Kracke

v.

Mental Health Review Board & Ors (General)

Victorian Civil and Administrative Tribunal

[2009] VCAT 646

23 April 2009

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

GENERAL LIST

VCAT REFERENCE NO. G605/2008

APPLICANT

Gary Kracke

FIRST RESPONDENT

Mental Health Review Board

SECOND RESPONDENT

Mid West Area Mental Health Service

THIRD RESPONDENT

Attorney-General for the State of Victoria

FOURTH RESPONDENT

Victorian Equal Opportunity and Human Rights Commission

AMICUS CURIAE

Human Rights Law Resource Centre

CONTRADICTOR

Secretary to the Department of Human Services

WHERE HELD

Melbourne

BEFORE

Justice Kevin Bell, President

HEARING TYPE

Hearing

DATE OF HEARING

17-21 November 2008, 24 November 2008 and 9 December 2008

DATE OF ORDER

23 April 2009 (revised 21 May 2009)

CITATION

Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646

(revised 21 May 2009)

ORDER

The Mental Health Review Board breached Gary Kracke's human right to a fair hearing under s 24(1) of the Charter of Human Rights and Responsibilities Act 2006 by failing to conduct the reviews of his involuntary and community treatment orders under s 30(3) and (4) of the Mental Health Act 1986 within a reasonable time.

The further hearing of the application for review is adjourned to a directions hearing to be held within the next two weeks at a time convenient to the tribunal and the parties.

Justice Kevin Bell

President

APPEARANCES:

For the applicant:

Ms A Richards, QC with Dr P T Vout and Mr M Stanton, of counsel

For the first respondent:

Ms J Mazzeo, legal officer of the Mental Health Review Board

For the second respondent:

No appearance

For the third respondent:

Ms J Davidson, special counsel with Ms K L Walker, of counsel

For the fourth respondent:

Ms S Fitzgerald, senior advisor to the Victorian Equal Opportunity and Human Rights Commission

For the Human Rights Law Resource Centre:

Mr M Moshinsky, SC with Mr C Young, of counsel

For the Secretary to the Department of Human Services:

Dr K Emerton, SC with Ms M Richards, of counsel

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REASONS FOR DECISION

A INTRODUCTION

(1) Application to tribunal for review

Gary Kracke is a 37 year old man being subjected to medical treatment without his consent. He has been diagnosed as mentally ill and is required to take psychotropic medication. The drugs have adverse side effects. Mr Kracke has been trying unsuccessfully to convince the medical authorities to let him stop taking them.

The drugs are being administered under treatment orders issued pursuant to the Mental Health Act 1986. Such orders authorise the treatment of mentally ill patients without their consent and can be extended. They are subject to important safeguards, one being the Mental Health Review Board must review any orders within specified times. Involuntary treatment orders start the process and must be reviewed quickly and then periodically no less than every

12 months from the initial review. Community treatment orders must be reviewed within eight weeks of any extension. The legislation is silent on the consequences of the board's failure to do so.

The board did not conduct these reviews on time. Mr Kracke's involuntary treatment order went for over two years without being reviewed. His second extended community treatment order went for over one year before it was reviewed, and then only after it was replaced by the third extension (which was also reviewed late). Regrettably, this was not an isolated case.

Some of the delay in Mr Kracke's case can be explained by his requests for adjournments. The review of the second extended community treatment order was actually commenced within time. It was adjourned at his request so he could get a second medical opinion. But the main explanation for the delay is administrative oversight on the part of the board. The board lost track of Mr Kracke's case and allowed the reviews to drift.

About nine months passed before the board eventually realised it was still to complete the reviews. When it brought them back on for hearing, Mr Kracke submitted it was too late. Exceeding the time limit meant the safeguards in the system had failed and his human rights under the Charter of Human Rights and Responsibilities Act 2006 had been breached.

Undoubtedly, it would be a breach of Mr Kracke's human rights under the Charter to compel him to take medication without proper medical justification. Mr Kracke went further and submitted he could not be so compelled when the safeguards had not been properly applied. Respecting his human rights under the Charter meant the review periods in the Mental Health Act must be strictly adhered to, otherwise the treatment orders become invalid.

The board accepted the importance of respecting Mr Kracke's human rights but confirmed the orders. It decided treating him involuntarily was justified on medical grounds which remained valid even when the review periods were exceeded. Mr Kracke now seeks review of the board's decision in the Victorian Civil and Administrative Tribunal.

The application has become a test case on important aspects of the application and operation of the Charter. Therefore the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission have exercised their rights of intervention under ss 34(1) and 40(1) of the Charter. I have also given leave to the Human Rights Law Resource Centre to appear as amicus curiae. To ensure a fully argued case would be put in defence of the board's decision, I gave the Secretary to the Department of Human Services leave to intervene as the contradictor. The assistance I have received in the submissions has been indispensable in my analysis of the issues.

On agreed facts, and at everybody's request, I decided to first hear and determine the question whether the treatment orders became invalid because the review periods were exceeded. That will require consideration of Mr Kracke's human rights, including whether the board breached his human right to a fair hearing by taking an unreasonable time to conduct the reviews.

(2) Time limits for reviewing treatment orders

I will look at the provisions in detail later. For now, it is sufficient to say s 12 of the Mental Health Act allows a person to be placed on an involuntary treatment order. This allows the medical authorities to treat them without their consent in detention in a medical health service. Under s 14, a person on an involuntary treatment order can be placed on a community treatment order. Thereafter they will be treated in the community and not in detention. Under s 14B, a community treatment order can be extended on the same basis.

There is a review and appeal system for treatment orders. Section 30(1) requires the board to conduct an initial review of an involuntary treatment order within eight weeks of it being made. Under s 30(3), it must conduct a periodic review of such an order at intervals not exceeding 12 months following the initial review. Section 30(4) requires the board to conduct a review of a community treatment order within eight weeks of it being extended. Appeals may be brought by the involuntary patient under s 29(1) against either order at any time.

(3) Delayed reviews by the board

Again, I will look at the facts fully later. For now I say Mr Kracke was placed on an involuntary treatment order under s 12 on 1 April 2005. It should have been periodically reviewed at least twice between 19 April 2006 and 19 April 2008, but it was not reviewed in that period.

From the reasons given in writing on 8 July 2008 of the board's decision to confirm Mr Kracke's community treatment order given on 3 June 2008, I infer the board also implicitly conducted the overdue periodic review of, and confirmed, Mr Kracke's involuntary treatment order. That review was more than 12 months overdue and more than two years since the last review.

Mr Kracke was placed on a community treatment order under s 14 on 8 December 2005. It was extended once then a second time on 15 February 2007 until 14 February 2008. The eight week review under s 30(4) was due by 12 April 2007. It was not conducted before the order was replaced with the third extended order on 17 January 2008 until 16 January 2009. The eight week review of the third extension was due by 13 March 2008. The order was confirmed on 3 June 2008.

Mr Kracke's extended community treatment order should have been reviewed at least twice in the 13 months period between 15 February 2007 and 13 March 2008. The review conducted on 3 June 2008 was about 14 months overdue for the second extension and about 3 months for the third.

I will consider the reasons for the delay in the context of whether the board breached Mr Kracke's right to a fair hearing under s 24(1) of the Charter.

(4) The issues

On those facts a number of important issues arise, which I will consider in this order:

the correct way to work out when and how to apply the Charter

the extent and manner in which the Charter applies to courts and tribunals

whether the Charter applies retrospectively to change legal relations arising from past events

whether the human right to a fair hearing in s 24(1) of the Charter applies to the board (and the tribunal) and whether it was breached by the board

the scope and nature of the human rights engaged by the involuntary treatment of Mr Kracke

when the provisions of the Mental Health Act are considered under the standard principles of interpretation, whether the treatment orders are invalid by reason of the reviews being conducted outside the specified times

when the provisions of the Mental Health Act are considered taking into account Mr Kracke's human rights under Part 2, and applying the special interpretative obligation in s 32(1), of the Charter, whether the treatment orders are invalid

what remedies should be given if the board is found to have breached Mr Kracke's human right to a fair hearing and, in particular, whether the tribunal should make a declaration of breach against the board

First, to the Charter.

B INTERPRETING AND APPLYING THE CHARTER

(1) Preamble and purpose

The enlightened conception on which the Charter is based may be explained by reference to the Preamble of the International Covenant on Civil and Political Rights,[1] whereby its parties, including Australia, state:

in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... [and]

in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights ...

The fundamental values and principles on which the Charter is founded are stated in its Preamble:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles –

human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;

human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

Consistently with those values and principles, these are the purposes of the Charter as specified in s 1(2):

The main purpose of this Charter is to protect and promote human rights by –

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

(e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

The Victorian Charter is based on the parliamentary model. It respects the sovereignty of Parliament as the ultimate expression of the will of the people. It is ordinary legislation that can be amended in the usual way. It is not constitutionally entrenched. But the provisions of the Charter are an important part of the general framework for the operation of the law and the exercise of the administrative power of government. It is fundamental law.

The Charter is historic legislation. At the individual level, it protects and promotes human rights, and thereby respects the bedrock value that every person without exception has a unique human dignity. It is most especially needed in the protection of human rights of vulnerable people, of whom Mr Kracke, a person found to be mentally ill and being subjected to involuntary medical treatment, is a classic example.

Individual people live in society, which involves mutual respect and responsibility. By accepting personal responsibility to respect the human rights of others, people can expect their own human rights to be respected in return. Individual respect for human rights begets respect for individual human rights.

Victorian society is fortunate to have a democratic system of government which is based on the rule of law. The Charter does not take it for granted. It makes an explicit connection between respect for human rights and the democratic aspirations of society. Legal protection of the human rights in the Charter is seen to be the minimum necessary for respecting the dignity of the individual in that social and political context. It was Ronald Dworkin who said: "Because we honor dignity, we demand democracy".[2] This is Cory J in Kindler v Canada (Minister of Justice)[3] expressing the same idea: "It is the dignity and importance of the individual which is the essence and cornerstone of democratic government."

Thus, as the Preamble declares, the Charter has communitarian purposes that go beyond the individual. Those purposes include strengthening respect for the rule of law and our fundamental democratic institutions. This strengthens society itself, and every individual in society. Laws and public institutions that respect individual human rights are deserving of society's respect.

Now the interests of people and groups living in society sometimes conflict and must sometimes be balanced. Therefore, in certain cases, human rights might need to be limited. That is why, under the Charter, human rights are not seen to be absolute. But they can only be limited according to a stringent standard of justification. Limitations can only be imposed under law, must be reasonable and demonstrably justified, and go only so far as is necessary in the interest of a free and democratic society that respects the dignity of the individuals who make it up.

(2) Interpreting human rights instruments generally

The Charter is ordinary legislation in the sense that it was passed and can be amended by Parliament in the usual way. It is far from ordinary in it scope, purpose and content. As we have just seen, the Preamble and purposes of the Charter proclaim most strongly its intention

to enhance our system of government by protecting and promoting those human rights which are fundamental to the rule of law in a democratic society. The Charter, like its equivalents overseas, must be interpreted with that purpose firmly in mind.

In formulating the human rights specified in the Charter, the ICCPR and the European Convention on Human Rights[4] have been influential, especially the former. Those instruments are treaties. Therefore, they are interpreted purposively in accordance with article 31(1) of the Vienna Convention on the Law of Treaties 1969.[5] When interpreting the provisions of the ICCPR or ECHR to understand the meaning of a right in the Charter, the rules in the Convention may be relevant. They are not in the present case.

It is often said the open-textured style of human rights legislative drafting calls for a particular kind of interpretation. As Lord Wilberforce put it in Minister of Home Affairs v Fisher,[6] human rights drafting uses a "broad and ample style which lays down principles of width and generality." This requires a generous interpretation, one that avoids 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[7] With interpreting human rights legislation, said the Supreme Court of Canada in Hunter v Southam Inc[8] (citing an American author), the object was "not to read the provisions of the [charter] like a last will and testament lest it become one."

Rights in conventions, treaties and like instruments are interpreted like a "living tree capable of growth and expansion within its natural limits."[9] For example, the Human Rights Committee has said the ICCPR:[10]

should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

That principle was applied in Tyrer v United Kingdom.[11] The court held the birching of a boy aged 15 years was degrading punishment against article 3 of the ECHR. It said this punishment was contrary to "present-day conditions" and the development of "commonly accepted standards".[12] But Soering v United Kingdom[13] held developments in penal and social policy had not reached a point that warranted the interpretation of article 3 as inconsistent with the death penalty.[14]

The interpretation of the provisions of human rights instruments and legislation is therefore evolutionary, dynamic and responsive to changing social and economic conditions. Such provisions are not interpreted according to the originalist notion that their meaning is confined to the intention of those who made them. We will see examples of this when we examine the ICCPR and the ECHR, and the Human Rights Act, in the context of the scope and engagement of the human rights at issue in the present case.

This broad and purposive principle of interpretation applies to the provisions of cognate constitutional and legislative charters of rights, such as those in Canada[15] and New Zealand.[16] It applies to the charters of state entities in constitutional federations.[17] The Human Rights Act in the United Kingdom is a hybrid, for it legislates for the domestication of the ECHR. The same principle is applied.[18]

These principles also apply to the interpretation of the Charter. The subject matter, context and purpose of the legislation show this was intended, and it is consistent with s 35(a) of the Interpretation of Legislation Act 1984.

So interpreting human rights provisions has its limits. As Andrew Butler and Petra Butler say,[19] the principle is "no excuse for overshooting the target, and is not a substitute for a careful analysis of all relevant matters that disclose the true purpose of the provision in issue." The process is one of interpreting the relevant provisions, not legislating in favour of new ones.

(3) Standard principles of interpretation: continuing significance of common law and other human rights sources

However much human rights energy the Charter brings to Victorian law, it does not claim to be its exclusive source. The Charter explicitly recognises the continuing relevance of other sources. Under s 5, rights or freedoms recognised in other laws, including international law, the common law and Commonwealth law, must not be taken to be abrogated by the Charter by reason of not being included. That recognition was given in the context that, at the present, and to an evolving extent, the common law takes significant account of international human rights in various ways, as in the interpretation of legislation[20] and the exercise of statutory and judicial discretions.[21] Far from bringing this process to an end, the Charter would see it continue. These vital sources of human rights protection are essential organs in the body of the common law and remain very much alive in the legislative human rights age.

Independently of the special interpretive obligation is s 32(1), three aspects of the standard principles of interpretation need attention when considering legislation touching on human rights: taking context and purpose into account; interpreting the legislation consistently with Australia's international obligations; and the principle of legality – interpreting legislation consistently with fundamental rights and freedoms unless the contrary intention appears with irresistible clarity.[22]

The meaning in law of the text in a statutory provision is to be ascertained by considering its language understood in the first instance in its full context and having regard to its purpose. The justification for this principle is utility not necessity – utility in using legitimate sources to ascertain the meaning of the text, not necessity in resolving an ambiguity. Context here is broadly defined to include extrinsic legislative materials and other sources that may legitimately assist in understanding the meaning of the language used. Purpose includes the remedial and policy objectives of the legislation. This modern approach to the statutory interpretation has been stated in many decisions of the High Court, most especially in CIC Insurance Ltd v Bankstown Football Club Ltd.[23]

Under the standard principles of interpretation, Australia's international obligations, although not incorporated into domestic law, may inform the interpretation of statutory provisions.[24] The general common last law principle was succinctly expressed by Maxwell P in Royal Women's Hospital v Medical Practitioners Board:[25]

the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be

interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.

That statement is not qualified by reference to ambiguity or time. As to ambiguity, it has been held the principle applies only where such is present.[26] No narrow approach to the concept of ambiguity is taken.[27] As to time, there is a debate about whether an international instrument can inform the interpretation of a previously enacted statutory provision. With respect I agree with the views of Kirby J in Coleman v Power,[28] with which the statement of Maxwell P is consistent.

According to the principle of legality, fundamental common law rights and freedoms cannot be abrogated without "a clear expression of an unmistakable and unambiguous intention". So said Mason CJ, Brennan, Gaudron and McHugh JJ in Coco v The Queen.[29] Their Honours approved this authoritative statement of the principle, which O'Connor J in Potter v Minahan[30] derived from Maxwell on Statutes:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

Comparable principles are applied in the United Kingdom. The courts consider that Parliament intends legislation to comply with the obligations of that country under international law.[31] Accordingly, ambiguities in statutory language are resolved consistently with any treaty obligation.[32] International law may also be taken into account in the exercise of statutory and judicial discretions.[33] Courts also consider the Parliament does not intend to limit fundamental rights of the common law without very plain and express language in legislation.

The early cases – discussed in Beatson et al[34] - concerned access to the courts. An important precedent was Chester v Bateson.[35] Avory J held general words in a war-time statute did not authorise a regulation criminalising the eviction of munitions workers, for "nothing less than express words in the statute taking away the right of the King's subjects of access to the Courts of justice would authorize or justify it."[36] The principle has been gradually applied to other fundamental rights of the common law, such as the right to freedom of expression[37] and the right to peaceful protest in public place.[38]

This principle of legality was described by that name in R v Secretary of State for the Home Department; Ex parte Pierson,[39] which was decided shortly before the Human Rights Act was passed. Lord Browne-Wilkinson and Lord Steyn applied the principle that Parliament is presumed not to change the common law without express or necessarily implicit words.[40] By reference to authoritative texts, including Maxwell on the interpretation of statutes,[41]

Lord Steyn called this “the principle of legality”,[42] which he said was explained thus by Sir John Romilly MR in Minet v Leman:[43]

The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched ...

The principle of legality flows in the river of principle running underneath the Human Rights Act and the Charter. Shortly after the Human Rights Act was passed, the continuing application of the principle in this context was emphasised by Lord Hoffmann in R v Secretary of State for the Home Department; Ex parte Simms:[44]

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

A little later the House of Lords approved and applied the principle of legality in R (Daly) v Secretary of State for the Home Department,[45] to which I will return.

In R (Gillan) v Commissioner of Police of the Metropolis[46] Lord Bingham acknowledged the principle of legality and said it did not apply where legislation infringing fundamental human rights did so not “by general words but by provisions of a detailed, specific and unambiguous character.”[47]

To return to R (Daly) v Secretary of State for the Home Department,[48] it was a human rights case involving the inspection of legally privileged correspondence of prisoners. Despite the application of the Human Rights Act, it was wholly resolved by reference to the standard principles of interpretation that incorporate the principle of legality. For want of clear words, the statute under which the disputed inspection policy was promulgated was held not to authorise it. Lord Cooke emphasised the importance of the common law principles:[49]

while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my

opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal advisor for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.

Consistently with this approach, the courts have not hesitated to apply the pre-existing principles of interpretation in ways that have obviated the need to apply the special interpretive obligation in s 3(1) of the Human Rights Act. For example, in R v A (No. 2)[50] Lord Steyn said this of the offending provision: "ordinary methods of purposive and contextual interpretation may yield ways of minimising [its] prima facie exorbitant breadth". Then in Ghaidan v Godin-Mendoza[51] Lord Millett looked at the relationship between the standard principles of interpretation and the special interpretive obligation. His Lordship explained that relationship with this commendable clarity:[52]

the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention. Ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way which would put the United Kingdom in breach of its international obligations. This presumption will often be sufficient to enable the court to interpret the statute in a way which will make it compatible with the Convention without recourse to section 3. It is only where this is not the case that section 3 comes into play. When it does, it obliges the court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principle and presumptions.

Australia applies the principle of legality, drawing on its historical foundation in the United Kingdom. Thus, in K-Generation Pty Ltd v Liquor Licensing Court,[53] French CJ referred to our presumption that legislation is not interpreted, where this is "open", so as not to encroach on fundamental rights and freedoms at common law. His Honour said this was an aspect of the principle of legality applied by courts in the United Kingdom.[54] "There is nothing revolutionary about the principle of legality" said Gleeson CJ extra-judicially.[55] Although, as the Chief Justice points out, the principle used to be one of obstruction not construction.[56] Gleeson CJ[57] and French CJ[58] have both described this principle of interpretation as an aspect of the rule of law.

I would adopt the same approach to the application of our standard principles of interpretation in cases potentially governed by the Charter as the courts in the United Kingdom have in cases potentially governed by the Human Rights Act. Applying the standard principles of interpretation, it may be that a provision can be interpreted consistently

with human rights, which would obviate the need to resort to the special interpretive obligation in s 32(1).

However applicable and influential the standard principles of interpretation may therefore be, they operate within certain categorical limits, whereas provisions like s 32(1) of the Charter, in the understated words of Sir Anthony Mason in HKSAR v Wai and Man,[59] obligate the Court to "go further". That last point will take us to the special interpretive obligation in s 32(1) of the Charter. First we must examine the manner in which it is applied.

(4) Proper approach to interpretation and justification under the Charter

The parties were in dispute over the correct way of applying the special interpretative obligation in s 31(2) and the justification test in s 7(2) of the Charter.

Mr Kracke and the intervener submitted legislation should be first interpreted and applied without regards to the justification test, which was only relevant when the Supreme Court of Victoria was deciding whether to make a declaration of inconsistent interpretation under s 36(2). That approach was said to reflect the dissenting judgment of Elias CJ in R v Hansen.[60]

The contradictor and the Attorney-General submitted justification was taken into account if the provision proved incompatible with human rights when interpreted according to the standard principles of interpretation. It was part of applying the special interpretative obligation.

The answer to these submissions lies in the scheme of the Charter, which must be interpreted as a whole. The fundamental principles, values and purposes of the Charter must be kept firmly in mind. A key concept is compatibility with human rights. This means compatible after considering whether any limitation imposed is justified under s 7(2).

The main purpose of the Charter is "to protect and promote human rights".[61] This has been done by the means specified in s 1(2)(a)-(e) – specifying the human rights, ensuring legislation is interpreted compatibly with human rights, making it obligatory for public authorities to act compatibly with human rights, requiring statements of compatibility for legislation and conferring the jurisdiction on the Supreme Court of Victoria to make declarations of inconsistent interpretation.

The human rights protected and promoted are specified in Part 2. When interpreting legislation, the issue usually raised is whether the provision infringes or limits those human rights. That turns in the first instance on the interpretation of the provision and the scope of the rights. Very often the issue will be relevant to the lawfulness of the conduct of a public authority.

