c), and his rights under ss 13(a), 10(b), 12, 21 and 24 were breached.
2. The right to seek a declaration in the VCAT in relation to unlawful government conduct arises under s 124 of the *Victorian Civil and Administrative Tribunal Act 1997*. This power is available in all proceedings before the VCAT, whether in the original jurisdiction or the review jurisdiction: *Buttigieg v Melton SC (No 2)* [2004] VCAT 868 at [32] (Morris J).
3. That power is expressly preserved by s 39(2) of the *Charter* which relevantly saves a person's right to seek a declaration of unlawfulness in respect of an act or decision of a public authority. (See Simon Evans and Carolyn Evans, "Legal Redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 PLR 264, 275).

4. That a declaration may be made in respect of unlawful government conduct that has already occurred was confirmed in *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ).
5. There is no impediment to the grant of declaratory relief in this case. The declaration would be directed to the determination of a legal controversy between Mr Kracke and the Board; the question of the violation of Mr Kracke's rights is not hypothetical.
6. Additionally, there are real consequences of the making of the declaration. The importance of a declaration that a public authority has violated human rights should not be underestimated. Having a credible and authoritative finding of the facts and a determination that the state violated the applicant's human rights establishes the truth of the allegation and vindicates the victim. (Dinah Shelton, *Remedies in International Human Rights Law* (2001) at 200-201).
7. Declarations of violations of human rights are at the heart of international human rights complaint procedures and regional human rights courts. Declarations are used, particularly in the European Court of Human Rights, as a retrospective remedial measure.
8. The main purpose of the *Charter* is to protect and promote human rights (*Charter*, s 1(2)). To paraphrase Lord Bingham in *Greenfield's Case* – a case in which the House of Lords made declarations that a public authority had acted unlawfully – a finding of violation will often amount to “just satisfaction” for a complainant because the focus of the *Charter* is on the protection of human rights and not the award of compensation (*R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [9]). Further, the finding of violation is an important part of the remedy and an important vindication of the right the complainant has asserted: *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [19]. The importance of a declaration of unlawfulness is even more pronounced in Victoria because of the unavailability of damages for a breach of human rights under the *Charter* (s 39(3)).

**Dated:** 24 November 2008

MARK MOSHINSKY

CHRIS YOUNG

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Allens Arthur Robinson  
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Law Resource Centre