Under s 38(1), public authorities are obliged to act and make decisions compatibly with human rights. Otherwise their conduct is "unlawful". Section 38(2) supplies a defence if, under legislation, the public authority could not reasonably have done otherwise.

Section 7(2) is a general limitations provision allowing human rights to be limited "under law" only if demonstrably justified in the circumstances specified. Primary or secondary

legislation may so limit human rights. If it does, the act or decision of the public authority will not be incompatible with human rights under s 38(1).

Section 32(1) specifies the special interpretative obligation. It governs the interpretation of all legislation, including legislation under which public authorities operate. It too is based on the concept of compatibility with human rights. It requires statutory provisions to be interpreted compatibly with human rights so far as possible consistently with their purpose. That concept of legislation being compatible with human rights necessarily calls up the application of s 7(2), for a possibly consistent interpretation can only be compatible under s 32(1) if any limitations imposed are justified under s 7(2).

If it is not possible, after considering justification under s 7(2) and reinterpretation under s 32(1), to remove any incompatibility between the interpretation of the statutory provision and the relevant human right, the Supreme Court of Victoria has a jurisdiction under s 36(2) to make a declaration of inconsistent interpretation. Inconsistency here is synonymous with incompatibility in the same sense.

Under the scrutiny of new legislation provisions, members of Parliament proposing new legislation must cause a statement of compatibility to be prepared.[62] It must state the member's opinion as to whether the proposed legislation is compatible or incompatible with human rights, and to what extent.[63] This provision clearly means compatible or incompatible in the post-justification sense.

The override declaration provisions[64] are likewise clearly based on the concept of compatibility as so understood.

That is the scheme of the Charter. In applying its terms to the interpretation of legislation, it is necessary to take account of the same elements.

In consequence, when interpreting legislation having regard to the Charter, the questions are: whether the legislation limits human rights, having regard to its interpretation and their scope; if so, whether the limitation is justified under the general limitations provision in s 7(2); if not, whether it is possible to interpret the legislation compatibly with human rights under the special interpretative obligation in s 32(1); and, if not, whether the Supreme Court should exercise its power to make a declaration of inconsistent interpretation under s 36(2). The four stages of analysis required when interpreting legislation against the Charter are, therefore: engagement, justification, reinterpretation and (for the Supreme Court alone) declaring inconsistency.

I will examine each of those steps in turn.

(5) The four steps in applying human rights

(a) Step one: engagement

I use the term engaged to mean the statutory provision apparently limits a human right. The term engagement is preferable to breach, violation or infringement for two reasons: one, it better describes the nature of this analytical step; and two, under the Charter, those other

terms are more apt for describing a provision containing an unjustified limitation which is thereby incompatible with human rights. Even then, under the Charter, incompatible is the more exact description of such a provision. That is not to say those other expressions are wrong. What is important is the concept and approach, not the terminology. I use the expression apparently to mean the provision prima facie imposes a limit that needs to be justified under s 7(2) so that, if it is justified, the provision will be compatible with human rights.

To decide whether the provision engages a human right, it is necessary to interpret the provision according to the standard principles of interpretation and interpret the right in issue so as to identify its scope, then compare the two.

When applying the standard principles of interpretation, it may be possible to interpret the provision consistently with the relevant human rights. If so, the interpretative difficulty may be resolved at this first stage.

It is necessary to identify the scope of the relevant human rights for two reasons. First, the scope of the right needs to be considered under the standard principles of interpretation. Second, the whole purpose of the engagement analysis is to identify whether the statutory provision, so interpreted, appears to limit human rights such as to lead to the possible need for justification under s 7(2) and reinterpretation under s 32(1).

In R v Hansen,[65] Tipping J held the special interpretative obligation in s 6 of the New Zealand Bill of Rights Act was only concerned with interpretation of provisions which are inconsistent with human rights. It was therefore necessary to identify the ordinary meaning of the provision before applying that obligation:[66]

It is only when a meaning is inconsistent that the preference for a consistent meaning mandated by s 6 comes into play. Logically, therefore, the Court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned.

With respect, I agree with this statement, and more or less with his Honour's approach generally.[67] I put it that way for two reasons.

First, with respect, correct though it is, the approach is described in rather formulaic and legalistic terms. I would describe the steps more flexibly to leave more room to move and in language that uses human rights terms to describe the relevant steps.

Second, in putting the initial focus on the ordinary meaning of the provision, it is important not to put too little focus on the scope of the rights. I am sure Tipping J had both in mind, because the question of inconsistency which he raises necessarily involves both, and because he referred to the continuing relevance of "all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament."[68] One reason I prefer the term engagement to describe the first stage of the analysis is that it captures these two equally important components more adequately. This helps to ensure that the analysis carried out at this first stage is not misunderstood.

The concept of engagement is necessarily implicit in the judgments of the majority in R v Hansen, but only the dissentient examined it in detail. Elias CJ followed the landmark Canadian decision of R v Oakes[69] to hold this:[70]

The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the "cardinal values" it embodies. Collapsing the interpretation of the right and [its] justification is insufficiently protective of the right. The later justification is according to a stringent standard, in which a party seeking to justify must show that the limit on a fundamental right is "demonstrably justified" in a free and democratic society.

With respect, this is a very valuable insight. Once it is understood that the issue at the first stage is engagement not justification, the correctness of the statement is manifest.

The factor that complicated the analysis in Hansen was that New Zealand (like Australia) but not Canada has the special interpretative obligation in s 6 of the New Zealand Bill of Rights Act. All three countries have a general limitations provision like s 5 of that Act. South Africa has something like a special interpretative obligation in s 39 of the Constitution of the Republic of South Africa Act 1996.[71]

Elias CJ says she did "not agree that s 5 applies to the s 6 preference for a meaning consistent with the enacted rights and freedoms in Part 2."[72] As regards the Charter, I do not agree with that statement. I think its application to the Charter would confuse the need to identify the scope of the human rights broadly at the engagement stage with keeping the special interpretative obligation out of the interpretative analysis altogether. That would be contrary to the statutory scheme.

Elias CJ criticises "persistent suggestions that it is necessary to identify the content of rights by a balance to be struck in each case which weighs a wider public interest against the right."[73] Such suggestions deserve criticism, for the content of a human right is ascertained by interpreting the provision conferring it by reference to the fundamental values and interests that it expresses, absent limitation in the first instance. Only when its scope is so understood can the justification for any limitation be properly considered. It is at the justification stage that it becomes necessary to "balance the interests of society with those of individuals and groups."[74] That is engagement followed by justification.

Of the proper approach to applying the special interpretative obligation in s 3 of the Human Rights Act, Lord Woolf CJ said this in Poplar Housing Association Ltd v Donoghue:[75]

Unless the legislation would otherwise be in breach of the [ECHR] section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention) ...

With respect, I join with Nettle JA in RJE v Secretary to the Department of Justice[76] in saying this approach is to be preferred. But it does need a little explanation.

Reading Lord Woolf's remarks in the context of the whole judgment, his Lordship had in mind the way breach was analysed in human rights law: a human right is "breached" when the act or provision places a limit on the right which is not demonstrably justified under a general or specific limitation provision. The right at issue in Poplar Housing Association Ltd was the right in article 8(1) to respect for your home, which could be limited under article 8(2). Lord Woolf said: "To evict the defendant from her home would impact on her family life. The effect of article 8(2) is therefore critical."[77] This is an interests-oriented engagement analysis followed by justification. Under the principle stated by his Lordship, the next step (if called for) would be reinterpretation.

Our s 7(2) was modelled on s 36(1) of the Constitution of the Republic of South Africa Act 1996, which was distilled from s 1 of the Canadian Charter of Rights and Freedoms. The approach of the courts in those countries to questions of statutory interpretation therefore deserves attention. Putting aside certain issues of terminology, they support the approach I prefer here. I will focus on the leading cases.

S v Zuma[78] was decided by the Constitutional Court of South Africa under the general limitations provision in s 33 of the Constitution of the Republic of South Africa Act 1993 ("the interim Constitution"). The whole court[79] agreed with Kentridge AJ, who adopted the Canadian "two-stage" approach: "First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?" [80]

That approach was confirmed in S v Makwanyane.[81] Chaskalson P developed it further by saying the two-stage approach involved "a broad rather than a narrow interpretation"[82] being given to the human rights concerned. This case also established the proportionality principles which govern the question of justification in South Africa. In National Coalition for Gay and Lesbian Equality v Minister of Justice,[83] the court adopted these principles for the Constitution of the Republic of South Africa Act 1996 ("the final Constitution"). We will return to those principles in the context of justification.

The two-stage approach was developed yet further in Ferreira v Levin.[84] Ackermann J wrote the leading judgment. The case concerned the validity of s 417(2)(b) of the Companies Act 1973 (SA) against the right to freedom and security of the person in s 11(1) and personal privacy in s 13 of the interim Constitution. Following S v Zuma[85] and S v Makwanyane[86] Ackermann J said this meant looking at "infringement" then "whether such infringement is justified".[87] As part of infringement, it was necessary to identify the scope of the human rights to the extent relevant to the inquiry at that stage. This was done broadly:[88]

It is obviously unwise and undesirable (if not impossible) even to attempt an exhaustive or comprehensive definition or circumscription of the right designed to hold good indefinitely and for all further cases. Yet, even if the exact nature and boundaries of the right are to be defined on a case to case basis, some attempt must be made at this stage to determine the meaning, nature and extent of the right.

Ackermann J went on to identify the scope of the human rights broadly, in accordance with the approach adopted by the Supreme Court of Canada in R v Big M Drug Mart Ltd.[89] That Court unanimously agreed with Dickson J, who described the proper approach thus:[90]

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

That is the approach still followed in Canada,[91] as well as South Africa.

On the question of terminology, decisions of the Constitutional Court of South Africa under the interim Constitution on the first stage of the analysis were often written in the language of infringement and contravention. Not all of the court's decisions at this time were so written. For example, in Coetzee v Government of the Republic of South Africa[92] Kriegler J said the question was whether the legislation or action "limits rights" and then whether "the limitation [is] justified".[93]

Under the final Constitution, as time went on, the court started using the language of limitation. For example, in Moise v Greater Germiston Transitional Local Council,[94] Somyalo AJ (the whole court concurring) gave this explanation of the proper approach:[95]

This entails a two-stage enquiry: first, whether or not [the provision at issue] limits the right ... If it does not, that is the end of the matter. However, if it does, a second enquiry has to be undertaken. That is whether the limitation of the right ... is reasonable and justifiable within the meaning of s 36 of the Constitution.

That is the approach now applied.[96]

Based on these decisions, the leading South African authors, Cheadle, Davis and Haysom,[97] describe the first stage of the inquiry as requiring definition of "the constitutionally protected interest advanced by the right." The scope of the right is determined purposively and commences "with the mischief the right is intended to

remedy."[98] I agree with that description. It applies equally to the first-stage task of engagement under the Charter.

In the United Kingdom the same question of approach arises because the courts there have to apply the justification and proportionality tests in the individual articles of the ECHR as domesticated by the Human Rights Act. Moreover, like the courts here, the courts there have to adopt an approach that includes the application of the special interpretative obligation in their s 3. The approach adopted there is the one I think applies here.

R v Lambert[99] concerned the right to presumption of innocence in article 6(2) of the ECHR. Lord Steyn asked, first, whether the legislative provision made "an inroad on" or "derogates" from the right.[100] His Lordship secondly considered "the question of justification for the legislative interference" with it,[101] which involved issues of proportionality.[102] The question of reinterpretation under s 3 came next.[103] Following Brown v Stott,[104] Lord Hutton said "whether or not there has been a violation of article 6(2) depends, therefore, upon whether [the legislation] is confined within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence."[105]

In Brown v Stott[106] the House of Lords considered domestic legislation affecting the right in article 6(2). The court applied the Strasbourg jurisprudence, under which some aspects of the right may be limited for legitimate ends by proportionate means. Lord Bingham spoke of the "limited qualification of these rights", which he then subjected to proportionality analysis.[107] Lord Hope spoke of the "modifications or restrictions" on the right, then proportionality.[108]

The question in Wilson v First County Trust Ltd (No 2)[109] was whether the credit legislation was incompatible with the lender's human right to a fair hearing under article 6(2). Lord Hope said the court first had "to construe the provisions of the statute which it is being asked to apply."[110] Then it had to determine whether the practical effect of the provision in the events that happened was "to engage any of [the lender's] Convention rights."[111] The case was resolved at this engagement stage. The court held right to a fair trial was not limited by the legislation. It didn't need to go on to consider justification and reinterpretation.

In Beaulane Properties v Palmer,[112] Nicholas Strauss QC (sitting in the High Court) considered Wilson and said: "I must first consider whether [the ECHR] is engaged and if so whether it has been breached."[113] As to breach, his Honour was speaking of an unjustified limitation.[114]

The question of engagement does not have to be approached in any programmatic or formulaic manner. So the interpretation of the legislation does not have to precede identifying the scope of the right. In R (Middleton) v West Somerset Coroner[115] Lord Bingham (speaking for the House of Lords) went the other way around. The question was whether the coroner's functions under the legislation were too narrow to be compatible with article 2 of the ECHR. Lord Bingham first identified the requirements of the Convention by reference to the Strasbourg jurisprudence, then considered whether the coronial legislation was inconsistent with it.[116]

The issue of what approach should be adopted in Victoria is considered in two Australian texts. Evans & Evans[117] discuss the issue in the context of proportionality. They endorse the two-stage approach because Victoria has a general limitations provision in s 7(2). They

say “a broad approach to identifying the scope of the protected right” is adopted at the first stage.[118] It is at the second stage that “the substantive inquiry occurs ... , which asks whether the limitation is reasonable and demonstrably justified”.[119] In the context of s 7(2) of the Charter, Pound & Evans[120] refer to “the general practice in other jurisdictions ... to take a broad view of scope of individual human rights and to require that any limitation be positively justified”.

For these reasons I conclude the first stage of the interpretative analysis involves considering whether the statutory provision engages a human right specified in the Charter. The provision is interpreted according to the standard principles of interpretation, including those calling up Australia’s international obligations and the principle of legality. The scope of the human right is identified broadly and not legalistically, focusing on its purpose and the interests it protects. The scope of the right is identified in a way that fulfils its purpose and secures for individuals the full benefit of its protection. The significance of this task should be understood. It is drawing the boundaries around the protected arena. The question then is whether the provision, so interpreted, limits the scope of the right, so identified. Justification of any limitation under the general limitations provision in s 7(2) is considered at the next stage.

(b) Step two: justification and proportionality under s 7(2)

(i) “reasonable limits ... demonstrably justified in a free and democratic society”

(A) Charter and comparable instruments

This is the general limitations provision in section 7(2):

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The second reading speech contains an extensive discussion of limiting human rights. It accurately describes s 7(2) as a "general limitations clause", which "embodies what is known as the 'proportionality test'."[121] Such a provision is needed because "rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests."[122] The speech mentions the limitations in some specified rights. These "are not exhaustive and do not exclude the application of the general limitations provision ...".[123] Importantly, the speech unequivocally states that action taken under a justified limitation on a human right will not be prohibited under the Charter, and are not incompatible with the right.[124]

The explanatory memorandum is to the same effect. It says the general limitations provision was modelled on s 5 of the New Zealand Bill of Rights Act and more particularly on s 36 of the Constitution of the Republic of South Africa 1996.[125]

Of the other comparable jurisdictions, Canada, New Zealand and South Africa each have a general limitations provision. For the purposes of the following analysis, it is necessary to set these out.

This is s 1 of the Canadian Charter of Rights and Freedoms:[126]

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.

This is s 5 of the New Zealand Bill of Rights Act:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this bill of rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This is s 36 of the Constitution of the Republic of South Africa 1996:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Europe and hence the United Kingdom do not have a general limitations provision. There is none in the ICCPR. But both the ECHR and ICCPR have specific limitations provisions which call up a proportionality analysis in various ways.

Australia is notable in one respect. It has both a general limitations provision (s 7(2)) and specific limitation provisions in some individual rights.

When analysing s 7(2), two requirements have to be addressed, although they overlap: legality and proportionality. The first is whether the limitation is "under law"; that is the legality requirement. The second is whether the limitation is "reasonable [and] demonstrably justified in a free and democratic society", as to which reference is allowed to the inclusively specified criteria. That is the proportionality requirement. The overlap arises because "under law" is a broad concept that includes proportionality considerations. I deal with the legality requirement later.

The onus of establishing whether human rights are engaged rests on the party making that assertion. The onus of establishing whether any limitations are justified likewise rests on the party making the assertion. That will usually be the government. The onus is a practical one.[127] The standard of proof is the civil standard of the balance of probabilities.[128] But the test in s 7(2) requires the limitations to be both reasonable and "demonstrably justified", which imposes a "stringent standard of justification".[129]

Some rights are expressed in terms that contain specific limitations. As relevant in the present case, the possibility of imposing lawful and non arbitrary limitations on the right to privacy in s 13(a) of the Charter is one example.[130] The right to be free of arbitrary detention in s 21(2) is another. Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not seen to be reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).

Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification analysis which is undertaken in the next stage. That is why the international jurisprudence shows there is very considerable interplay

between the application of specific limitations provisions on the one hand and general limitations provisions on the other.

As you saw, the second reading speech said s 7(2) embodies the proportionality test. This is a foundational concept in the international human rights jurisprudence. It is applied universally across the various jurisdictions in determining whether limitations on human rights are justified. Broadly speaking, the concept requires "reasonable proportionality" between the limitations imposed on the rights and the pressing and substantial social benefits offered in justification.

In the application of the proportionality test, certain factors are taken into account, derived from the landmark Canadian judgment in R v Oakes,[131] to which we will soon come. To a certain extent, the structure of s 7(2) is tautologous, for the specified factors in paragraphs (a)-(e) "broadly correspond"[132] to those identified in R v Oakes[133] as being part of the general test, which is itself set out in the opening words of s 7(2). This structure was adopted on the recommendation of the Human Rights Consultation Committee for practical reasons. After referring to general limitations provisions which embody the proportionality test, the committee said specifying the matters to be taken into account would make the Charter "as easy as possible to apply."[134]

(B) Strasbourg

Turning to the ECHR, the leading Strasbourg cases are Handyside v United Kingdom[135] and The Sunday Times v United Kingdom.[136] They applied the limitations provision in article 10(2), which permits limitation of the right of freedom of expression in article 10(1). Article 10(2) requires any limitation to be "prescribed by law and ... necessary in a democratic society ...".

Handyside v United Kingdom[137] concerned the possession by an English publisher of The Little Red Schoolbook, for which it was prosecuted under the obscene publications legislation. The court rejected the publisher's complaint of breach of article 10(1) on the grounds the laws were justified under article 10(2). As to what was "necessary" in a democratic society, the court said:[138]

The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10(2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".

It said the local legislature had a margin of appreciation:[139]

Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

Finally it recognised the importance (and consequences) of:

pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[140]

Handyside v United Kingdom was applied in The Sunday Times v United Kingdom.[141] The court said it must be decided whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given to justify it were relevant and sufficient under article 10(2).[142]

(C) United Kingdom

The Strasbourg proportionality principles have been adopted by the English courts in cases decided under the Human Rights Act.[143] In considering whether the limitation is proportionate to the legislative aim pursued, the English courts apply the principles stated in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing.[144] These require consideration of:[145]

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

To these considerations, in Huang v Secretary of State for the Home Department[146] the House of Lords has recently added "the need to balance the interests of society with those of individual and groups."[147] In making that addition, Lord Bingham said it was inherent in the judgment of Dickson CJ in R v Oakes[148] from which the approach to proportionality arose.[149] His Lordship also cited R (Razgar) v Secretary of State for the Home Department[150] in which the House of Lords held the judgment on the question of proportionality:[151]

must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.

Cases involving limitations on the human rights of mentally ill patients raise acute proportionality issues. R (Munjaz) v Mersey Care NHS Trust[152] is an example. The applicant was a long-term and sometimes violent psychiatric patient in a hospital. He was compulsorily detained in a high security ward under the mental health legislation. He was also placed in seclusion for lengthy periods, by reason of his own violence. Under a statutory code of practice issued by the Secretary of State for Health, hospitals were required to have policy guidelines about the treatment of mentally ill patients, including their detention in seclusion.

The patient alleged his detention was unlawful as contrary to the legislation and also inconsistent with the Human Rights Act. He attacked the hospital's policy guidelines and code of practice. The House of Lords upheld the policy guidelines as lawful under the code of practice and the legislation, and consistent with human rights.

As regards human rights, the patient had relied on (among others) article 8. The court held secluded detention could clearly found a claim of human rights breach. This is Lord Bingham: "It is obvious that seclusion, improperly used, may violate a patient's article 8 right in a serious and damaging way and may found a claim for relief." [153] The court approached the matter by assuming that secluded detention did interfere with the patient's human rights. It then went on to consider whether the detention was justified and lawful. We will return to the latter when we get to "under law" – the legality requirement.

As to justification, the court looked at whether the objectives of the policy were legitimate and implemented by proportionate means. The critical consideration was, in the words of Lord Bingham, that the policy allowed seclusion when it was "the only means of protecting others from violence or intimidation and for the shortest period necessary to that end."[154] His Lordship went on to say why the policy was justified under article 8(2):[155]

Seclusion under the policy is plainly necessary for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Properly used, the seclusion will not be disproportionate because it will match the necessity giving rise to it.

Lord Hope adopted the same approach:[156]

The aim of seclusion is to prevent disorder or crime, as it is resorted to only as a last resort to protect others from significant harm. The purpose of the policy is to address the special considerations that need to be applied to its use in a high security hospital, whose patients are considered to present a grave and immediate risk to the public and may do so also to other patients, staff and visitors: see the introduction to the policy. It shares the aims of the Code in this respect, and its aim is a legitimate one. It also aims to ensure that the procedure is resorted to in a way that is proportionate, as it is designed to avoid harm to the patient and to ensure that, even in long-term cases, it is brought to an end as early as possible.

(D) Canada

Turning to Canada, R v Oakes[157] is the leading international case on proportionality. The celebrated judgment of Dickson CJ has inspired judges and legislators for over a generation. Because of the importance of the concept of proportionality to a proper understanding of the justification test in s 7(2) of the Charter, it needs close attention.

The decision concerned the constitutionality of a reverse-onus provision in federal drug-control legislation. It was said the provision violated the presumption of innocence in s 11(d) of the Canadian Charter of Rights and Freedoms. Section 1 permitted such violation, but only by reasonable limits in the terms set out already.

This is the approach articulated by Dickson CJ:[158]

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R v Big M Drug Mart Ltd, supra, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R v Big M Drug Mart Ltd, supra, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd, supra, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the

measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

This judgment is still followed in Canada.[159]

Several points should be noted. The first criterion in the Oakes test relates to the objective of the limitation and requires it to be of sufficient importance. This is directed to the importance of the need, not the relative importance of the right. If that criterion is met, the second criterion relates to the means chosen and requires them to be reasonably and demonstrably justified. This is directed to the nature of the means, which must (among other things) limit the right as little as possible. In both the first and the second criteria, the test takes the right as the circumstances find it and focuses on the ends and means of the limitation.

(E) South Africa

Turning now to South Africa, the early authorities under the interim Constitution, of which S v Makwanyane[160] is prominent, reflected R v Oakes[161] and the international jurisprudence. An enhanced general limitations provision was enacted in s 36 of the final Constitution, which you have seen.

On this jurisprudence it is sufficient to say the South African courts have tried to maintain flexibility in the application of the proportionality test now enshrined in s 36. This is Madala, Sachs and Yacoob JJ in the leading authority of S v Manamela:[162]

It should be noted that the five factors expressly itemised in s 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

From this analysis of the origins of the general limitations provision in s 7(2) of the Charter I would make these general points.

First, the test is whether the limitation is reasonable and demonstrably justified in a free and democratic society based on the values of the Charter. This requires a global judgment and not a mechanical, check-list approach. The specific factors are given to help in making that judgment. They are inclusive and other criteria may be considered.

Second, the test reflects the concept of proportionality as articulated in the international jurisprudence, which assists us in understanding how a general limitation provision of this kind operates and, in particular, how the specified factors in s 7(2) fit into the general proportionality analysis.[163]

Third, under s 7(2) the specified factors are taken into account according to their nature and are not simply thrown into a general balance. The first and second are foundational and, once applied, remain fixed in the analysis. After the values protected by the right are identified, and the purpose of the limitation is seen to be important enough to justify its imposition, the proportionality of the limitation can be assessed against the other factors.

To the specifically included factors I now turn.

(ii) Specifically included factors

(A) Paragraph (a): nature of the right

This is best understood as a threshold or foundational value and not a balancing factor.[164]

Note the importance of the right is not referred to. All of the human rights in the Charter without exception express and protect fundamental values and interests.

The task here is to identify those values and interests in the context of the particular right being limited. They will reflect those which were identified when determining whether the provision or act engages the right, and which mark out the bounds of the protected arena.

The task involves identifying the qualities of the rights in terms of those values and interests, not ranking them in terms of their order of supposed different quality.

Once so identified, you have something precious in your hands. It is the human right which the Preamble to the Charter says is “essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom”. The nature of the right thus identified remains fixed in the justification analysis. The question is whether the limitation of a right of that nature is demonstrably justified under s 7(2).

The justification analysis is thereby anchored in the fundamental values and interests enshrined in the Charter. The value choices inherent in the limitations and their potential justification can then be made transparently, explicitly and responsibly, which is consistent with the democratic aspirations of the Charter.

(B) Paragraph (b): importance of purpose of the limitation

This too is best understood as a threshold or foundational factor. It is the natural corollary to the nature of the right.

Attention is here directed to the importance of the relevant purpose, not the actual limitation, which is part of the proportionality analysis and comes later. Put another way, the focus is on the importance of the ends sought to be achieved by the means, not the means themselves. As with the nature of the right, it is the underlying values and interests of the purpose that are the focus. Once identified, the importance of the purpose of the limitation is fixed in the analysis.

This factor reflects the insistence in R v Oakes[165] that limitations must relate to societal concerns which are "pressing and substantial." As the Attorney-General submitted, based on Evans & Evans,[166] a limitation on a right will not be demonstrably justified if it is of insufficient importance or for an impermissible purpose. Put another way, proportionality under paragraphs (c)-(e) will only become an issue if the law or decision is seen to have a purpose which is sufficiently serious to justify limiting the right. It is therefore critical to understand how important that purpose is.

The evaluation of the purpose of the limitation must be undertaken in the context of the system of values in the Charter. In that regard, there are two issues: one, whether the limitation accords with that value system; and two, whether, in terms of that system, the purpose is sufficiently important to justify limiting the right.[167] This is Van der Westhuizen J of the Constitutional Court of South Africa in Magajane v Chairperson, North West Gambling Board[168] on the identical provision in s 36(1)(b) of the final Constitution:[169]

The second factor ... is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation ... The court must carefully review the public interest served by t he statutory provision and determine the weight that this purpose should carry in the proportionality review.

It follows that if pressing and substantial societal concerns are identified, they may lead to reasonable and demonstrably justified limits being placed on human rights. There is a need to balance the interests of society with those of individuals and groups, and this factor lays the foundation for that balance. In the second reading speech, the Attorney-General gave examples of the kinds of purposes that may lead to such limits, including "laws which are necessary in order to protect security, public order, public safety or public health".[170]

The onus is on the government or other party seeking demonstrably to justify the limitation to identify the purpose relied on with clarity and evidence if necessary.

(C) Paragraph (c): nature and extent of the limitation

The specified factors here move from those which found the proportionality analysis to those which are balanced in the analysis itself.

The focus here is on the limitation, not the right or the purpose of the limitation, both of which have been identified. It is necessary to consider both the nature and the extent of the limitation. The greater the limitation of the right, the more compelling must be its justification. Thus it is necessary to know how great the limitation is. The focus is on the limitation as the means by which the purpose of the limitation is achieved.

What is required is an objective identification of the nature and extent of the limitation on the right in issue. This is Pound & Evans:[171] "the precise way in which a limitation constrains a right will be central to an assessment of whether the limitation is justifiable."

What is of concern is the limitation on the right, not the person holding it. At this stage it is not to the point that, for them, the practical consequences of the limitation may be small. That may be an issue later. The Charter expects human rights, which all reflect fundamental values and interests, to be fully respected. Every limitation of a right must be demonstrably justified, even those with minor consequences.[172] The nature and extent of the limitation of the right must be appreciated before that assessment can be made.

(D) Paragraph (d): relationship between the limitation and its purpose

The focus here is on whether the limitation on the right, regardless of its importance, is reasonably related to its intended purpose. This is a means-ends assessment. The question is whether the limitation is "rationally connected to the objective." That was Dickson CJ in R v Oakes.[173] Put another way, the question is whether the means are rationally connected to the ends. As the Attorney-General submitted, the harm done must be proportionate to the benefits achieved.

The nature of the right, the importance of the purpose of the limitation and its nature and extent are here background considerations. If the limitation on the right is not rationally connected to its purpose, it is not justified on that account, however important that purpose may be. This means an important purpose can only be used to justify limitations aimed at (in the sense of being rationally connected with) that target and not at others which lack that importance.

Thus, in S v Makwanyane,[174] deterrence was rejected as a purpose that justified limiting human rights by imposing the sentence of death. The evidence did not establish the purpose of deterrence was achieved by that means.[175] That means (the death penalty) was not proved to achieve that end (deterrence).

(E) Paragraph (e): any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

This factor expresses the minimum impairment principle.

The minimum impairment principle was stated in R v Oakes[176] in terms of the limitation impairing the right "as little as possible."[177] That the impairment be as little as possible is the animating purpose of the principle. It is very important for this to be taken into account when a provision is drafted or a decision is taken. It is the best way to ensure the provision is a proportionate response to the pressing social need.

When it comes to deciding whether a limitation in a provision or decision is justified, the principle is applied sensibly. Thus in Canada,[178] South Africa[179] and (probably) the United Kingdom[180] it is recognised the Parliament or a public authority may legitimately choose between a number of reasonable means of achieving the permissible purpose. This is McLachlin J in RJR-MacDonald v Canada:[181]

the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

The minimum impairment principle is applied this way even in South Africa where, as you have seen, the provision refers to "less restrictive means".

Differently to the provision in South Africa, the minimum impairment principle in s 7(2)(e) refers to any less restrictive means "reasonably available" to achieve the intended purpose. The qualification was plainly deliberate and intended to codify the principle to reflect the way it is internationally applied. To be demonstrably justified under s 7(2), it is not necessary for the limitation in the provision or act to be the least possible to achieve the intended purpose. As Hollingworth J held in Sabet v Medical Practitioners Board,[182] it was sufficient if "the chosen measure falls within a range of reasonable alternatives."

So much for the specifically included factors. Now for "under law".

(iii) "under law"

You have seen s 7(2) of the Charter permits human rights to be subject to reasonable limits, but only "under law". This is known as the legality requirement.

The Canadian general limitations provision uses "prescribed by law".[183] The New Zealand provision also uses "prescribed by law".[184] The South African provision uses "in terms of law of general application".[185] The ICCPR does not have a general limitations provision. Neither does the ECHR nor (it follows) the Human Rights Act of the United Kingdom.

All jurisdictions – except South Africa – include words of limitation in at least some of the human rights protected by their legislation, even if they do have a general limitations provision. In Victoria, for example, the right to privacy in s 13(a) is a right not to have your privacy etc "unlawfully or arbitrarily interfered with". Article 17(1) of the ICCPR uses the words: "No one shall be subjected to arbitrary or unlawful interference". Article 8(2) of the ECHR has a specific limitations clause that uses "in accordance with the law". In Victoria, the right to liberty in s 21(2) and (3) of the Charter is a right not to be subjected to "arbitrary" arrest or detention and not to be deprived of your liberty "except on grounds, and in accordance with procedures, established by law." Article 9(1) of the ICCPR is

indistinguishable. Article 5(1) of the ECHR uses the expression "prescribed by law" and permits only "lawful" detention.

In s 7(2), the Charter uses "under law", which is no less general than "prescribed by law" and its cognate expressions in the comparable instruments and legislations abroad. By including this legality requirement, the Parliament has incorporated in the Charter an important requirement, for thereby limitations can only be imposed "under law" by a law which possesses certain minimum attributes. I will later identify what they are.

The second reading speech says s 7(2) was intended to cover "limitations specified by the common law as well as by statutory provisions."[186] Notably, it refers only to those two legal sources. The explanatory memorandum also refers (only) to "statutory or common law" limitations.[187]

I will begin by examining the specific limitations provisions in the ICCPR and the ECHR, then move to the general limitations provisions in the New Zealand, Canadian and South African jurisdictions.

The requirement for a limitation to be "under law", "prescribed by law", "lawful", not "arbitrary" and "in accordance with law" is not an adjunct to the human rights protective scheme. It is an essential component of fundamental importance. The words that follow were spoken by Lord Bingham in R (Gillan) v Commissioner of Police of the Metropolis[188] in reference to the ECHR, but they are equally descriptive of the purpose of the legality requirement in s 7(2) of the Charter:[189]

The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.

General Comment 16 of the Human Rights Committee on article 17 of the ICCPR deals with what is "unlawful" and "arbitrary" in the context of the right to privacy. The comments are, however, of general assistance in understanding these key concepts. The comment describes "unlawful" thus:[190]

The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

And this is the scope of "arbitrary" interference:[191]

The expression “arbitrary interference” is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

The decisions of the Human Rights Committee applying these concepts are dealt with in Joseph et al.[192] One important case is Toonen v Australia.[193]

Nicholas Toonen is the Tasmanian historian who took strong objection to consenting sex between homosexual adults being criminalised by the State legislation. The committee upheld the complaint and confirmed “that adult consensual sexual activity in private is covered by the concept of ‘privacy’”.[194] As the interference was legislative, it was lawful. The committee repeated General Comment 16 on what was arbitrary. As we have seen, it requires the interference to be “reasonable in the particular circumstances”.[195] As to the reasonableness component, it said this:[196]

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The committee found the legislation to be arbitrary. It was later repealed by the Tasmanian Parliament. The decision of the committee is a good example of the overlap between arbitrariness and proportionality.

The European Court of Human Rights at Strasbourg has dealt with these concepts extensively and in a number of different contexts. I will deal with three different contexts in turn.

The context of The Sunday Times v United Kingdom[197] was the right of freedom of expression in article 10(2) of the ECHR. The question was whether an injunction restraining publication of an article on the drug thalidomide was a justified interference with the newspaper’s right to freedom of expression in circumstances where it was involved in ongoing litigation. That depended on whether the interference was “prescribed by law” and necessary in a democratic society.

“Law”, held the court, covered “not only statute but also unwritten law.”[198] Therefore an interference under the common law was covered.[199] It said the expression “prescribed by law” had two requirements:[200]

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to

foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The court held the general discretionary principles under which the English courts grant injunctions answered this description. It went on to consider the requirement in article 10(2) that the interference was necessary in a democratic society.

The context of Winterwerp v The Netherlands[201] was the right to liberty in article 5(1) of the ECHR. We will look at this case again in the context of that specific right as it applies in the present case. Our focus here is on the legality requirement that any deprivation be "in accordance with a procedure prescribed by law" and "lawful".

The court held that these two concepts overlapped.[202] "Lawful" covered "procedural as well as substantive rules."[203] The two expressions reflected the aim of article 5(1) – maintenance of the rule of law and prohibiting arbitrary detention.[204] It said "no detention that is arbitrary can ever be regarded as 'lawful'."[205] When was an infringement "in accordance with a procedure prescribed by law"? The answer given by the court was when the domestic law was based on "fair and proper procedure, namely, that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary."[206]

The context of Malone v United Kingdom[207] was the right to respect for private and family life in article 8(1) of the ECHR. The applicant complained his right in that respect was infringed by police wire-tapping carried out under warrant. The applicant was a suspected receiver of stolen goods. To be compatible with human rights, the wire-taps had to be "in accordance with the law" as required by article 8(2).

The court said it was necessary to consider "the quality of the law". The law had to be compatible with the rule of law, which was a purpose of the Convention.[208] The law must provide "a measure of legal protection ... against arbitrary interferences by public authorities with the rights safeguarded" by article 8(1).[209] The domestic laws had to be foreseeable, which meant they must "be sufficiently clear in [their] terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to" infringe this right.[210] A law which confers a discretion is not in itself inconsistent with the requirement for foreseeability, provided that the scope of the discretion and the manner of its exercise were identified "with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[211]

The court held the wire-tapping laws of the United Kingdom were too vague to satisfy this requirement and upheld the applicant's complaint.[212]

Olsson v Sweden[213] offered a summary of the principles. The court said the three requirements of being "in accordance with law" under article 8(1) of the ECHR were (a) precision and foreseeability (which did not mean excessive rigidity); (b) protection against arbitrariness, consistent with the rule of law; and (c) reasonable indication of the scope of any discretion, having regard to its legitimate aims.[214]

These principles have been applied by the Strasbourg court in many cases concerning mentally ill people. We will look at the scope of the human rights involved in these instances in detail later. Our focus here is on the legality requirement. Besides Winterwerp v The Netherlands,[215] let me deal with two other examples.

The patient in HL v United Kingdom[216] was being held in detention as an informal patient under the common law doctrine of necessity. He complained his rights under article 5(1) and (4) of the ECHR were being breached.

The court referred to its earlier authorities and confirmed the requirements for a limitation to be "in accordance with a procedure prescribed by law" in article 5(1).[217] It held the doctrine of necessity might possibly satisfy the predictability requirement. But it went on to say it considered "the further element of lawfulness, the aim of avoiding arbitrariness, has not been satisfied."[218] In reaching that conclusion, the court took into account the lack of procedural rules, the lack of a "network of safeguards" and the lack of a "specific provision requiring a continuing clinical assessment" of the patient's mental disorder.[219]

Following these principles, in Storck v Germany[220] the court stressed the need for safeguards to protect the rights to liberty of mentally ill persons in such cases:[221]

In the case of a detention for a mental illness, special procedural safeguards may prove to be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. Board reviews of involuntary and community treatment orders under the Mental Health Act fall directly into this category.

Thus we see that the presence of safeguards is an important consideration in determining whether an interference is unlawful or arbitrary. The general principle was explained by Beatson et al in a leading text as follows:[222]

Absence of arbitrariness, in Convention law, means that the law contains adequate safeguards, both procedural and substantive, to ensure that the power may be used only for its designated purpose and may not be abused.

The authors base that statement on the Strasbourg jurisprudence, some of which I have analysed here. They refer[223] to examples from several fields where the courts have taken safeguards (or the lack thereof) into account when considering arbitrariness and lawfulness, including revenue,[224] judicial review of the exercise of discretions,[225] taking children into public care,[226] as well as the medical treatment or detention of mentally ill persons.

These authorities deal with the need for the safeguard but not with the consequences of non-observance. I will have to consider that against first principles in the context of the board's obligation under s 24(1) to afford Mr Kracke a fair hearing of his review applications.

In cases under the Human Rights Act, the English courts have followed the Strasbourg jurisprudence.

An early example is R v Governor of Brockhill Prison; Ex parte Evans (No 2).[227] Lord Hope examined the right to liberty under article 5 of the ECHR and the domestic law of the

United Kingdom. His Lordship said, “assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate”.[228]

R (Munjaz) v Mersey Care NHS Trust[229] relevantly concerned the patient’s rights under article 8 of the ECHR, which permitted limitation “in accordance with law”. The House of Lords took a broad view of that expression, which does not concern us immediately here. It confirmed the central purpose of the legality requirement. As Lord Bingham put it:[230]

it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied.

The court considered the limitations not to be arbitrary because they were clear, written, accessible and “sets out standards in the light of which under domestic law judicial review of such interferences is available.”[231]

Returning to R (Gillan) v Commissioner of Police of the Metropolis,[232] the House of Lords held the expressions “prescribed by law” and “in accordance with law” in the ECHR had the same meaning.[233] Following the Strasbourg court, it held the domestic law had to possess the two qualities of being accessible, precise and predictable, and not arbitrary.[234] The stop and search laws in issue were upheld against the convention standard.

Turning to the Canadian Charter of Rights and Freedoms, under s 1 human rights can only be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The courts have applied the Strasbourg jurisprudence in determining the meaning of “prescribed by law”. Thus in Re Luscher v Deputy Minister, Revenue Canada[235] the Federal Court of Appeal of Canada held the terms “immoral” and “indecent” in the customs tariff legislation did not meet the requirements of a reasonable limit and hence breached the right to freedom of expression in s 2(b) of the Charter. This is the principle applied by Hugessen J, who delivered the judgment of the court:

In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences.

In R v Zundel[236] the Ontario Court of Appeal[237] explained the requirement as being that the "limits must be ascertainable and understandable and articulated with some precision. They cannot be vague, undefined and simply discretionary, at the whim of an official".[238]

Turning to the New Zealand Bill of Rights Act, the general limitations provision in s 5 was considered by McGrath J in R v Hansen.[239] Citing legislative and authoritative academic sources, his Honour said the legality requirement in that provision operated in this manner:[240]

To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

Under s 22 of the New Zealand Bill of Rights Act, "everyone has the right not to be arbitrarily arrested or detained." In Re M[241] Gallen J held this proscription of arbitrary infringement, in the mental health context, was directed at capricious and wholly unreasonable actions, and actions contrary to appropriate discretionary principles.[242] That approach was followed in Re S[243] where Barker J held the detention of mentally ill patients will become "arbitrary if it is unprincipled, or it is for a prohibited ulterior purpose."[244] His Honour followed L'Heureux-Dube J in R v Duguay, Murphy and Sevigny[245] to hold: "A detention is arbitrary if it is the product of an untrammelled discretion."

That deals with justification. I turn now to the third stage of the analysis: reinterpretation.

(c) Step three: reinterpretation

(i) General concept

This is s 32:

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of –

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

The second reading speech of the Charter recognises that the traditional role of the courts is "interpreting legislation passed by Parliament."[246] While not allowing courts to invalidate legislation, the speech says s 32(1) allows "courts to interpret statutory provisions in a way which is compatible with the human rights contained in the charter, so far as it is possible to do so consistently with their purpose and meaning."[247]

The explanatory memorandum says s 32 "provides for certain rules of statutory interpretation under the Charter."[248] Section 32(1) "establishes the requirement that courts and tribunals must interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provision."[249] The explanatory memorandum goes on to say:[250]

The object of this sub-section is to ensure that courts and tribunals interpret legislation and give effect to human rights. The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose of interpret legislation in a manner which avoids achieving the object of the legislation.

Section 32(2) facilitates resort to domestic, foreign and international sources of human rights law. The scope of s 32(2) should be appreciated. For the interpretation of all Victorian primary and subordinate legislation (including the Charter)[251] touching on human rights (in the Charter),[252] it operates as a statutory permission to consider international law and judgments in all cases whatsoever. It is a separate and additional capacity to that conferred by s 32(1) and enhances the Court's capacity to take relevant human rights into account under the standard principles of interpretation.

Under s 32(2), the provision being interpreted need not be ambiguous and the law or judgment need not have been made or pronounced before the provision was enacted. The rationale of s 32(1) is not parliamentary intention to enact legislations in conformity with international law, but the utility of referring to international law and judgments in understanding the relevant human right and how it may be reflected in or influence the interpretation of the statutory provision. Not just conventions and treaties are relevant, but all legitimate sources of international law,[253] as well as the judgments of domestic, foreign and international courts and tribunals. The explanatory memorandum gives considered examples:[254]

Under sub-section (2), a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations (see article 38 of the Statute of the International Court of Justice). Decisions of the International Court of Justice, European Court of Justice, Inter-American Court of Human Rights and United Nations treaty monitoring bodies including the Human Rights Committee, will be particularly relevant. The section also permits consideration of judgments of domestic and foreign courts and tribunals relevant to a human right when interpreting a statutory provision. A number of jurisdictions have incorporated international human rights into domestic law. Decisions from courts in these jurisdictions including the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom may be relevant.

Unlike s 32(1), which is compulsive, s 32(2) is permissive. But it is powerfully permissive. It should be applied to the full extent that its language allows, unrestricted by notions derived from debate about the scope of the correlative principle at common law.

Section 32(3) is an important provision which reflects the paramount sovereignty of Parliament within the new human rights legislative infrastructure.

Returning to s 32(1), the ICCPR and ECHR do not have a provision like this. Section 32(1) is a descendent of s 3(1) of the Human Rights Act. Here it is (with s 3(2)):

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

New Zealand has a similar provision in s 6 of the New Zealand Bill of Rights Act. It provides:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The subject of s 32(1) is everybody. It applies to the courts, tribunals, government officials, public authorities and "to everyone else who may have to interpret and give effect to legislation." So spoke Lord Rodger in Ghaidan v Godin-Mendoza[255] of s 3(1) the Human Rights Act. His Lordship's words apply equally to s 32(1) of the Charter.

The Charter applies "vertically" to public authorities who are bound directly by its terms (especially s 38). By s 32(1), the Charter also applies "horizontally" to anybody whose rights, obligations and interests may be governed or affected by legislation, for all legislation must be interpreted compatibly with human rights so far as it is possible to do so. That is because the meaning of legislation is a question of law. As s 32(1) applies to the resolution of such a question, the human rights in the Charter become justiciable to that extent, whether or not the parties to the proceeding are all private or include a public authority affected in that capacity. If a court, tribunal or other interpreter makes an error of law in that regard, it is amenable to appeal or review in the usual way.[256] Ghaidan v Godin-Mendoza[257] was a horizontal application case. Another interesting example is Beaulane Properties Ltd v Palmer[258] (private action for recovery of possession of land). Nettle JA applied s 32(1) and the Charter in that way in RJE v Secretary to the Department of Justice.[259]

Because s 32(1) requires all legislation to be interpreted compatibly with human rights if possible, it imposes a particular interpretation on provisions which confer open-ended discretions. If possible consistently with their purpose, the provision must be interpreted such that the discretion can only be exercised compatibly with human rights. Therefore, unless the very purpose of the provision is incompatible with human rights, which will surely be an exceptional case, the solution to legal problems concerning the exercise of an open-ended statutory discretion will depend on whether it has been exercised compatibly with human rights, not the interpretation of the provisions which, under s 32(1), is set.

In its late conduct of the reviews of Mr Kracke's involuntary and community treatment orders, the board exercised certain discretions. These principles will therefore be relevant.

Applying its general approach to interpreting legislation consistently with the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada came to that conclusion in Slaight Communications Inc v Davidson.[260] This is Lamer J: "Legislation conferring an imprecise discretion must ... be interpreted as not allowing the Charter rights to be infringed."[261] The consequence of this principle is that, in such a case, it is not the interpretation and compatibility with human rights of the authorising discretion that is in issue; it is the compatibility with human rights of the exercise of the discretion.[262]

In Victoria, it is perhaps more accurate to say that, under s 32(1), legislation conferring an open-ended discretion must be interpreted as allowing the discretion to be exercised only in a

manner which is compatible with human rights, assuming that is not inconsistent with its purpose. The solution to a human rights problem of this nature therefore turns on engagement and justification. Generally speaking, if a right is engaged, resolving the problem will depend on the proportionality of the exercise of the discretion.

The special interpretative obligation in s 32(1) needs to be read with the power of the Supreme Court of Victoria in s 36(2) to make a declaration of inconsistent interpretation. I will say a little about that power under step four.

The application of s 3(1) of the Human Rights Act has received extensive consideration in a great many cases. This jurisprudence would undoubtedly have influenced the Victorian legislature in enacting s 32(1).

Before going there, one difference between s 32(1) of the Charter and s 3(1) of the Human Rights Act should be noted, if only to put it to one side. Our legislation contains a reference to "purpose". That reference was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in Ghaidan v Godin-Mendoza[263] (which had been decided before the Charter was enacted).

That conclusion is consistent with the function of the special interpretative obligation in the two statutory schemes. Section 32(1) of the Charter and s 3(1) of the Human Rights Act express the same special interpretative obligation and are of equal force and effect. It is also consistent with the report of the Human Rights Consultation Committee, which referred to Ghaidan v Godin-Mendoza, and said the purpose requirement would provide the courts "with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question."[264]

The boundaries identified in Ghaidan v Godin-Mendoza, on which the purpose requirement is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended. Narrower boundaries would reduce the special interpretative obligation to a restatement of the standard principles of interpretation or the rules already expressed in s 35(a) of the Interpretation of Legislation Act 1984.

With respect I therefore cannot agree with the views expressed in Raytheon Australia Pty Ltd v ACT Human Rights Commission.[265]

(ii) Principles of application

The special interpretative obligation in s 32(1) is like its English parent – "very strong and far reaching", and may even require "the court to depart from the legislative intention of Parliament."[266] Because the obligation is to make legislation conform to transcendent human rights principles wherever possible, the role of the courts is fundamentally different to their role under the standard principles of interpretation. However, that role is still interpretation, not amendment.[267] In consequence, there is "a limit beyond which a [human rights compliant] interpretation is not possible ..."[268]

The idea that the courts now have a certain obligation to interpret legislation differently to what Parliament intended is a challenging one. Of course we are speaking here of Parliament's intention in objective not subjective terms. According to the standard principles of interpretation, the legal function of the courts is to identify the meaning which they consider objectively to be consistent with Parliament's intention. By enacting s 32(1), the Parliament has injected a new intention into the analysis. Under the special interpretative obligation, the courts must impute to the legislation an intention not to be incompatible with human rights wherever possible. For legislation enacted before the Charter came into force, it is like that intention is added back and then treated as if it were always there. For legislation post-dating the Charter, it is like it was there from the start. In both cases, the source of the obligation is Parliamentary fiat which, in a democracy based on the rule of law and separation of powers, it must be.

In Moonen v Film and Literature Board of Review[269] the Court of Appeal of New Zealand discussed s 5 of the New Zealand Bill of Rights Act 1990, which is similar to our s 32(1). Among other things, the court said s 5 should be applied so that statutory provisions were given "the least possible limitation".[270] In the later case of Moonen v Film and Literature Board of Review,[271] the court declined to clarify its analysis until the opportunity arose fully to analyse s 5.[272]

Applying s 32(1) of the Charter, the function of the interpreter is not to search for the meaning which involves the least possible limitation in any possible case. The interpretative task arises in a factual and legal context. That gives the interpretation its relevance, although it may have wider application which has to be considered. The interpretation is to be compatible with human rights as far as possible in that context, not the most compatible that could conceivably be adopted in any context.

Turning to the application of the obligation generally, I will look at just two leading authorities, In re S[273] and Ghaidan v Godin-Mendoza,[274] and then summarise the general principles.

In re S is the drifting in care case. The House of Lords held the Court of Appeal overreached in its use of s 3(1), although for thoroughly understandable reasons. Vulnerable children in care were not being supervised properly under their care plan. The Court of Appeal decided it would reinterpret the relevant provisions to bring them into line with the rights of the natural parents and the children under articles 6(1) and 8 of the ECHR. It did so by adding in to the legislation a procedure whereby the essential milestones in a care plan were identified and starred. If not achieved, specified action had to the taken.

The House of Lords held this to be an impermissible use of the special interpretative obligation. This is Lord Nicholls (with whom the judicial committee agreed):[275]

In applying section 3 courts must be ever mindful of [the] outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament ...

For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.

Ghaidan v Godin-Mendoza[276] is the leading case on the use of s 3(1). It is an example of the difference it can make to interpreting legislation. Only three years earlier the House of Lords had reached the opposite result applying the standard principles of interpretation.

Mr Godin-Mendoza and his deceased male partner had lived in their flat for many years in a domestic relationship. The public housing legislation would have allowed him to succeed to the tenancy after his partner died if they had been living as husband and wife without being married. In Fitzpatrick v Sterling Housing Association Ltd[277] the House of Lords held this did not extend to same-sex couples living in the same relationship. They had to be man and women.

That, held the House of Lords in Ghaidan v Godin-Mendoza, was discriminatory and contrary to articles 8 and 14 of the ECHR. The legislation could be interpreted compatibly with human rights under s 3(1) by reading it as extending to same-sex partners living as husband and wife.

The court held the special interpretive obligation could not be used to "adopt a meaning inconsistent with a fundamental feature of legislation."[278] So said Lord Nicholls, who also approved Lord Rodger's pithy test that any words implied must "go with the grain of the legalisation."[279] Lord Steyn said the obligation required "a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved."[280]

Notably, the court also adopted a broad approach to the identification of the fundamental feature, grain or purpose of the legislation. In the words of Lord Nicholls, the policy of the legislation was to extend "security of tenure ... to the survivor of couples living together as husband and wife",[281] which was equally applicable to same-sex partners. The court did not identify the policy as confining succession to heterosexual partners, even though that was the policy of the legislation literally interpreted. To identify the underlying purpose of a provision for the application of the special interpretative obligation in s 32(1) of the Charter, it is thus necessary to work at an appropriately general level of abstraction.

From these and other authorities on s 3(1) of the Human Rights Act, certain principles may be distilled. These principles apply to s 32(1) and supply a useful framework within which to analyse its operation and application:

Remember, the sovereignty of Parliament is paramount.[282] According to Lord Hope in R v Lambert,[283] the interpretative principle "preserves the sovereignty of Parliament". It has been written on the basis that judges have the role of interpreting legislation and Parliament has the role of enacting and amending legislation. It "does not entitle the court to legislate", said Lord Woolf CJ in Poplar Housing Association Ltd v Donoghue,[284] for "its task is still one of interpretation (but interpretation in accordance with the direction contained in section

3)". The courts cross the line when they use the principle in a way that amends legislation rather than interpreting it.[285]

Application of the special interpretative obligation is mandatory.[286] It is a "powerful tool whose use is obligatory", said Lord Nicholls in the case of In re S.[287] According to Lord Steyn in Ghaidan v Godin-Mendoza,[288] there is a "strong rebuttable presumption" in favour of an interpretation compatible with human rights. But it is not an open-ended obligation. The word "must" is qualified by "so far as it is possible to do so": Lord Hope in R v Lambert.[289]

The obligation applies whether the standard meaning of the legislation is clear or ambiguous.[290] In the case of In re S[291] Lord Nicholls said its use is not "dependant on the existence of ambiguity". It applies even where "the meaning of the legislation admits of no doubt", his Lordship said in Ghaidan v Godin-Mendoza.[292]

The court is not bound by pre-Charter interpretations of the same provision, which may need to be reinterpreted in the light of the obligation to make its meaning compatible with human rights if it is possible to do so.[293] Ghaidan v Godin-Mendoza[294] is the archetypical example. Nettle JA so decided in RJE v Secretary to the Department of Justice.[295]

Applying the special interpretative obligation does not depend on semantics. Nor does it depend on the actual words used in the primary legislation.[296] According to Lord Steyn in R v A (No 2),[297] the obligation is not concerned with "the niceties of the language [but] broader considerations". What is important is the "substance of the measure" under consideration: Lord Rodger in Ghaidan v Godin-Mendoza.[298]

The principle may require the court to depart from original Parliament's intention. For example, Parliament didn't actually intend same-sex couples to benefit from the tenancy succession provisions in Ghaidan v Godin-Mendoza.[299] But, the interpretation can't go against Parliament's plainly deliberate intention on the very point at issue. That would not be "judicial interpretation but judicial vandalism", said Lord Bingham in R (Anderson) v Secretary of State for the Home Department.[300] According to Lord Hope in R v Lambert,[301] the court cannot "expressly contradict the meaning which the enactment would have".

The limitation is "so far as it is possible to do so consistently with [the] purpose" of the provision (s 32(1)). This has been explained to mean not "inconsistent with a fundamental feature" or "the underlying thrust" of the legislation,[302] to "go with the grain of the legislation"[303] and not to violate a "cardinal principle" of the legislation.[304] But it is the statutory test and not these explanations which counts.[305]

The purpose of the legislation is discerned at an appropriately general level of abstraction. In Ghaidan v Godin-Mendoza,[306] that was security of tenure for the survival of domestic partners. This is Lord Nicholls in Wilson v First County Trust Ltd (No 2):[307] "What is relevant is the underlying social purpose sought to be achieved by the statutory provision."

When s 32(1) applies, the court or other interpreter can read in (add new words to the provision),[308] read down (narrow its operation)[309] and read broadly (widen its operation).[310] It is not the number of words but the effect of the reinterpretation that is important.[311]

The modified meaning should be confined to what is necessary to achieve compatibility,[312] and to make it intelligent and workable.[313] If radical[314] alterations are required, or "violence"[315] has to be done to the legislation, the principle can't be used. That may be so when the troubling features of the legislation are "inter-linked" such that achieving compatibility requires a "radically different approach."[316] The power should not be used to create a "substitute scheme" [317] or establish new schemes requiring judicial management or supervision.[318]

That is enough on reinterpretation. I will deal briefly with declarations of inconsistency before going to the application of the Charter in courts and tribunals.

(d) Step four: the declaration of inconsistent interpretation

That power is in s 36(2) of the Charter:

Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

An override declaration is a declaration in legislation inserted in accordance with s 31(1) of the Charter that a statutory provision has effect despite being incompatible with human rights. Special parliamentary procedures govern such declarations.[319]

The Supreme Court has not yet had the opportunity to say anything about this power.

It has been held in the United Kingdom that the power to make a declaration of inconsistent interpretation is an "exceptional course"[320] or "a measure of last resort".[321] If that is so with the Charter then, wherever possible, the provision should be interpreted compatibly with human rights under the special interpretative obligation in s 32(1).

C APPLICATION OF CHARTER TO COURTS AND TRIBUNALS

(1) Section 6(2)(b)

Mr Kracke submits the board (and the tribunal standing in its shoes) has the statutory function of reviewing the need for and standard of a patient's involuntary psychiatric treatment. That function is directly related to many of the human rights specified in Part 2 of the Charter, including the right not to be subjected to involuntary medical treatment,[322] the right not to have your privacy unlawfully or arbitrarily interfered with,[323] the right of freedom of movement[324] and the right to liberty and to non-deprivation of liberty except in accordance with lawful procedures.[325] Therefore, he submits, since 1 January 2007 (when

s 6 of the Charter came into force), the Charter applied to the board (and the tribunal) by reason of s 6(2)(b).

So you can see s 6(2)(b) in context, here is s 6(2) in full:

This Charter applies to –

(a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and

(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and

(c) public authorities, to the extent that they have functions under Division 4 of Part 3.

What Mr Kracke is submitting is that the board (and the tribunal) have "functions under Part 2" because its review and appeal functions under the Mental Health Act naturally engage, or are directly related to, many of the human rights specified in that Part.

There is a need to reconcile the interpretation of s 4(1)(j), which excludes courts and tribunals from definition of "public authority" in s 4(1) except when they are acting in an administrative capacity, with s 6(2)(a), which makes the Charter applicable to courts and tribunals to the extent that they have the specified functions.

Beginning with Part 2 of the Charter, "it sets out the human rights that Parliament specifically seeks to protect and promote."[326] The rights specified range across a spectrum from general rights having no necessary legal context, such as the right to freedom of movement in s 12, to rights with a legal focus applying naturally to proceedings in courts and tribunals, such as the right to a fair hearing in s 24(1). Part 2 also confers certain powers of a specific nature on courts and tribunals, such as the power in s 24(2) to exclude a member of the media and the public from a hearing.

This spectrum has led Evans & Evans to suggest there is a broad, intermediate and narrow interpretation of s 6(2)(b).[327] I think it is susceptible to different interpretations, and those three conveniently cover the range of possibilities. I will analyse Mr Kracke's submissions within that broad framework.

Mr Kracke, supported by the Commission and the amicus, relies on the broad interpretation. The Attorney-General relies on the intermediate interpretation. The contradictor's submissions focussed more on s 4(1)(j) than s 6(2)(b). It accepted the board was bound act compatibly with the right to a fair hearing in s 24(1) of the Charter.

Adopting the broad interpretation would give best effect to the purposes of the Charter,[328] for it would then apply to courts and tribunals to the full extent of all the human rights specified in Part 2. As institutions of justice with responsibility for interpreting and enforcing human rights, it seems natural and appropriate that courts and tribunals should apply those rights themselves. There is symmetry in the idea that courts and tribunals not only enforce but also observe human rights. It would enhance their legitimacy as institutions of justice if they did. There is asymmetry about the obverse, and no such enhancement. The judiciary is bound both to enforce and to apply human rights in the comparable legislative human rights framework in the United Kingdom.[329] This is also the case in New Zealand[330] and South Africa.[331] Adopting the broad construction would see Victoria in line with this international standard.

However, the broad construction must be rejected because it is inconsistent with the structure of the Charter and the way it distributes power and responsibility.

The main provision by which obligations under the Charter are imposed is s 38(1), which provides this: "it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right." The concept of a "public authority" is defined in s 4 and s 4(1)(j) specifically excludes a court or tribunal, except "when it is acting in an administrative capacity".[332] Thus, courts and tribunals acting in a judicial capacity are not public authorities, which means, in that capacity, they are not obliged by s 38(1) to observe the human rights specified in the Charter.

To interpret s 6(2)(b) broadly would explode this structural feature of the Charter and offend against the principle that charters must be interpreted as a whole.[333] While being a public authority bound under s 38(1) only when acting in an administrative capacity, a court or tribunal would come within its general scope because, on that interpretation, the "functions under Part 2" potentially encompass all of the human rights specified in that Part. The Charter would then operate indirectly to bring about what has been excluded directly. It would apply to courts and tribunals as if they were public authorities in all capacities when they are not. I cannot accept that was intended, even though I think it is the preferable outcome.

The narrow construction must also be rejected. These are the powerful opening words of s 6(2): "This Charter applies to". Those words convey the meaning that what follows is an important description of the coverage of the Charter. Paragraphs (a), (b) and (c) identify respectively the Parliament, courts and tribunals and the public authorities "to the extent" that they have functions specified in divisions or parts of the Charter. I do not think the legislature would have used such a lynch-pin provision simply to confer on courts and tribunals a power like the one in s 24(3) not to publicise a judgment or decision.

Furthermore the narrow interpretation is not based on a defensible category. There is no reason in legal principle or policy for distinguishing (for example) between the human right to a fair hearing in s 24(1) from the power conferred by s 24(3). Nor is there any such reason for distinguishing between the other human rights in Part 2 that relate to court and tribunal proceedings from that power.

"Function" is a word of some generality which encompasses in its ordinary meaning "the action of performing; discharge or performance" (OED). The meaning of the word is made wider again by s 3(2)(a), under which "a reference to a function includes a reference to a power, authority and duty". The expression "to the extent that they have functions under Part

2" is apt to scoop up a class of matters much wider than the ones contemplated by the narrow interpretation.

The intermediate interpretation is that the functions under Part 2 referred to in s 6(2)(b) are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings. I think this is the correct interpretation because it respects the structure of the Charter, is most consistent with its purposes in the context of that structure and gives the opening words of s 6(2), and the words "functions under Part 2" in s 6(2)(b), an appropriately general meaning.

The difficulties in interpreting ss 4(1)(j) and 6 (2)(b) were noted by King J in R v Williams.[334] Her Honour held it was unnecessary to decide how they related to each other in that case, for the minimum guarantees in ss 24 and 25 would form the basis of what a court would determine to be a fair hearing. With respect, I agree with that view, which accords with the approach I took to considering the right to a fair hearing in article 14(1) of the ICCPR in the context of the court's duty to ensure a fair hearing in Tomasevic v Travaglini.[335] But the conclusion I have reached here is that courts and tribunals are bound to act compatibly with ss 24 and 25 by reason of s 6(2)(b).

In De Simone v Bevnol Constructions and Developments Pty Ltd,[336] Neave JA and Williams AJA decided courts and tribunals were directly bound by ss 24 and 25 of the Charter when they exercise functions specifically calling up those rights. That decision applies to the conduct of the board review, and the conduct of this tribunal review, in the present case. It is consistent with the approach I have adopted to the general interpretation of s 6(2)(b).

I accept the Attorney-General's submission that the human rights in Part 2 potentially applying to courts and tribunals under s 6(2)(b) are those specified in ss 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24(1), 24(2), 24(3), 25, 26 and 27 of the Charter. I add s 10(b) to the extent that it specifies the human right not to be "punished in a cruel inhuman or degrading way", as it relates very specifically to what a court does in sentencing proceedings (see s 21(8) for a comparative example). I do not include the human right of equality before the law specified in s 8 because it relates to the rights possessed by individuals rather than to court and tribunal proceedings. In the course of such proceedings, a court or tribunal may be called on to enforce the rights in s 8, as the case may involve the non-observance of those rights by a public authority or the application of the interpretative principle in s 32(1). The same may be said of the right to life[337] and freedom of expression,[338] to give two examples, which likewise relate to persons and not to court and tribunal proceedings.

In conclusion, under s 6(2)(b), the Charter applies to courts and tribunals "to the extent that they have functions under Part 2 and Division 3 of Part 3". The functions under Part 2 that potentially apply are the functions of applying or enforcing the human rights specified in Part 2 that relate to court or tribunal proceedings, being those specified in ss 10(b) (in its reference to punishment), 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24(1), 24(2), 24(3), 25, 26 and 27 of the Charter. The actual engagement and application of these human rights for courts and tribunals depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.

(2) Application of Charter to courts and tribunals as public authorities acting in an administrative capacity

(a) Interpretation of s 4(1)(j)

Under s 38(1) of the Charter, public authorities must act in a way that is compatible with human rights and, in making decisions, give proper consideration to relevant human rights. Their actions or decisions are otherwise unlawful.

There is an expansive definition of "public authority" in s 4(l)(a)-(k), supported by s 4(2)(a)-(e), which specifies factors that may be taken into account.

A member of the tribunal is not a "public official" within the meaning of the Public Administration Act 2004 as mentioned in s 4(1)(a).[339] Members of the board are public officials under that legislation because they are holders of a statutory office.[340]

Courts and tribunals like the Mental Health Review Board and the Victorian Civil and Administrative Tribunal are, on the other hand, entities established by statute and have functions of a public nature, as mentioned in s 4(1)(b). They have functions connected to and generally identified with functions of government, as mentioned in s 6(2)(a). Moreover, as the Attorney-General submitted, powers that are coercive or "wide-ranging and intrusive", such as these possessed by the board and the tribunal in the present case, will commonly be characterised as public functions.[341] Therefore statutory courts and tribunals would, under that definition, be public authorities.

But s 4(l)(j) provides a court or tribunal is not a public authority "except when it is acting in an administrative capacity".

Mr Kracke, supported by the Attorney-General, the Commission and the amicus, submits the board (and the tribunal standing in its shoes) is a public authority within s 4(1)(j) because it acted in an administrative capacity when it confirmed his community treatment order.

The contradictor submits the board was not, because it was acting in a quasi-judicial capacity. However, the contradictor accepts it is necessary to consider the right to a fair hearing under s 24(1) of the Charter, as the board was a tribunal conducting a quasi-judicial civil proceeding within that section. Thus, interpreting the provisions of the Mental Health Act as required by s 32(1) of the Charter would engage s 24(1) even though the board is not a public authority under s 4(1)(j).

The difference between the parties, therefore, is whether the board is directly bound to observe the right to a fair hearing in s 24(1) as a public authority within s 4(1)(j), or because its own legislation would be interpreted consistently with s 24(1) by reasons of s 32(1).

There is no issue about the function of administering courts and tribunals – carrying out the multifarious range of administrative and managerial tasks which are necessary to support the operation of the institution generally. When performing functions of that kind, a court or tribunal acts in an administrative capacity and, under s 6(2)(b), is a public authority bound by the Charter to that extent.

The issue concerns the performance of the deliberative functions of courts and tribunals. In Sabet v Medical Practitioners Board[342] Hollingworth J held the medical board was a public authority because, in performing those functions in the disciplinary context, it was acting in

an administrative capacity as distinct from a judicial capacity. With respect, I agree that is the relevant distinction.

There is a note to s 4(1)(j), which I will set out under the provision as it is in the Charter:

(j) a court or tribunal except when it is acting in an administrative capacity; ...

Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

Sections 36(3A) of the Interpretation of Legislation Act 1984 makes this note part of the Charter, that is, part of the provision it explains. The provision and the note must therefore be interpreted together. The note is not just part of the context in which the provision would otherwise be interpreted in the first instance, as we shall see is the case with the explanatory memorandum.

The note refers to a committal proceeding as an example of acting in an administrative capacity. A committal proceeding is an investigation, usually conducted by a magistrate, into criminal charges brought against an accused person to determine whether there is sufficient evidence to justify the charges being tried.[343] When conducting a committal, the magistrate (who usually exercises a judicial function) is undoubtedly acting in an administrative capacity in the public law sense.[344] The issuing of a warrant is likewise an exercise of administrative power in that sense, not an exercise of judicial power.[345]

Another example given by the note is listing cases. Now it is possible to think of instances in which, in a judicial proceeding in a court or tribunal, the listing of a case by a judicial officer would be an exercise of judicial power,[346] just as it is possible to think of instances in which the judicial officer might be exercising administrative power. The character of the power in such instances would depend on the circumstances. But the note refers to those functions in the sense of what is normally done by the administrative or registry staff of courts or tribunals. As such it too is a good example of the exercise of administrative power in the public law sense.

As to the third example – adopting practices or procedures – its character would also depend on by whom and in what context it was done. But functions of that kind are widely performed by administrative and registry staff, and by judicial officers, in courts and tribunals in the exercise of administrative power.

Thus the note to s 4(1)(j) strongly suggests “administrative capacity” is a reference to the exercise of administrative power, as against judicial power, in the public law sense.

The explanatory memorandum to the bill for the Charter gives this explanation of s 4:[347]

Courts and tribunals and members of Parliamentary Committees are also bound by the Charter, when acting in an administrative capacity (paragraphs (g) and (j)). For example, they are considered to be public authorities when hiring staff. The obligation to comply with the Charter does not, however, extend generally to Parliament or Parliamentary proceedings or to the courts when acting in a judicial or quasi-judicial capacity (paragraphs (i) and (j)).

Under s 35(a) of the Interpretation of Legislation Act and according to the standard principles of interpretation, the explanatory memorandum forms part of the context in which s 4(1)(j) is to be interpreted. It is not, however, part of the Charter.

The decision of the board in this and other cases[348] that it is not a public authority under the Charter is based on the proposition that the Charter does not extend to a body acting quasi-judicially.

There are a number of difficulties with the proposition which I can examine by reference to the explanatory memorandum. The first and second sentences are unexceptional. But the third refers only to courts when s 4 covers both courts and tribunals. It then refers to courts acting in a judicial or quasi-judicial capacity.

In Victoria, courts and tribunals can both exercise judicial power. The tribunal plainly exercises judicial power in hearing and determining consumer and trader disputes under Part 9 of the Fair Trading Act 1999.

While the Victorian Civil and Administrative Tribunal can exercise judicial power, for most purposes it is not a court.[349] For example, it is not a court for the purposes of the Commonwealth Constitution, [350] the Judiciary Act 1903 (Cth)[351] or the Trade Practices Act 1974 (Cth).[352] It has only statutory and no inherent jurisdiction,[353] although it has implied jurisdiction.[354] However, sometimes "court" is interpreted liberally and beneficially.[355] Applying this approach, the tribunal can be a court for certain purposes.[356]

The explanatory memorandum omits reference to these considerations, which are clearly raised by the terms of s 4.

Courts in Victoria can exercise administrative power.[357] The power of a magistrate to conduct committal proceedings is a good example. When a judge of a court exercises administrative power in the public law sense, they may be said to be acting quasi-judicially, but that does not change the nature of the power they are exercising. Likewise, when a tribunal such as the Victorian Civil and Administrative Tribunal exercises administrative power, it may said to be acting "quasi-judicially". Neither does this alter the character of the function, which is administrative, not judicial, in the public law sense.

When the courts have considered this question, they have held administrative decisions are not subject to metamorphosis. This is von Doussa J in Pancontinental Mining Ltd v Burns:[358] a "decision does not cease to be one of an administrative character because the [decision-maker] was required to act judicially". In Lamb v Moss Bowen CJ, Sheppard and Fitzgerald JJ held an administrative decision which must be made quasi-judicially "does not

turn ... into a judicial one nor [is] it ... judicial in character."[359] That is because there is a long-standing distinction between acting judicially and exercising judicial power.[360] To say that an administrative decision-maker is bound to act judicially "is to do no more than to describe how he must perform his administrative function."[361]

The explanatory memorandum deals inadequately with these important and entrenched public law concepts, which are inherent in the language of s 4(1)(j), as reflected in the note.

It would not be consistent with the concept of a public authority under the Charter to exclude courts and tribunals exercising administrative power quasi-judicially. Many public authorities within s 4(1)(a)-(h), though not courts or tribunals, exercise statutory power that is administrative and yet affects or determines the rights or interests of individuals. In the traditional language of administrative law a public authority, in those circumstances, would be performing a quasi-judicial function. Thus the Charter does not exclude from being a public authority those persons or entities, not being courts or tribunals, who perform quasi-judicial functions in an administrative capacity in the public law sense. There is no reason to think courts and tribunals exercising administrative power of that kind are, under the Charter, excluded as a special case.

In conclusion, by reason of the combined operation of ss 4(1)(b) and (j) and 4(2), courts and tribunals acting in an administrative capacity in the public law sense are public authorities and fully bound in that capacity to comply with the Charter. Courts and tribunals acting in a judicial capacity are not public authorities and not fully bound by the Charter; they are bound only to the extent specified in s 6(2)(b).

(b) What is "acting in an administrative capacity"?

The focus of attention in s 4(l)(j) is on the "capacity" in which the court or tribunal is acting, not on the general character of the institution. It is quite different with the constitutional character of a court, which reflects the character of the institution as a whole.[362] The "capacity" in which a court or tribunal is "acting" reflects the scope and nature of the power being exercised, as well as the particular decision being made, in the facts and circumstances of the given case, remembering that, in Victoria, courts and tribunals can act in both judicial and administrative capacities.

There is an extensive Commonwealth constitutional and administrative law jurisprudence on the character of legislative, judicial and administrative powers. These oft-quoted general remarks of Fox ACJ in Evans v Friemann[363] should be borne in mind:[364]

It has in fact proved very difficult, virtually impossible, to arrive at criteria which will distinguish in all cases the three concepts I have mentioned. They at times overlap: "The borderland in which judicial and administrative functions overlap is a wide one, and the boundary is the more difficult to define in the case of a body such as the appellant board, the greater part of whose functions are beyond doubt in the administrative sphere".[365] Sometimes the category into which an act or function will be placed will be decided in part on historical considerations or on the source of power or the nature of the body to which it is given. In the judicial sphere, there are many incidental functions, essentially of an administrative nature, and even of a legislative nature, which are regarded as being within the judicial power of the Commonwealth, because they are incidental to, or incidents of, the

exercise of judicial power. Many administrative tribunals are, to a greater or less extent, required to act judicially. Parliament has a power to try, and punish, for contempt of the Parliament.

With legislative and administrative (or executive) powers, the "distinction is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases".[366] As Latham CJ said in Commonwealth v Grunseit,[367] the "general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases."

As between judicial and administrative powers, it is useful to identify what is not administrative by identifying what is judicial.

Some powers are so plainly judicial that they are exclusively characterised in that way. Examples include "the determination of criminal guilt [and] also actions in contract and tort."[368] Put a little wider, the category encompasses "the punishment of criminal offences and the trial of actions for breach of contract and for wrongs."[369] Put wider again, the category includes claims "for the enforcement of existing legal rights".[370] This category is derived from history, precedent and legal tradition. Courts or tribunals exercising jurisdiction of this nature cannot be acting in an administrative capacity, only in a judicial capacity.

There is an additional and more general principle that judicial power is giving a binding and authoritative determination between definite parties as to their legal rights and duties according to existing legal principles.[371] As the High Court[372] said in Brandy v Human and Equal Opportunity Commission,[373] a "judicial determination" means "an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found." It is critical to the exercise of judicial power that the relevant principles of law – the principles and standards by which the determination is to be made – are "supposed already to exist".[374]

However, it is established that, when acting in an administrative capacity, tribunals can make final decisions between contending parties in ways that affect their legal rights and duties.[375] Moreover, certain powers may be administrative or judicial, depending on the repository (court or tribunal) and their purpose (judicial or administrative).[376]

For example, it is an administrative function to exercise a discretionary authority to make orders creating new rights and imposing new liabilities, especially where policy considerations have an important part to play in the determination.[377] Similarly, a conciliation and arbitration tribunal can enquire into past events, and form views as to existing legal rights and obligations, when deciding whether and how to exercise a statutory power to create new industrial rights and obligations.[378]

Legislation commonly confers on tribunals exercising administrative review jurisdiction certain evidentiary and procedural powers which are usually possessed by courts. The Victorian Civil and Administrative Tribunal is an example. When a tribunal uses such

powers, say by issuing a summons to a witness to give evidence[379] or to produce documents,[380] and it does so in the aid of the conduct of an administrative review jurisdiction, the exercise of the power is administrative not judicial.

In cases where there is doubt about the nature of the jurisdiction being exercised, it can be relevant to consider how the determinations of the decision-maker are enforced. In Brandy v Human Rights and Equal Opportunity Commission,[381] the judicial nature of the jurisdiction of the Commission was confirmed by the automatic enforceability of its orders in the Federal Court of Australia. This consideration will not, however, be determinative where the other indications clearly point in the other direction.

To summarise, when identifying whether a power being exercised is judicial, it is necessary to consider whether it comes within that category of powers which are exclusively judicial. It is also necessary to consider the nature and subject matter of the power, the purposes for which it is being exercised, the character of the person or body exercising it and the legal consequences for the parties of its exercise.

Applying these principles to state tribunals, it is important not to be distracted by two considerations: the federal doctrine of separation of powers and the distinction between a court and a tribunal.

First, the federal doctrine of separation of powers. Although the main Australian cases concerning the nature of judicial as against administrative powers have been decided in that context, the doctrine of separation of powers arises under Chapter III of the Commonwealth Constitution and does not apply directly to the States.[382] State courts can and do act in an administrative capacity, and state tribunals can and do act in a judicial capacity. That is so with the Supreme Court of Victoria and the Victorian Civil and Administrative Tribunal.

Second, the distinction between a court and tribunal. A state tribunal can exercise judicial power, for example, the Administrative Decisions Tribunal of New South Wales[383] and the Anti-Discrimination Tribunal of Tasmania.[384] But, as we have seen, a tribunal is not a court strictly so called. Thus the Administrative Decisions Tribunal constituted under the Administrative Decisions Tribunal Act 1997 (NSW), even when exercising its substantial commercial jurisdiction under the Retail Leases Act 1994 (NSW), is not a court under s 77(iii) of the Commonwealth Constitution and s 86(2) of the Trade Practices Act 1974 (Cth), for (among other things) it is not comprised predominantly of judges.[385] For the same reason, the Domestic Building Tribunal under the Domestic Building Contracts and Tribunal Act 1995 (Vic), the predecessor to the Victorian Civil and Administrative Tribunal, was not a court for the purposes of s 86(2) of the Trade Practices Act.[386] Neither is the Victorian Civil and Administrative Tribunal when exercising jurisdiction under the Retail Tenancies Reform Act 1998 (Vic).[387]

That being the nature of acting in a legislative and judicial capacity, acting in an administrative capacity can be dealt with briefly, for it is a broad residual category. An exercise of statutory power, neither legislative nor judicial in character, is most likely administrative in character, it being a category of power applicable to executive or governmental decision-making generally.

This broad scope of decisions of an “administrative” character is dealt with in the cases concerning the meaning of the words “decision of an administrative character” in the

Administrative Decisions (Judicial Review) Act 1977 (Cth). The analysis of Ellicott J in Burns v Australian National University[388] has been enduring. His Honour saw "administrative" as carrying "the notion of 'managing', 'executing' or 'carrying into effect.'"[389] He said the expression "decision of an administrative character" is:[390]

at least apt to describe all those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make in the exercise of statutory power conferred on them, whether by Act of Parliament or by delegated legislation. In other words it at least covers the decisions made in executing or carrying into effect the laws of the Commonwealth. Such decisions, as the definition indicates, may or may not require the exercise of a discretion. Usually they will. Quite often, they will, in the exercise of a discretion, involve the application of the general to the particular, for example, a general rule or broadly framed power to particular circumstances.

Before applying these principles to the board and the tribunal, it is necessary to determine whether they are "tribunals" under s 4(l)(j).

(c) Board and tribunal are each a "tribunal" within s 4(1)(j)

It is first necessary to determine what the Charter means by "a court or tribunal". "Court" is defined to mean the Supreme Court, the County Court, the Magistrates' Court or the Children's Court.[391] The board and the tribunal are not included in that list, are not courts properly so-called and are not courts for the purposes of the Charter.[392] It is notable that at least one institution called a court – the Coroner's Court – is not included in the definition, so it is the definition of "court", not the name, that is important. However, the Charter does not define "tribunal".

The Charter seems to take account of the fact that, under the Victorian system of justice, both courts and tribunals play a part. Both act and make decisions to enforce, apply and administer the law in ways that affect the human rights of the community. In several places the Charter draws a distinction between a court and a tribunal, and then makes provision in terms that apply to both. For example, it does so in s 4(1)(j), with which we are presently concerned, and in s 24(1), which specifies the human right to a fair hearing.

The Charter thus enlists both courts and tribunals to enforce, apply and administer the Charter, although only the Supreme Court can make a declaration of inconsistent interpretation.[393] So the Charter uses the expression "court or tribunal" in a general way to encompass those several and diverse institutions in the system of justice that enforce, apply and administer the law.

While that is so, the expression "court or tribunal" does not encompass every person or institution who might enforce, apply or administer the law. A great many ministers, officials and authorities who are not courts or tribunals possess statutory power and discretions. When the Charter makes provision with respect to a court or tribunal, it does not necessarily do so with respect to them.

As you saw, the Charter does not define "tribunal". The word "tribunal" is one of some generality and can encompass domestic tribunals, such as those in the sports, as well as large statutory institutions, such as the Victorian Civil and Administrative Tribunal.

Generally speaking, in the context of the Charter, I think a tribunal is a person or body who, under a statute, operates independently of government and possesses a limited and specified jurisdiction or authority to make particular decisions of a judicial or administrative character applying general principles of law or policy. Although such a tribunal can operate flexibly and informally, it would normally conduct a proceeding according to practices and procedures, either specified under the statute or within the authority and control of the tribunal, appropriate and adapted to the nature of its jurisdiction. A tribunal will not be directable by government with respect to the determination of particular cases.

A minister, official or other authority operating within and not independently of government is not a tribunal even though they may possess statutory authority to make decisions of a judicial or administrative character. Also, such a decision-maker would not normally conduct a proceeding even in the informal sense.

The Victorian Civil and Administrative Tribunal is clearly a tribunal under the Charter. It is established under statute.[394] Its members are independent of government.[395] Its jurisdiction is limited to those specified in the statute, being the original and review jurisdictions specified in ss 41 and 42, which can be of a judicial and administrative character. While it can conduct "proceedings"[396] informally,[397] its general procedures and authority in this respect are also specified in the statute and within its authority and control.[398] The tribunal is not directable by government in relation to the determination of particular cases.

The Mental Health Review Board is also a tribunal under the Charter, for the same reasons. It does not matter that it is called a board and not a tribunal, for it takes its character under the Charter from its statutory jurisdiction, its independence and its control over its manner of operating, not its name. It is a statutory body,[399] independent of government,[400] with a limited specified jurisdiction that is administrative in character (see below).[401] It conducts "proceedings"[402] informally[403] but according to generally specified procedures within its authority and control.[404] Its individual decisions are not directable.

Being tribunals under the Charter, the Mental Health Review Board and the Victorian Civil and Administrative Tribunal are public authorities when acting in an administrative capacity.[405] To that issue we can now turn.

(d) Board and tribunal are each acting in an administrative capacity

It is convenient to start with the tribunal. It can act in an administrative and a judicial capacity. To decide between the two, it is necessary to examine the nature of the jurisdiction and the powers being exercised in the individual case, keeping in mind the principles I identified earlier.

Under the Victorian Civil and Administrative Tribunal Act, the tribunal has an original[406] and review[407] jurisdiction. The review jurisdiction is "conferred on the Tribunal by or under an enabling enactment to review a decision made by a decision-maker."[408] The

original jurisdiction is the jurisdiction of the tribunal "other than its review jurisdiction".[409] In the present case, the tribunal is exercising the jurisdiction conferred by s 120(1) of the Mental Health Act to review a determination of the board. By s 3(1) of that latter Act, a "determination" includes an order. A community treatment order is an order, as is an involuntary treatment order.

When exercising the review jurisdiction under its legislation, the tribunal stands in the shoes of the decision-maker. Its function is to make the correct or preferable decision on the merits in the circumstances of the individual case. The tribunal's review jurisdiction is substitutionary not appellate and includes a full power of fact-finding. The character of the jurisdiction is derivative. It is to be ascertained by reference to the jurisdiction of the original decision-maker. In this case, that was the board and its jurisdiction was administrative. That will be the usual case in the review jurisdiction.

The capacity in which the board was acting was the exercise of its jurisdiction to conduct the periodic review of Mr Kracke's involuntary treatment order under s 30(3) of the Mental Health Act and a review of the second extension of his community treatment order under s 30(4). This also required the board to review Mr Kracke's patient treatment plan.[410]

As regards the involuntary treatment order, the power of the board was to discharge Mr Kracke[411] or to confirm the order,[412] depending on its determination as to the application of the criteria in s 8(1) to him. As regards the community treatment order, the power of the board was to discharge Mr Kracke[413] or to confirm or revoke the order,[414] depending on the same considerations and some others.[415] As to the treatment plan, its power was to order revision of the plan, depending on its determination as to whether the plan complied with the criteria in s 19A and was capable of being implemented by the service.[416]

According to the principles already stated, these functions of the board were plainly not legislative. They did not involve prescribing a general rule. Neither were they judicial. They did not involve the determination of Mr Kracke's contractual or tortious legal rights, and did not involve the determination of his general existing legal rights and duties on the basis of past events found to exist by reference to legal standards supposed to exist. The board was reviewing Mr Kracke's involuntary and community treatment orders and treatment plan for the purposes of determining, for the future, whether he would continue to be subjected to involuntary medical treatment and the general treatment specified in the plan. Those are administrative functions in the public law sense. Appeals under s 29 are in the same category.

The Mental Health Act specified in s 8(1) the criteria relevant to those review functions. The criteria are broad and protective and require an expert assessment of the patient's mental health and need for treatment. These are not the type of hard and fast matters normally submitted to courts for consideration. Further, the criteria in s 8(1) relevantly relate only to the discharge of the board's appeal and review jurisdictions. They are not prescriptive of Mr Kracke's legal rights and responsibilities generally.

The administrative and non-judicial nature of the board's function is reinforced by s 22(2), which requires it, when determining any review or appeal, to have regard primarily to the patient's current mental condition and consider the patient's medical and psychiatric history and social circumstances. In the course of the review, the board must review[417] the patient's treatment plan,[418] which is an administrative function.

I have looked at the other functions of the board under the Mental Health Act to see whether they supply a context in which these administrative review and related functions should be treated as judicial. The functions of the board as described in s 22(1) are administrative in character, as would be expected from the objects and purposes of the Mental Health Act and the role of the board in the administration of the statutory scheme. I have examined the individual functions of the board under its legislation. It exercises only administrative power in the public law sense. It does not exercise judicial power.

Under the Mental Health Act, the board can state a special case for the opinion of the Supreme Court.[419] So can many administrative tribunals. It is an offence to act in contempt of the board.[420] That is to protect the board in the discharge of its administrative jurisdiction. Further, the offence is enforced elsewhere. The board is given the same protection and immunities as a judge of the Supreme Court.[421] That is because it is not a court exercising judicial power and can only get this protection and immunity by statute. The board can award costs in limited cases.[422] That is so it can protect the integrity of its administrative proceedings against abuse.

I conclude that reviewing orders for the involuntary treatment and plans for the general treatment of patients found to be mentally ill are functions of an administrative character. Therefore, when discharging its review functions in the present case, the board was acting in an administrative capacity within s 4(1)(j). In that capacity, the board was wholly bound by the Charter as a public authority.

Having regard to the importance of its decisions for the human rights of mentally ill people, that is entirely appropriate. Like mental health review tribunals elsewhere, the board must operate within the human rights framework created by the Charter. It would be surprising if it were otherwise.

Turning to the tribunal, Mr Kracke's application for review was made under s 120(1) of the Mental Health Act for a review of a determination of the board. Section 3(1) defines "determination" to include an "order, direction, consent, advice and approval". The determination of the board to confirm Mr Kracke's community treatment order was a determination within s 120(1). Confirming the involuntary treatment order came into the same category.

Mr Kracke's application for review enlivened the tribunal's jurisdiction under s 42(1) of the Victorian Civil and Administrative Tribunal Act. In exercising that review jurisdiction, the tribunal has all the functions of the board under the Mental Health Act.[423] We know the tribunal's function is to stand in the shoes of the board and to make the correct or preferable decision on the merits on the facts and circumstances before it. In doing so, the tribunal applies the same statutory provisions, legal principles and appropriate policies as does the original decision-maker, subject to the provisions of the Victorian Civil and Administrative Tribunal Act and the tribunal's fresh consideration of the matter. In determining a proceeding for review, the tribunal has the powers to affirm, vary, set aside and remit the decision under review for reconsideration.[424] The decision of the tribunal to affirm, vary or substitute a decision of the decision-maker under review is deemed to be a decision of the decision-maker.[425]

As I have said, the review jurisdiction of the tribunal is substitutionary, not appellate. In exercising that jurisdiction the tribunal acts in the same capacity as the decision-maker under review. The tribunal also may have other functions under its own legislation,[426] but these

do not alter the capacity in which it is acting. The legal character of the capacity in which the tribunal is acting is the same as that of the original decision-maker; it does not change because the tribunal is acting in that capacity in its review jurisdiction.

Some individual indicia need to be considered.

The tribunal has judges among its members, and one as its president.[427] They exercise the jurisdiction in the case at hand, be it original or review, as I here exercise administrative jurisdiction in the latter.

The provisions of the Victorian Civil and Administrative Tribunal Act for enforcing monetary[428] and non-monetary[429] orders depend on party-initiated registration with the appropriate court. Enforcement of non-monetary orders requires a certificate from a judicial member.[430] After registration, the orders are enforced in the usual way as orders of the court.[431] These provisions do not operate automatically as in Brandy v Human Rights and Equal Opportunity Commission.[432] Even if they did, I do not think they would transform the tribunal's review jurisdiction from administrative into judicial, for the other indications are powerfully conclusive.

The legislation creates a number of offences to protect proceedings before the tribunal. For example, it is an offence to fail to comply with a non-monetary order,[433] although it is enforced elsewhere. Failing to comply with a summons is an offence,[434] as is failing to give evidence[435] and giving false or misleading information to the tribunal or a registrar.[436] All of this is in aid of the tribunal's jurisdiction for the time being. It does not affect my classification of the review jurisdiction as generally administrative.

A judicial member[437] of the tribunal can punish people for contempt of the tribunal.[438] The judge can imprison or fine the comtemptor.[439] This power is plainly judicial. When exercised to protect the review jurisdiction, it is an example of a power that is judicial because of its very nature. But it does not alter the substantive jurisdiction. There will doubtless be other special powers in this category, just as some powers of the tribunal in what may ordinarily be judicial proceedings will be administrative.

The tribunal's members also have the same immunity as judges of the Supreme Court.[440] That changes nothing. It has some of the trappings of a court, such as a Rules Committee with important powers with respect to procedure and the organisation of the tribunal.[441] That is to support the tribunal in exercising the jurisdiction it possesses however characterised.

As the board was acting in an administrative capacity when it determined to confirm Mr Kracke's community treatment order, the tribunal was acting in an administrative capacity in reviewing the board's decision. Again, I have looked at the other jurisdictions exercised by the tribunal to see whether they suggest the otherwise administrative jurisdiction of reviewing determinations under the Mental Health Act should be regarding as judicial, not administrative, when exercised by the tribunal.

The tribunal's original jurisdiction involves some functions of a judicial character, but that is a separate jurisdiction of the tribunal, and not the jurisdiction being exercised here. As I have indicated, the other review jurisdictions of the tribunal are generally based on the model of providing merits review of decisions of an administrative character, as in the present case. I therefore accept the Attorney-General's submission that, in its review jurisdiction, the

tribunal is exercising administrative power and is thereby a "public authority" within s 4(l)(b) and (c) and not excluded by s 4(l)(j) of the Charter. The exercise by the tribunal of its review jurisdiction with respect to decisions of the board under the Mental Health Act is an example of this general type. There may be individual exceptions which have to be considered case by case.

In reviewing the decision of the board with respect to Mr Kracke's community treatment order, the tribunal is wholly bound by the Charter under s 4(1) as a public authority. Wholly bound, that is, to the extent that the Charter has effect, which brings me to the retrospectivity issue.

D DOES THE CHARTER HAVE RETROSPECTIVE APPLICATION?

(1) Mr Kracke's submissions

Mr Kracke submits the special interpretative obligation in s 32(1) of the Charter governs the interpretation of the provisions of the Mental Health Act as they applied to the board's review of his involuntary treatment order and the second extension of his community treatment order in 2007. The second extension of his community treatment order should have been reviewed under s 30(4) by 12 April 2007 but was not. The involuntary treatment order should have been periodically reviewed under s 30(3)(a) by 19 April 2007 but was not. The question is, what are the legal consequences?

On Mr Kracke's submissions, interpreting the provisions of the Mental Health Act according to the standard principles of interpretation would lead to the conclusion that the involuntary and community treatment orders are, for that reason, invalid. As you will see, I do not accept that submission. Mr Kracke's alternative submission is that interpreting the provisions according to the special interpretative obligation in s 32(1) leads to the same conclusion. It is necessary to decide, therefore, whether the obligation in s 32(1) applies to the interpretation of the provisions of the Mental Health Act in 2007 in this case.

The Mental Health Act was enacted in 1986 before the Charter came into force. That, says Kracke, is beside the point. He relies on the general language of s 32(1) – it is not expressed to operate with respect to future legislation only. That much of his submission can immediately be accepted.

Section 32(1) applies to the interpretation of all Victorian statutory provisions[442] whenever made and whoever is doing the interpreting. By s 49(1), the Charter "extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement." Thus the Charter applies to all primary and subordinate legislation whenever passed or made.

The Parliament has very deliberately not divided up Victorian statutory law into the old and the new, the latter being interpreted consistently with human rights where possible and the former not. It has treated Victorian legislation as a single body of law, all of which is to be interpreted by reference to the one modern human rights interpretative obligation. By the device of making the special interpretive obligation apply to the entire statute book, it has

inoculated all legislation – past and future – against having an operation incompatible with human rights where it is possible to avoid it. Thus, when interpreting the Mental Health Act, I must apply the special interpretive obligation in s 32(1), even though it was enacted before the Charter came into force.

It is when Mr Kracke goes a step further that he encounters difficulty. On his submission, the second extension of his community treatment order in 2007 may be valid when the provisions of the Mental Health Act are interpreted without s 32(1), but invalid when interpreted with s 32(1). As regards the position in 2007, he submits s 32(1) may apply to change the legal status of the order. The difficulty is s 32(1) came into operation on 1 January 2008. In my view, Mr Kracke is attempting to give it a retrospective operation it does not have.

(2) General presumption against retrospectivity

There is a general presumption against legislation having a respective operation with respect to the substantive law. In the absence of very clear words indicating the contrary, the courts assume Parliament did not intend legislation to operate in this way. This is the classic statement of the principle by Dixon CJ in Maxwell v Murphy,[443] which captures its several elements:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish L.J. in Republic of Costa Rica v Erlanger.[444] "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done".[445]

Another well accepted statement of the principle is that of Fullagar J in Fisher v Hebburn Ltd.[446] His Honour said the courts tend against giving legislation a meaning that changes the legal consequences of past events:[447]

There can be no doubt that the general rule is that an amending enactment – or, for that matter, any enactment – is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.

The presumption is a rule of construction whose effect depends on the whole of the circumstances.[448] It is a point of departure, not a point of destination. The destination is justice and fairness to everybody in the operation and application of legislation. In George Hudson Ltd v Australian Timber Workers' Union[449] Isaacs J cited the principle in Maxwell on Statutes, that the policy of the presumption was "the Legislature does not intend what is unjust ...".[450] That, said Isaacs J, was "the universal touchstone".[451] It was necessary to consider "the whole of the circumstances", for what may seem unjust from the standpoint of one person affected may be fully justified when viewed from the standpoint of the other.[452] Applying the presumption against retrospectivity thus involves more than reading the statement of Dixon CJ like a dictionary against the facts of the case; it is necessary to keep the policy of the presumption – justice and fairness – in mind.[453]

In Victoria it has been said that the principle "is founded on a presumption of common sense that in a well-ordered and civilized society the Legislature would not intend what is unjust."[454] Those words were spoken in Doro v Victoria Railways Commissioner[455] by Adam J, who went on to say the ease of lifting the presumption depended on the degree of injustice it brought about:[456]

The strength of the presumption against retrospectivity in any particular case, and accordingly the ease or difficulty with which it may be overcome, must, I would think, depend on the nature and degree of the injustice which would result from giving a statute a retrospective operation. Where a palpable injustice would result, the presumption should be given its fullest weight. In such a case it is but common sense to require the clearest indication of legislative intention that such an unjust result was intended. On the other hand, where to give retrospective operation to a statute might be considered to work some injustice to one party, but is clearly required to rectify a manifest injustice to others, there would, on principle, seem little reason for giving much weight to the presumption. In such a case, where the Legislature has used language which is apt to give its statute retrospective operation, it would appear to be a matter of conjecture to presume that it preferred the interests of the one to the others.

It is first necessary to decide whether the interpretation being considered would give the provision retrospective operation. Mr Kracke, the Commission and the amicus contend that to apply s 32(1) to the board's review obligations under s 30 of the Mental Health Act would not do so, as the legal consequences would flow only for the future. That submission must be rejected.

(3) General presumption does apply

Look again at the second sentence of Dixon CJ's classical formulation of the principle in Maxwell v Murphy.[457] You can see past events giving rise to particular legal relations can be used as the foundation for imposing future legal relations of a different character.[458] "Since provisions which affect existing rights prospectively are not retroactive, the

presumption against retroactivity does not apply",[459] it has been pithily said. The classic example is Re A Solicitor's Clerk.[460]

The clerk was convicted of larceny in 1953 when the statute prohibited his employment only if he stole from his employer or client. It was amended to impose the same prohibition after conviction for larceny as such. The legislation was held not to be retrospective simply because it attached future consequences to a past event.[461] La Macchia v Minister for Primary Industry [462] and R v Field[463] are to the same effect.

Contrary to Mr Kracke's submissions, the application of s 32(1) to the interpretation of the Mental Health Act would, on his alternative submissions, alter the legal consequences of past events. On those submissions, s 30(3) and (4) of that Act must be interpreted consistently with human rights according to the special interpretative obligation in s 32(1). The consequence would be that the involuntary treatment order and the second extension of the community treatment order are invalid for non-timely review. That would not be the consequence following from the application of the standard principles of interpretation.

Mr Kracke relies on the policy of the rule against retrospectivity – justice and fairness. As regards the status of his community treatment order, I do not think it would be unjust or unfair to Mr Kracke to hold s 32(1) to its prospective operation in this case. The board, the doctors involved in Mr Kracke's treatment and the other persons administering the mental health system with respect to him have been making important decisions about his continuing treatment on the basis of the Mental Health Act as it was in 2007. It would be very damaging to the conduct of public administration, and give rise to all sorts of unsatisfactory consequences, for the exercise of substantive statutory powers to be made unlawful, when they were lawful when made. I should interpret the legislation as it was in 2007 under the standard principles of interpretation with whatever consequences that may bring, not under the special interpretative obligation that came in later, with potentially different consequences.

After a period of settling in, the courts in the United Kingdom have adopted that same approach to the application of the special interpretative obligation in s 3(1) (which ours nearly mirrors) and the other provisions of the Human Rights Act 1998.

In R v Lambert[464] the House of Lords (by a majority) decided the Human Rights Act was not intended to apply to things that happened before its provisions came into force. So a convicted person could not rely on a human right recognised in the Act to impugn a pre-Act criminal trial. That conclusion was upheld in R v Kansal (No 2),[465] although the House of Lords criticised the reasoning in the earlier authority. In Wainwright v Home Office[466] the plaintiffs sought damages for an illegal pre-Act strip-search, and relied on s 3(1). The Court of Appeal[467] refused to apply it. Lord Woolf CJ referred to R v Lambert[468] and Re Kansal (No 2)[469] and said:[470]

the decision in both cases is consistent with the general presumption that legislation should not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force. But the whole purpose of this part of the claimants' argument is to rely on section 3 to assist in establishing a liability on the Home Office for causing humiliation and distress where without section 3 it would not exist. This is therefore an attempt by Mr Wilby to rely on section 3 to achieve an interpretation of rule 86 which is then to be applied retrospectively to a situation when the Act was not in force.

The issue was considered extensively in Wilson v First County Trust Ltd (No 2).[471] It arose there in the horizontal application of the special interpretative obligation in a civil dispute between a borrower and a pawnbroker. The transaction pre-dated the commencement of the Human Rights Act. The question was whether s 3(1) applied to the interpretation of the credit-regulating legislation. The House of Lords held it did not. The focus in the judgments is on the injustice and unfairness of altering settled rights arising from past events. Lord Nicholls approved and applied[472] this statement of principle made by Staughton LJ in Secretary of State for Social Security v Tunnicliffe:[473]

the true principle is 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, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

Lord Nicholls held the obligation in s 3(1) could apply to pre-Act events, but not to produce unjust results. Hence the provision could not result in the rights of the parties being "changed overnight" in respect of past transactions.[474] Lord Hope said the presumption against retrospectivity was based on "fairness and legal certainty".[475] Those concepts allowed some scope for the application of s 3(1) "in the future on events that have happened in the past",[476] but not so as to alter "accrued rights and the legal effect of past acts".[477] The other members of the House of Lords agreed.

Re McKerr[478] was an attempt to use the Human Rights Act to compel the government to conduct a proper investigation into fatal shootings in Northern Ireland in 1982. The House of Lords held this could not be done. "It is now settled as a general proposition," said Lord Nicholls, "that the 1998 [Human Rights] Act is not retrospective".[479] A public authority was not obliged by s 6(1) to observe human rights by investigating a death occurring before the commencement of the Act.[480] The investigative obligation was necessarily linked to the death itself; it did not change with that commencement.

To the same effect was R (Hurst) v London Northern District Coroner.[481] The mother of a deceased son relied on the special interpretative obligation in s 3(1) in arguing the coroner should interpret his legislation so as to require an inquest into not just "how", but also "by what means and in what circumstances", the death occurred. The rights recognised in the Human Rights Act, as interpreted by the European Court of Human Rights, meant that interpretation was called for under s 3(1) after the Act came into force. It was not called for, held the House of Lords, with respect to the application of the legislation to past events. The judgments emphasised the scheme of the Human Rights Act – remedies, obligations, interpretation and declarations of incompatibility were meant to run together.[482]

Very recently the House of Lords decided Jain v Trent Strategic Health Authority[483] on that basis. Citing Re McKerr[484] and R (Hurst) v London Northern District Coroner,[485] Baroness Hale said "the interpretative duty in s 3(1) ... does not arise if those acts took place before the 1998 [Human Rights] Act came into force".[486]

There are some differences between the Charter and its English antecedent. For example, the Charter does not create a new cause of action for breach of human rights.[487] Courts and tribunals are only public authorities under the Charter when acting in an administrative capacity.[488] However, our s 32(1) operates in basically the same way as s3(1) of the Human Rights Act.[489] The architecture of the Human Rights Act and the Charter is broadly the same. The courts in the United Kingdom and Australia apply the same cognate principle of interpretation that legislation is presumed not to apply retrospectively. Therefore the decisions of the courts in the United Kingdom, particularly those of high authority, are of considerable importance on this point.

The substantive character of the validity of Mr Kracke's community treatment order in 2007 would be altered if, accepting his alternative submissions, the special interpretative obligation in s 32(1) of the Charter was applied to the provisions of the Mental Health Act. To do so would give s 32(1) a retrospective interpretation, which could only be justified if the Charter made that interpretation very plain. That brings me to the commencement and transitional provisions.

(4) Is there a very clear intention of retrospectivity?

Under s 2(1), the Charter (except Divisions 3 and 4 of Part 3) came into operation on 1 January 2007. Divisions 3 and 4 of Part 3 came into operation on 1 January 2008.

We have seen that s 49(1) makes the Charter applicable from 1 January 2007 to all primary[490] and subordinate legislation whenever passed. Under s 49(2), the Charter "does not affect any proceedings commenced or concluded before the commencement of Part 2". But under s 49(3), "Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division", being 1 January 2008.

Division 3 of Part 3 contains (among other things) the special interpretative obligation in s 32(1) and the provisions relating to the making of declarations of inconsistent interpretation by the Supreme Court of Victoria in s 36. Division 4 of Part 3 contains (among other things) the obligation of public authorities to observe the Charter in s 38(1). These several provisions did not come into operation until 1 January 2008.[491] The rest of the Charter came into operation on 1 January 2007.[492] There was an interregnum of about 18 months, whose purpose was to allow time for the implementation of the Charter.

Under s 38(1), human rights incompatible acts and decisions of public authorities are unlawful (unless s 38(2) applies). As those provisions did not come into affect until 1 January 2008,[493] it was perhaps in abundance of caution that s 49(2) provided that Division 4 of Part 3 (which contains s 38(1)) did not apply to any act or decision of a public authority before that date. Certainly s 49(3) explicitly prevents the provisions of that Division, including s 38(1), being applied retrospectively. Thus the fundamental obligation on public authorities to act and decide in a human rights compatible manner does not apply retrospectively.

Section 49(2) raises difficult questions of interpretation. It contemplates the Charter might have some effect on proceedings, commenced or concluded before 1 January 2007, but for the exclusion to which it gives effect. It is not easy to see what that effect might have been. "Proceedings" is not defined, but presumably refers to proceedings in a court or tribunal. The obligation and enforcement provisions in Divisions 3 and 4 of Part 3 (which include ss 32(1), 36 and 38(1)) did not come into operation until 1 January 2008,[494] so I am not sure how they could have affected proceedings commenced or concluded before 1 January 2007. Whatever the scope of its application, s 49(2) does not express a very plain intention that s 32(1) would operate retrospectively so as to alter legal relations arising from past events. Of course s 49(2) does not affect the present proceedings in the tribunal as these were commenced on 5 August 2008 when Mr Kracke filed his application of review.

As we have seen, s 49(1) is time neutral. As regards primary and subordinate legislation, it reaches backwards and forwards. It makes the special interpretative obligation in s 32(1) retrospective in the sense that it applies to past legislation. It is one thing to make such an obligation apply to past legislation. It is quite another to make it apply to the operation of past legislation on past events so as to alter the settled legal relations arising from them. That s 49(1) does not do. Section 49(1) therefore is not a very plain indication that the special interpretative obligation was intended to operate retrospectively in that sense.

For these reasons I conclude the special interpretative obligation in s 32(1) of the Charter does not apply to the interpretation of s 30(3) and (4) of the Mental Health Act before s 32(1) came into effect on 1 January 2008. It applies to the interpretation of those provisions after that date.

That does not mean the delay that occurred before 1 January 2008 is irrelevant to the question whether the board violated Mr Kracke's right to a fair hearing under s 24(l). That right crystalised on 1 January 2008 and the board was bound itself thereafter to act compatibly with it. But it was not as if the previous time was dead. As the Attorney-General submitted, the lawfulness of the board's conduct after 1 January 2008 must be considered in the context of all the circumstances including its conduct before that date. In particular, any determination of whether the delay that occurred after 1 January 2008 was unreasonable will necessarily have regard to all of the circumstances, including any delay before that date.

E BREACH OF RIGHT TO FAIR HEARING

(1) Was the board bound by s 24(1)?

(a) The issues

Mr Kracke submitted the board was bound to respect his right to a fair hearing under s 24(1) of the Charter. It was a public authority, a tribunal acting in an administrative capacity within s 4(1)(b) and the special interpretative obligation required its general powers and discretions in the Mental Health Act to be interpreted consistently with that obligation. He submitted the

board violated that right by delaying unreasonably in conducting the review of his involuntary and community treatment orders.

The Attorney-General submitted the board was not bound by that right under the Charter, although it was bound to afford natural justice to Mr Kracke. The board was not conducting a "civil proceeding" of the kind covered by s 24(1). If the board was bound to observe this right, so would every government decision-maker. This would mean all such decision-making would have to be made by an independent and impartial court or tribunal. To avoid that consequence, s 24(1) should be interpreted as being confined to civil proceedings of a judicial character. I have already decided the proceedings before the board were administrative not judicial. The Attorney-General did not make submissions on the issue whether, if it applied, the board violated the right.

The contradictor submitted the board was not a public authority under the Charter and therefore was not directly bound to act compatibly with human rights. But it was bound to interpret the provisions of the Mental Health Act governing its powers and discretions consistently with human right under s 32(1). Accepting that the right to a fair hearing would thereby be relevant, it made very helpful submissions on the content and application of the right.

The first question that arises is whether the proceedings before the board were "civil proceedings" covered by s 24(1). I will consider that questions in the context of the human right to a fair hearing in civil cases generally.

(b) Right to a fair hearing in civil cases under s 24(1)

(i) The Charter

This is s 24 of the Charter:

(1) 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.

(2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

Under the Charter, only persons have human rights and all persons have them.[495] The person having the right to a fair trial in s 24(1) is "a person charged with a criminal offence" and "a party to a civil proceeding". There are only these two categories.

The explanatory memorandum is descriptive of the right in s 24(1). It describes s 24(2) as "an exception to the right outlined" in s 24(1).[496] It is descriptive of the obligation created by s 24(3). It and the second reading speech are silent on the application of s 24(1) to civil proceedings. Nothing is said suggesting the right to a fair trial in civil cases in s 24(1) was intended to operate any differently to its international counterparts. Nothing is said suggesting the words "of a judicial nature" should be read in after the words "civil proceeding".

Section 24 is closely related to s 25, which applies to criminal proceedings. Section 25 creates a suite of "minimum guarantees" in relation to criminal proceedings. These are additional to and in many cases more explicit than, but do not derogate from, the rights in s 24(1).

Section 24 broadly follows article 14(1) of the ICCPR (just as s 25 does article 14(3)). There are some differences. Article 14 contains a right that "all persons shall be equal before the courts and tribunals." The Charter deals with this separately in s 8. As regards civil cases, article 14 uses the expression "rights and obligations in a suit at law", while s 24(1) refers to a "civil proceeding". Both refer to courts and tribunals. In regard to civil cases, neither specifically mentions expedition. It is implicit in both as an aspect of what a fair hearing requires.

On the other hand article 6(1) of the ECHR gives effect to the right to a fair hearing in a way that deals with the matter expressly:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

(ii) Human Rights Committee

The Human Rights Committee[497] has published General Comment 32[498] on article 14 of the ICCPR to equality before the courts and tribunals and to a fair trial. It is of great assistance and I have given it close attention. It describes the right as "a key element of human rights protection and serves as a procedural means to safeguard the rule of law."[499] It says the equality and access right ensures "equality of arms."[500] I examined that concept in Ragg v Magistrates' Court of Victoria.[501] Reflecting the international jurisprudence, I said it was relevant to both criminal and civil proceedings.[502]

Based on the extensive jurisprudence in the Human Rights Committee, General Comment 32 deals with the concept of determining rights and obligations "in a suit of law", which is "more complex" than the concept of determining criminal charges.[503] A "suit of law" 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 the domestic legal systems for the determination of particular rights."[504] Notably, the comment states unequivocally article 14(1) applies to judicial and administrative proceedings:[505]

The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of pricate property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

The comment goes on to say the right of access to a court or tribunal "does not apply where domestic law does not grant any entitlement to the person concerned."[506] In the examples it includes promotion decisions in the civil service and the appointment of judges.

The right enshrined in article 14(1) is to "a fair and public hearing by a competent, independent and impartial tribunal established by law." Working back from there, the purpose of article 14(1) is to oblige contracting states to separate, organisationally, the judiciary, which must have the specified attributes, from the administration.[507] (Since the context is international human rights, I am using "judiciary" here in the broad sense to include tribunals with appropriate institutional independence.) This organisational separation is central to the broad purpose of the ICCPR, which is democratic governance under the rule of law.

Although separation of powers is a purpose of article 14(1), General Comment 32 and the communications of the Human Rights Committee show that a good many administrative decisions by government authorities are covered by the right to a fair trial. In such cases, where the primary decision-maker is not independent and impartial, it can be sufficient if there is a review or appeal body with full jurisdiction over the matter. In other cases nothing less that an independent and impartial court or tribunal is required. The issue has been examined in the Strasbourg jurisprudence and in the United Kingdom.

(iii) Strasbourg

Starting with Strasbourg, the application of article 6(1) of the ECHR to areas of private law, such as contract and tort, has never been in dispute. Its application to areas of public law has evolved from a narrow to a broader coverage.[508] This is an example of the dynamic interpretation of international human rights instruments that respond to changing social conditions. Further, the concept of a civil claim under article 6(1) is interpreted in the light of the principle that access to law is a universally recognised legal principle and essential for the rule of law.[509]

The Strasbourg court has enunciated the foundation concept that the words "rights and obligations" in article 6(1) have an autonomous meaning. By this is meant the words are to be

understood in terms of their meaning in the ECHR. That meaning is not controlled by the interpretation of the domestic legislation, although it is very relevant.[510]

As a general principle, s 6(1) "covers all proceedings the result of which is decisive for private rights and obligations".[511] In practice this means, whatever the subject matter, if the decision determines private rights and obligations in a broad sense, the proceeding is covered by article 6(1). That the authority invested with jurisdiction is an "ordinary court, administrative body, etc"[512] is of little consequence.

Further, the issue is addressed as a matter of substance not form:[513]

Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned.

The first decision of the court in the field of social security illustrates these principles. In Feldbrugge v The Netherlands[514] the applicant claimed her statutory entitlement to sickness allowance was cancelled by reason of her unfitness for work. She alleged she was not given a fair hearing by the appeals board, which dismissed her appeal against the cancellation. The court upheld the applicant's claim. It was deeply divided but the majority view is now accepted.

Under the applicable Dutch law, the applicant's rights were of a public law nature. As we saw, the ECHR has an autonomous concept of what is a civil right. Thus the Dutch classification was not determinative. Further, the court applied the principle that the important thing was the substantive content and effect of the right, not its legal classification.[515]

The court held the applicant's claim was civil despite the character of the disputed allowance as a public benefit payable under compulsory social insurance legislation. These factors were outweighed by the private law aspects of the rights and issues, which were of a personal and economic nature and had a close connection with the contract of employment and with notions of insurance under private law.[516] On the personal and economic nature of the rights concerned, the court said this:[517]

To begin with, Mrs Feldbrugge was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from specific rules laid down by the legislation in force.

For the individual asserting it, such a right is often of crucial importance; this is especially so in the case of health insurance benefits when the employee who is unable to work by reason of illness enjoys no other source of income. In short, the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere.

On the same day, the court decided Deumeland v Germany.[518] It applied the same principles to hold a widow's claim for a statutory pension was a civil one, and the article 6(1) right to a fair hearing had been breached by the delay of 11 years.

The court used its later decision in Salesi v Italy[519] unanimously to state the now settled position: the principles expounded in Feldbrugge v The Netherlands[520] are applicable. The applicant's claim was for state-provided welfare benefits that had no insurance analogy with social security payments. They were neither contributory nor employment related. Article 6(1) was held to apply because the applicant's private, personal and individual right to pecuniary assistance was at stake and this was civil in nature.[521]

That article 6(1) of the ECHR now has a very substantial coverage over administrative decisions cannot be doubted. The long list of decisions with a private-law character in a leading text are mostly administrative.[522] As social conditions and expectations are developing, so the list is expanding. This is being driven by further refinements in the jurisprudence about the disputes and determinations covered by article 6(1).

For example, it has been held that factual conclusivity is enough,[523] that the civil right does not have to constitute the object of the proceeding[524] and that, in very many cases, disputes determining the applicability or capacity of the applicant to enjoy the rights and freedoms in the ECHR itself concern "civil rights and obligations" within article 6(1).[525] This latter point is directly relevant to the present case, for the board's power of review was determinative of several of Mr Kracke's human rights under the Charter.

I emphasise, the application of article 6(1) to making administrative decisions does not mean every government official must be constituted as an independent and impartial court or tribunal. That would be contrary to the democratic objectives of the ECHR. This is the court in Kaplan v United Kingdom:[526]

An interpretation of Article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the Contracting States.

To avoid that consequence, the principle that has evolved in the Strasbourg court is that decision-making in administrative cases according to the strict judicial model is not required in all cases. This has been achieved in several ways, and the path to a settled position is still being trod.

One way is that a global view is taken of the words "in the determination of" in article 6(1). As the court held in Zumtobel v Austria,[527] article 6(1) does not require "that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of the provision." Non-compliance in one respect – say that the initial decision-maker is a government official who is not independent – can be overcome by the existence of a sufficient opportunity for appeal or review.

Another is the nature of the jurisdiction of the court or tribunal of final review or appeal. That jurisdiction must be "full", but this concept is not applied mechanically. As held in Bryan v United Kingdom,[528] in considering the sufficiency of the review provided:

it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which the decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

Thus, in cases involving policy decisions, such as those relating to planning and compulsory purchases, appropriate judicial review is sufficient, and it is not necessary for the court or tribunal of final review or appeal to have jurisdiction to conduct merits review based on full fact-finding.[529]

(iv) United Kingdom

The same approach is followed in the United Kingdom. The important cases concern the application of article 6(1) to the making of administrative decisions. I will deal only with R (Alconbury Developments Limited v Secretary of State for the Environment, Transport and the Regions[530] and Runa Begum v Tower Hamlets London Borough Council[531] and the recent decision of the House of Lords in R (Wright) v Secretary of State for Health.[532]

Alconbury Developments concerned the administrative power of the responsible minister to decide planning applications and to call in those which would otherwise be decided by an inspector. The three cases concerned applications to develop a disused airfield into a national distribution centre, to use land as a depot for wrecked cars and to use compulsorily purchased land for improving a major road junction. The issue was whether article 6(1) applied. If it did, the minister's decision would have been incompatible with human rights as he was not an independent and impartial tribunal.

The House of Lords held the determination of the planning applications involved the "civil rights" of the applicants under article 6(1) and that the minister was not an independent and impartial tribunal. It reviewed and applied the jurisprudence of the Strasbourg court about the application of the right to a fair trial to administrative decisions of the kind at issue. Lord Clyde said this was the principle emerging from those cases:[533]

It is thus clears that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature.

The court went on to apply the global approach principle. This again is Lord Clyde:[534]

In the civil context the whole process must be considered to see if the article has been breached. Not every stage need comply. If a global view is adopted one may then take into account not only the eventual opportunity for appeal or review to a court of law, but also the earlier processes and in particular the process of public inquiry at which essentially the facts can be explored in a quasi-judicial procedure and a determination on factual matters achieved.

In cases involving issues of administrative policy that were matters for the democratically elected government, the court held it was sufficient for there to be judicial review of the legality of the decision and the procedure followed. Decisions made by the Secretary of State subject to such a review were not incompatible with article 6(1).[535] In the highly influential words of Lord Hoffmann, in these planning cases judicial review complied with the requirement for a "full jurisdiction", because this "means full jurisdiction to deal with the case as the nature of the decisions requires."[536]

Runa Begum v Tower Hamlets London Borough Council[537] concerned the administrative power to review the allocation of housing to the homeless applicant. She rejected an offer of accommodation made by a local authority. She wanted the matter reviewed by the independent review body, but the local authority referred it instead to the internal review officer. The applicant said this was incompatible with her article 6(1) rights. She appealed to the county court, who allowed the appeal.

The House of Lords assumed (without deciding) that the housing allocation decision was a determination of the applicant's civil rights. But it held the overall structure of decision-making was compatible with the fair hearing requirement in article 6(1). Measures were in place to safeguard the fairness of the proceedings within the authority. The decision was subject to the supervision of a court with jurisdiction to deal with the case as its nature required. This again is Lord Hoffmann stating the applicable principles:[538]

The Strasbourg court... has said, first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellant (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of Bryan v United Kingdom [1995] ECHR 50; (1995) 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the Alconbury case [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with case as the nature of the decision requires".

Lastly there is R (Wright) v Secretary of State for Health,[539] which illustrates when a global approach will not be enough. Under legislation the Secretary could black-list people considered unsuitable to work with vulnerable adults. The care-worker would thereby be prevented from getting any such employment. No oral hearing was conducted until after a lengthy administrative process (three-six months) during which a care-worker remained black-listed.

Following the Strasbourg jurisprudence, the House of Lords held the decision to black-list was determinative of the civil right to present and future work. This is Baroness Hale:[540]

The right to remain in the employment one currently holds must be a civil right, as too must be the right to engage in a wide variety of jobs in the care sector even if one does not currently have one.

The court therefore held the black-listing decision engaged article 6(1) of the ECHR. As to when a hearing before a court or tribunal was required, Baroness Hale gave this useful summary of the principles:[541]

It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises "full jurisdiction"... What amounts to "full jurisdiction" varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject-matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example... ; so too, it has been held, is the allocation of "suitable" housing to the homeless... ; but allowing councillors to decide whether there was a good excuse for a late claim to housing benefit was not.

The court held a hearing before a court or tribunal was required because of the "draconian effect" of the black-listing decision on the care-workers and the long delay before a full merits hearing could be obtained.[542] The court issued a declaration of incompatibility.[543]

That is how the right to a fair trial in civil cases is understood in the European jurisprudence. I think those principles apply equally to s 24(1) of the Charter. They seem substantially to meet the concerns underlying the submissions of the Attorney-General. I must now interpret "civil proceeding" in s 24(1).

(c) "Civil proceeding" in s 24(1)

To remind you, the question is whether "civil proceeding" in s 24(1) only covers judicial proceedings in a court or tribunal or covers administrative proceedings well.

Section 24(1) specifies a human right which the people of Victoria are to have. A human right is of fundamental importance in and of itself. The right to a fair trial is integral to the rule of law which, as mentioned in the Preamble, is a bedrock value of the Charter. Section 24(1), like all the provisions specifying human rights, is to be interpreted broadly and purposively with this firmly in mind.

It is not consistent with the values and purposes of the Charter to interpret "civil proceeding" in s 24(1) as being confined to civil judicial proceedings. That would be to interpret it restrictively and inconsistently with those values and purposes.

The right in s 24(1) reflects the international human right to a fair hearing which I have examined. That right encompasses proceedings which are determinative of private rights and interests in the broad sense. The issue is addressed as a matter of substance, not form. In international law, not only judicial proceedings are so determinative. Administrative proceedings can also be, and very many are. The international jurisprudence supports an interpretation of "civil proceeding" in s 24(1) which includes both judicial and administrative proceedings. It does not support reading the expression down to exclude administrative proceedings even when they are determinative in the necessary sense.

The language of s 24 contemplates civil proceedings being heard by a court or tribunal. "Tribunal" is mentioned three times. In Victoria courts and tribunals can and do exercise judicial and administrative jurisdiction. The general expression "civil proceeding", when used in reference to courts and tribunals, is very apt to include both of these jurisdictions, not just the first. In Victoria, courts usually exercise judicial power and tribunals usually exercise administrative power. The general expression "civil proceeding", in conjunction with "tribunal", is very apt to include the administrative jurisdiction of tribunals.

Section 24(1) specifies the right to a fair hearing with respect to two general categories of legal proceeding – criminal and civil. It has thus created its own universe populated by two species of proceeding.[544] The recent Australian jurisprudence suggests we should not, within that universe, approach dogmatically the task of identifying what is criminal and civil.[545] That issue has to be addressed by reference to the nature of the proceedings, the form and character of the action and the nature of the jurisdiction being exercised in the particular statutory setting.[546] While the assignment of a proceeding to one category or the other must be so approached, this is not a reason to approach narrowly what might fall into the civil category.

According to general principles, the expression "civil proceeding" describes a legal process, cause or action for the vindication or remedy of a private or individual wrong.[547] It has often been described as encompassing any proceedings which are not criminal in nature.[548] In the light of the modern authorities, we must qualify that kind of statement with the need to consider the specific context. But, incontestably, most administrative proceedings in boards or tribunals, such as those before the Mental Health Review Board and the Victorian Civil and Administrative Tribunal, are civil in nature by that test.

Again according to general principles, the expression "civil proceeding" is perfectly apt to describe proceedings of an administrative character in a statutory board or tribunal. As one author has said of the concept of civil procedure, it "embraces both arbitration and litigation before courts and tribunals."[549] According to Halsbury's Laws of England:[550]

Civil procedure is a separate, distinct branch of the law which exercises a pervasive influence over all the other branches of the law, except criminal law and practice. It comprehends the entire body of civil law, including the practice and procedure of the courts, which regulates the machinery and governs the administration of civil justice. It extends to every legal or equitable claim, right, relief or remedy properly brought before any court or tribunal, whether inferior or superior, at first instance or on appeal, which has power and jurisdiction to recognise, determine or adjudicate upon such claim or right and to award and enforce the appropriate relief or remedy (emphasis added).

Consistently with those principles, the courts frequently characterise administrative proceedings before tribunals as civil proceedings. One example is McCarthy v The Law Society of New South Wales.[551] The Court of Appeal[552] had to interpret the expression "any criminal or civil proceedings" in companies legislation. As I have here, it noted the expression "asserted a certain universality."[553] It held proceedings before a statutory disciplinary committee, which were administrative, to be "civil proceedings".[554]

In nature, criminal proceedings are said to be penal and civil proceedings remedial.[555] The dichotomy is notoriously unstable.[556] That instability might affect how the law would assign a proceeding to one category rather than the other under s 24(1). What is of present relevance, however, is that the proceedings of many boards, tribunals and other administrative decision-makers would incontestably fall into the civil category by this test. The board and the tribunal would do so in the present case.

Focussing on "proceeding", the ordinary definition includes the commencement or carrying on of an action at law, a legal action or process; any act done by authority of a court of law and any step taken in a cause by either party (OED). Thus "proceeding" is a word of wide connotation which can encompass both the initiation of proceedings and steps taken in their continuance. The exact sense in which the term is used must be ascertained from the statutory context and the objects of the legislation in question.[557] Consistently with its broad dictionary meaning, the authorities I have already cited show the word can be used to describe administrative as well as judicial processes.

The term "proceeding", and also "party", suggest s 24(1) was intended to apply to persons and bodies who conduct proceedings with parties. To be a "civil proceeding", there would need to be a certain kind of procedure and means for identifying those parties. Accepting that approach, the term "proceeding" is very apt to describe the administrative decision-making processes of many boards, tribunals and other administrators. This is consistent with the international jurisprudence, which covers administrative decision-makers of this kind.

I conclude the right to a fair hearing in a civil proceeding in s 24(1) of the Charter is not confined to proceedings of a judicial character. It can cover civil proceedings which are of an administrative character. Whether a person or body exercising an administrative jurisdiction

is doing so in a civil proceeding must be assessed on a case by case basis. Generally, administrative review proceedings in a statutory board or tribunal, such as the Mental Health Review Board and the Victorian Civil and Administrative Tribunal, will be civil proceedings within s 24(1).

If s 24(1) applies, it does not necessarily mean the person or body must themselves be independent and impartial. The whole decision-making process, including reviews and appeals, must be examined. The international jurisprudence on the application of the right in administrative cases will be relevant. For the reasons given below, this issue doesn't arise, because the board and the tribunal are independent and impartial tribunals.

(d) Appeal and review functions of the board, and review function of the tribunal, are civil proceedings

Mr Kracke was the subject of an involuntary treatment order under s 12 of the Mental Health Act. He was thus liable to compulsory treatment in detention in a mental health service. The community treatment order under s 14 allowed him to be involuntarily treated in the community, and was extended more than once. To have that treatment stopped, he could have appealed under s 29. Instead, as was his right, he looked to the board to carry out its statutory responsibility to review the extensions under s 30.

Under s 30(4), the board had to conduct that review within eight weeks of an extension being ordered. To examine the nature of such a review, I will consider the appeal and review functions and powers of the board, the procedures of the board, whether the legislation creates a proceeding between parties and how the review proceeding impacts upon Mr Kracke.

As we saw, the board is established under s 21 and constituted by a president and other members. Its relevant functions under s 22(a) and (b) are to "hear appeals" and "review periodically the orders made for involuntary patients". Appeals may be made (on application) under s 29 and reviews are conducted (mandatorily) under s 30. Appeals and reviews may be held concurrently under s 31.

In both appeals and reviews regarding patients on community treatment orders, the central function of the board under s 36C is to decide whether the criteria in s 8(1) apply to the patient. If the board considers the criteria do not so apply, s 36C(2) requires it to discharge the community treatment order. If it considers the criteria do apply, s 36C(3) allows it to confirm, vary or revoke the order.

The board has important powers in other kinds of cases, but these do not add to the analysis.

Moving now to the board's procedure, this is specified in s 24 and Schedule 2. By s 24(1)(a)-(c), the board must act according to equity and good conscience without regard to technicalities or legal forms, is bound by the rules of natural justice and is not required to conduct any "proceedings" in a formal manner. Section 24(3) allows it to inform itself as it thinks fit. Under s 24(4), it can take evidence orally or in writing and on oath, affirmation or declaration. Section 24(7) gives the board the power on its own motion, or the application of "any party to the proceedings," to cause a summons to appear or produce documents to be served on any person. By s 24(8), it can make an order for the manner of service, including

substituted service. Section 24(9) makes it an offence to disobey the summons. Under s 25, the board can appoint a lawyer, interpreter, or doctor or other expert to give assistance "in any proceedings" before it. Sections 33-35 contain extensive provisions in relation to "proceedings", including closing them to the public, not publishing any report of them and for their secrecy.

Schedule 2 contains extensive enabling provisions with respect to the board's procedure. They cover setting up divisions,[558] the determination of legal questions by the chairperson,[559] the procedural powers of the board,[560] which includes the power to adjourn "any proceedings",[561] and making determinations[562] and amended determinations.[563]

Appeals and reviews are consistently referred to as "proceedings". I have given several examples already. The legislation confers on the board procedural powers and responsibilities for conducting such proceedings.

Appeal and review proceedings are consistently referred to as having parties. Besides the examples I have given, I refer to cl 5A(a) and (b) of Schedule 2, which gives the board explicit power to add or substitute parties and to remove parties. Section 27(1) gives a "party to the proceedings" the right to request reasons in writing for any determination.

The parties to an appeal or review proceeding arise out of the notice provisions in s 32. These require the executive officer of the board to cause notice of hearing to be given to various persons including the involuntary patient and the authorised psychiatrist, who will usually be the primary parties.

Under s 26, persons given notice have the right to appear at the hearing in person. The patient is given the right specifically by s 26(1), and the others generally be s 26(4)(a). By s 26(5), the board can appoint someone to represent the patient "in any proceedings".

The impact of the proceedings on Mr Kracke is profound. An involuntary treatment order authorises the detention of the patient, which would otherwise offend against several tortious principles, including false imprisonment. Mr Kracke has a common law right not to be touched (without lawful authority). The involuntary treatment order allowed that right to be overridden. Appeal and review proceedings about such an order are determinative of the patient's private rights in those respects. So are appeal and review proceedings about community treatment orders, for they can result in the discharge of the patient.

A community treatment order allows treatment to be administered to Mr Kracke against his will. It can and does involve injections. Respect for the bodily integrity of a person is a cardinal value of the common law, under which it is a tortious assault to touch someone against their will. The community treatment order allowed his right not to be touched to be overridden. An appeal and review of such an order determines whether the extended community treatment order will be confirmed, varied or quashed. It thereby determines Mr Kracke's private rights in that respect.

That is to look at the impact of appeal and review proceedings in traditional legal terms. The impact should also be considered separately in human rights terms.

Like other patients, Mr Kracke has the right to personal autonomy and integrity which is embodied in a number of human rights in the Charter. He has the right to liberty. These rights

are personal to him and civil in nature. That is not because they have been recognised in the ICCPR but because they have been recognised in the Charter.

These rights concern Mr Kracke in a most important aspect of his private self. They are at least as important as the right to protect property. That right has been recognised in the international jurisprudence as a proper subject of civil proceedings protected by the equivalent of s 24(1). These other rights also deserve that protection, since they have been recognised in the Charter and must be respected by the board and the tribunal as public authorities. Appeal and review proceedings under the Mental Health Act and the Victorian Civil and Administrative Tribunal Act are determinative of those rights.

One example of this approach being followed in the United Kingdom is In re S.[564] As you know, this case concerned the rights of parents and children to respect for private and family life under article 8(1) of the ECHR. The House of Lords had to decide whether the right to a fair hearing in article 6(1) of the ECHR applied to decisions involving the determination of those rights. It held the article 8(1) rights, as recognised in the Human Rights Act, could be taken into account in deciding whether article 6(1) applied. This is Lord Nicholls (the other Lords concurred):[565]

Although a right guaranteed by article 8 is not in itself a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8.

Under s 38(1) of the Charter, it is unlawful for a public authority to act towards or make decisions about Mr Kracke incompatibly with his human rights. Under s 32(1), any provisions conferring statutory powers on the board must be interpreted so far as possible consistently with human rights. The board is a public authority and a tribunal. It was acting in an administrative capacity so it did not come within the exclusion in s 4(1)(j). Section 24(1) also applied by reason of s 6(2)(b). Review of the treatment orders by the board will determine whether interference with his human rights is medically necessary and thus justified under s 7(2). That is to determine whether Mr Kracke will be free from interference with his rights to personal autonomy and integrity, and liberty, which are enshrined in the human rights under the Charter that apply to him, and with which the board and this tribunal are bound to act compatibly.

The board's legislation constitutes appeals and reviews as proceedings with parties. They come within s 24(1) of the Charter.

In determining applications for review of the board's decisions, the tribunal stands in the shoes of the board. Under the Victorian Civil and Administrative Tribunal Act, the tribunal's proceedings in these respects are also of an administrative nature. It too is a public authority and a tribunal who is directly bound to observe the Charter, including by acting compatibly with Mr Kracke's right to a fair hearing. Under s 32(1), any provisions conferring statutory powers on the tribunal must also be interpreted so far as possible consistently with human rights. The tribunal is conducting "civil proceedings" within s 24(1) of the Charter.

(e) The board and the tribunal are a "competent, independent and impartial court or tribunal" within s 24(1)

If s 24(1) of the Charter applies then, subject to s 7(2), the charge or proceeding has to be decided by "a competent, independent and impartial court or tribunal". Article 14(1) of the ICCPR says "competent, independent and impartial tribunal established by law." Article 6(1) of the ECHR says "independent and impartial tribunal established by law."

I do not think it matters that s 24(1) omits reference to "established by law". It is an implicit requirement. Under our system of justice, a court or tribunal would not be "competent" to determine a criminal charge or civil proceeding without being so established. Interestingly, article 6(1) of the ECHR does not contain the express reference to "competent". The implicit assumption there is that, to carry the same meaning, it is enough to say "established by law".

As to the ICCPR, General Comment 32 fully covers what is required in these respects. The committee says the notion of a tribunal in article 14(1) "designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."[566] The committee goes on to address these matters in detail.

As to the ECHR, the competence requirement is that the court or tribunal have the function of determining "matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner."[567] A court or tribunal is not competent in the requisite sense if its authority is to give non-binding advice to the government, who can depart from it as they please.[568]

Generally, there are three aspects to the independence requirement in the ECHR.[569] The tribunal must function independently of the executive government and be free to decide the factual and legal issues itself without outside interference. In the discharge of their decision-making functions, they must not be directable.[570] There must be appropriate guarantees to ensure the court or tribunal can function with that independence. In this regard, the relevant considerations are the manner and duration of appointment of judicial officers and the existence of guarantees against outside interference.[571] There are no absolute rules and the degree of independence required in some cases may be greater than others. The term of office must be sufficient for the nature of the jurisdiction concerned and the judicial officers must, during their term, be legally or at least practically irremovable except for cause.[572] The last aspect is that the court or tribunal must present the appearance of independence and not dependence.

Notably, as we have seen, in R (H) v London North and East Region Mental Health Review Tribunal,[573] the Court of Appeal held the tribunal was a court for the purposes of the right to liberty in article 5(4) of the ECHR.[574]

These principles are stated under the ICCPR and the ECHR but are relevant in understanding the requirements of s 24(1) of the Charter.

Applying these principles, I think both the Mental Health Review Board and the Victorian Civil and Administrative Tribunal are competent, independent and impartial tribunals for the

purposes of s 24(1). The members of each have specific statutory authority to determine the matters within their jurisdiction, they do so according to procedures which are either specified in the statute or within their control, they are appointed for terms of office of appropriate length under the statute, they are legally or practically irremovable except for cause, they are independent of and not directable by the executive government, they present the appearance of independence and they are required by their statute to operate impartially.

(f) Expedition in the right to a fair hearing

(i) Expedition as an aspect of the right

The human right to a fair hearing of which expedition is an element is free-standing under the provisions of the Charter. The content and application of this right is governed by those provisions, as interpreted by reference to the relevant international sources. As regards delay, the right must be applied and observed according to its own terms. Its scope is not limited by the separate principles of public law by which a tribunal may lose its jurisdiction because the hearing becomes unfair by reason of very prolonged delay.[575]

Section 24(1) does not contain an explicit right to a fair expeditious hearing. But it is implicit, as it is in article 14(1) of the ICCPR.

"Expeditiousness", says General Comment 32 on article 14, is an "important aspect of the fairness of a hearing". That goes for criminal proceedings, where the issue is dealt with explicitly in article 14(3)(c). It also goes for "civil proceedings". With them, "delays... that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined" in article 14(1).[576] These considerations – complexity and behaviour – will be of importance in the present case.

The extensive jurisprudence in the Human Rights Committee on article 14 of the ICCPR is reviewed in Joseph et al.[577] As the authors say (consistently with General Comment 32), "one of the elements of the concept of a fair civil hearing... is that justice be delivered expeditiously".[578] In support of that statement, the authors instance Munoz Hermoza v Peru[579] and Fei v Columbia.[580] They were extreme cases.

The ex-sergeant of police in Munoz waited seven years for administrative review of his dismissal. The committee said "the concept of a fair hearing necessarily entails that justice be rendered without undue delay."[581] Seven years, it held, was "unreasonable delay".[582]

In Fei the author's children were kidnapped by their father. The mother's proceedings went unresolved in the courts for several years. Her claim of breach of article 14(1) was upheld as the concept of a fair trial included "respect for the principles of... expeditious proceedings."[583] It was relevant that the "state party has failed to explain these delays". The committee took into account the nature of the proceedings (which is also an important consideration in proceedings in a mental health tribunal). It said "the very nature of custody proceedings... requires that the issues complained of be adjudicated expeditiously."[584]

The Strasbourg jurisprudence follows the same path.

To use the words of the European Court of Human Rights in Golder v United Kingdom,[585] article 6(1) "enunciates rights which are distinct but stem from the same basic idea".[586] One component is a right to a hearing within a reasonable time which, as you have seen, is separately specified. In Attorney-General's Reference (No 2 of 2001),[587] Lord Bingham was able to point to that and several other "separate and distinct", although "related", rights in article 6(1), as being an aspect of the "core right... to a fair trial". It followed that a complaint of breach of one distinct aspect of article 6(1) was not answered by showing the others were not.[588]

The court at Strasbourg does not apply an inflexible rule of what might be unreasonable delay. Whether a given delay is unreasonable depends on the circumstances. Delay will be regarded as unreasonable unless it is explained by such considerations as the nature of the case and the conduct of the parties. Some of the cases concern criminal charges, but the principles are equally applicable to civil proceedings. I will focus on what seem to be the principal authorities.

König v Federal Republic of Germany[589] concerned the withdrawal of the applicant's authorisation to practise medicine and operate a health clinic. He challenged both decisions in an administrative court, which took five years and ten years respectively to be resolved, plus extra time for appeals. The court found a breach of the reasonable time requirement in article 6(1). It applied this principle, which has been oft-cited since:[590]

The reasonableness of the duration of proceedings covered by Article 6(1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the Court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The Court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by Article 6(1).

Over time the court refined its approach and identified particular circumstances of importance. For example, in Buchholz v Federal Republic of Germany[591] the applicant challenged his dismissal from employment as unjustified. The review and appeal proceedings took over five years, which the court said, in the circumstances, was not unreasonable. The relevant considerations were the same as those in criminal cases. This statement of principle is also oft-cited:[592]

The reasonableness of the length of proceedings coming within the scope of Article 6(1) must be assessed in each case according to the particular circumstances. In respect of criminal matters, the Court has for this purpose had regard, inter alia, to the complexity of the case and to the conduct of both the applicant and the competent authorities. The Court has taken account of the same criteria, as well as the defendant's behaviour and what is at stake in the litigation for the plaintiff, in cases concerning proceedings brought before administrative courts in connection with civil rights. It considers that it should adopt a similar approach in the present case. The Court would add that only delays attributable to the State may justify its

finding, in appropriate instances, a failure to comply with the requirements of "reasonable time".[593]

This issue of what is at stake for the applicant is an important consideration in many cases. The more is at stake for the applicant, the stronger is the reasonable time requirement. For example, in Silva Pontes v Portugal[594] the applicant was seriously injured in a road accident. His civil proceedings for damages took more than ten years to resolve, and then only by friendly settlement. The court held the applicant's article 6(1) rights had been violated. It took into account the complexity of the case, the conduct of the parties and what was at stake for the applicant. As regards that last consideration, it said "special diligence is called for in determining compensation for the victims of road accidents".[595]

As the court has emphasised, the right to a fair hearing is not a mere procedural right standing apart from the general scheme of human rights protection. It is a fundamental principle of the rule of law,[596] which is a bedrock value of the ECHR, as it is of the Charter.[597] That is true of both criminal and civil matters.[598] In Hornsby v Greece the court referred to the various rights guaranteed in article 6 and the "prominent place they hold in democratic society". This was a particular reason why the ECHR was "intended to guarantee not rights which are theoretical and illusory but rights that are practical and effective",[599] this being an important principle in itself.

When deciding cases under the Human Rights Act, the courts in the United Kingdom have adopted the Strasbourg jurisprudence on article 6(1) of the ECHR. Thus, in determining whether there has been unreasonable delay, it is necessary to consider "all the material circumstances". So spoke Lord Phillips in R (C) v London South and West Region Mental Health Review Tribunal.[600] We will return to this decision because it concerns delay in a case with some similarities to the present.

The Strasbourg authorities on delay were extensively examined by the Privy Council in Dyer v Watson.[601] The court adopted the familiar considerations of complexity, conduct of the parties and what was at stake for the applicant.[602] Further, as Lord Bingham said, the "threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed."[603]

According to Lord Bingham's approach, and with respect I agree, there is no need to inquire into the delay unless the elapsed period "is one which, on its face and without more, gives ground for real concern... since the Convention is directed not to departures from the ideal but to infringements of basic human rights."[604]

These principles have been applied in cases involving mentally ill patients and mental health review tribunals, all decided under article 5(4) of the ECHR. They deserve close examination. It is here that we return to R (C).

The claimant was compulsorily detained under the mental health legislation. He applied for a review. There was no statutory time limit for determining them. The tribunal had a practice of listing applications for hearing eight weeks after being made. The claimant said the tribunal had failed to hear his application within a reasonable time, as required by article 6(1).

As we saw, the Court of Appeal applied the approach of the court in Strasbourg. Thus it looked to the general circumstances. It said the tribunal had to deal with the applications "adequately and fairly."[605] The time required to do that would depend (for example) on the position of the applicant and their legal advisers. More time would be needed if the applicant wanted to have an independent psychiatric assessment.[606] But the court held the tribunal could not adopt a one-size-fits-all approach based on administrative convenience. Adopting a fixed eight week rule was inconsistent with the applicant's human rights because it paid no regard to what making a speedy decision in the circumstances of his application might require.[607]

In B v Mental Health Review Tribunal and Secretary of State for the Home Department[608] the claimant was a compulsory patient detained in hospital under mental health legislation. His application for review took nearly nine months. Scott Baker J said "delay does not of itself give rise to a breach of Article 5(4), but it does give rise to the need for an explanation."[609] A delay of nearly nine months called for such an explanation, but none was given.[610] It was the tribunal's way of managing cases that was the cause of the delay: "with effective case management the substantive hearing would have taken place a great deal earlier without in any way prejudicing B's right to a fair hearing."[611] The court said it would make a declaration of breach of article 5(4) and go on to consider the question of damages.[612]

It did so, but in combination with six other cases of failure of the tribunal to conduct timely reviews of patients' detention. R(KB) and Ors v Mental Health Review Tribunal and Secretary of State for Health[613] was the case, and Stanley Burnton J was the judge. His Lordship examined the delay, and the explanation and its consequences, case by case. The delays ranged from four to 15 weeks. In some cases, his Lordship held, a "finding of breach of [the claimant's] rights under Article 5.4 is sufficient just satisfaction"[614] and he made no order for damages. In others he made modest awards of damages of £750,[615] £1,000[616] and £4,000.[617] We will revisit this case in the context of remedies.

The courts in Canada and New Zealand have dealt with the human rights aspect of delays in civil and criminal proceedings, along similar lines. The principles they have stated and applied are very helpful.

Under s 11(b) of the Canadian Charter of Rights and Responsibilities, any person charged with an offence has the right to be tried within a reasonable time. The content and application of the right was considered by the Supreme Court of Canada in Askov v R[618] and Morin v R.[619] The approaches share a common underpinning but it is the one refined in Morin v R that still stands.

Turning first to Askov v R, the court said it was necessary to take into account the four considerations referred to in R v Smith.[620] These were the length of the delay, the reasons for the delay, any waiver by the accused and any prejudice to the accused.[621] But the court went on to indicate that "a period of delay in the range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."[622] When the decision was subsequently applied by the courts and prosecuting authorities, the general considerations were overlooked in favour of the court's indication of the outside limit. In consequence, some 47,000 charges were stayed or withdrawn in the province of Ontario alone.[623]

The court revisited the issue in Morin v R.[624] The drunk driver appealed his conviction on the grounds that she had been tried 14 and a half months after being charged. This, she said, was an unreasonable time and outside the period specified in Askov v R. The issue went to the Supreme Court, who disagreed and reviewed the applicable principles. Sopinka J wrote the leading judgment. The court held it was necessary to return to the approach which required a judicial balancing of the relevant considerations. This is Sopinka J:[625]

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith..."it is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" While the Court has at times indicated otherwise, it is now accepted that the factors to the considered in analyzing how long is too long may be listed as follows:

the length of the delay;

waiver of time periods;

the reasons for the delay, including

(a) inherent time requirements of the case,

(b) actions of the accused,

(c) actions of the Crown,

(d) limits on institutional resources, and

(e) other reasons for the delay; and

prejudice to the accused.

Sopinka J went on to make a number of other points. In balancing the considerations, "account must be taken of the interests which [the right] is designed to protect."[626] At first instance, "the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial."[627] From that may be subtracted any waived period. Then "it must... be determined whether this period is unreasonable having regard to the interests [the right] seeks to protect, the explanation for the delay and the prejudice to the accused".[628] As stated in R v Smith:[629] "Although the accused may have the ultimate or legal burden, a secondary or

evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case."[630] In the absence of an explanation which was clearly called for by the circumstances, the court would be entitled to infer the delay was unjustified.[631]

The court held a delay of 14 and a half months was sufficient to raise the issue of reasonableness. But the delay was due to the lack of institutional resources and it caused no prejudice to the accused, who appeared content with the pace of the litigation. In these circumstances the delay was not unreasonable.

Section 25(b) of the New Zealand Bill of Rights Act 1990 provides that everyone charged with an offence has the "right to be tried without undue delay". This right was applied by the New Zealand Court of Appeal in Martin v Tauranga District Court.[632] The facts are immaterial, except it was a criminal case in which the delay between charge and trial was 17 months. That, held the court, was unreasonable, essentially because it was the fault of the prosecutor. After examining the authorities, Cooke P said no "international tribunal would have decided Morin differently or would have brought any essentially different principles to bear."[633] The court stayed the prosecution.

(ii) Consequences of unreasonable delay and remedies

The question arises whether crossing the line from reasonable to unreasonable delay automatically renders the relevant process, hearing or ultimate decision invalid for breach of human rights. As we will see, that is not the general rule in criminal proceedings and cannot be the general rule in civil proceedings.

General Comment 32 on article 14 of the ICCPR is silent on the question of remedies for breach of the reasonable time requirements.

As to criminal proceedings, the European Court of Human Rights does not treat breach by delay as automatically invalidating. It is sufficient to refer to Bunkate v The Netherlands:[634]

The applicant's claims are based on the assumption that a finding by the Court that a criminal charge was not decided within a reasonable time automatically results in the extinction of the right to execute the sentence and that consequently, if the sentence has already been executed when the Court gives judgment, such execution becomes unlawful with retroactive effect.

That assumption is, however, incorrect. The Court is unable to discern any other basis for the claims and will therefore dismiss them.

The issue was extensively considered by the House of Lords in Attorney-General's Reference (No 2 of 2001).[635] The claimants were charged with criminal offences after a violent disturbance in a prison. When 11 months lapsed between their charge and trial, they relied on article 6(1) of the ECHR. The court held the delay breached their right to be tried within a

reasonable time. They were acquitted when the police offered no evidence against them. The Attorney-General referred certain questions to the Court of Appeal, who decided them and then referred them on to the House of Lords. We are concerned here with the question whether a criminal trial can be stayed on grounds of delay.

According to the principles applied by the majority, who followed the Strasbourg jurisprudence, breach on grounds of delay did not necessarily invalidate the hearing or conviction. The remedy has to be effective, just and proportionate in all the circumstances. If the breach was established pre-hearing, a public acknowledgment of the breach, an order for expedition or the release of a detained defendant on bail may be enough. A stay should not be ordered unless there could not be a fair hearing or it was otherwise unfair to try the defendant. If the breach was post-hearing, unless the hearing was unfair or it was unfair to try the defendant at all, the conviction should not be quashed.[636]

Applying these principles to criminal cases arising under ss 24 and 25 of the Charter, it can be seen that delaying bringing a defendant to trial does not necessarily invalidate the criminal process. The remedy will depend upon the circumstances. The scope and operation of the right to a fair and expeditious criminal hearing does not support the conclusion that a breach of s 24(1) by unreasonable delay in a civil proceeding necessarily invalidates the decision which is the subject of the proceeding.

Turning to civil proceedings, it was held in Attorney-General's Reference (No 2 of 2001) that "automatic termination for breach of the reasonable time requirement cannot sensibly be applied in civil proceedings."[637] It was Lord Hope who spoke those words, on this point in agreement with the majority. The reason is plain enough: a party with an unmeritorious case cannot escape liability to the other party by relying on delay alone. Only if the hearing is unfair can the proceedings be terminated on this basis.[638]

I do not think the scope and application of the human right to a fair and timely hearing, as identified in the international jurisprudence, supports the view that breach by unreasonable delay necessarily invalidates the legal process, or decisions made in that process or the charge or decision which is the subject of that process. The position as regards civil proceedings is similar in this respect to criminal proceedings, except it is a civil party with their own interests and not the prosecutor with the public's interests who is on the other side.

There is no case I am aware of in which an order infringing the human rights of a mentally ill person has been held to be invalid by reason of the breach of the requirement that the hearing be conducted within a reasonable time. Nor am I aware of any analogous case. The remedies awarded in cases of unreasonable delay are usually the just satisfaction of a declaration of breach and possibly damages.

That is not to say an order for invalidity or something similar might not be made in appropriate cases. The point is that it is not in the nature of the scope and application of the right to a fair hearing that such an order should necessarily be made.

Re EC[639] was a New Zealand case remarkably like the present in which that conclusion was reached. I will deal with it under the standard interpretation of the provisions of the Mental Health Act.

(2) Did the board breach Mr Kracke's right to a fair hearing?

(a) Board's statutory function and Mr Kracke's human right to a fair hearing

To repeat, under s 12 of the Mental Health Act, if specified criteria are met, a person may be placed on an involuntary treatment order. This allows the medical authorities to treat them without their consent in detention in a medical health service. Under s 14, if the necessary treatment can be obtained in the community, a person on an involuntary treatment order can be placed on a community treatment order. This allows the authorities to treat the person in the community. Section 14B allows a community treatment order to be extended on the same basis.

The Mental Health Act contains a system of safeguards for people on such orders. Two of its central features are reviews and appeals. Reviews are the responsibility of the board to commence, conduct and complete. Appeals are commenced by patients or someone on their behalf. With involuntary treatment orders, s 30(1) requires the board to conduct an initial review within eight weeks of it being made. Under s 30(3), it must conduct a periodic review at intervals not exceeding 12 months following the initial review. With community treatment orders, s 30(4) requires the board to conduct a review within eight weeks of it being extended. With appeals, s 29(1) allows them to be brought against either order at any time.

When conducting appeals or reviews of involuntary and community treatment orders, the board is bound by s 24(1) of the Charter. Appeals and reviews are civil proceedings of an administrative nature to which Mr Kracke is a party. The board is a public authority under s 38(1) and a tribunal within ss 4(1)(j) and 6(2)(b). The board was therefore directly (or "vertically") bound to act compatibly with s 24(1). Under s 38(1), it was unlawful for the board to act otherwise. Further, the board was "horizontally" bound. By reason of the special interpretative obligation in s 32(1), its general powers and discretions can only be interpreted compatibly with that right, for the purposes of the Mental Health Act do not require otherwise.

On the view I take of the matter, the jurisdiction of the board to conduct the reviews was not defeated by reason only that the statutory time limits were exceeded. After those time limits passed, the board was conducting the reviews under the same provisions which applied before.

In doing so, did the board act compatibly with the right? The proper approach to a problem of this nature is to consider whether the right was engaged, whether any limitation was justified, whether the legislation should be reinterpreted and (for the Supreme Court only) whether a declaration of inconsistent interpretation should be made. In this case, not all of these are in issue.

On Mr Kracke's submission, his right to a fair hearing was engaged by the reviews the board was conducting. I accept that submission. In his submission, the unreasonably delayed conduct of the proceedings was a limitation of the right. Whether that is so is the central issue.

There will be no need to consider justification and reinterpretation. This is one of those situations in which the decision-maker – the board - can only act compatibly with human

rights by reason of the operation of s 32(1) on the provisions governing its powers and discretions.

On behalf of the board, the contradictor offered a well-reasoned explanation for its delay. On that issue I have also carefully considered the board's reasons for decision dated 8 July 2008. Before considering the explanation for the delay, I will summarise the principles.

(b) Human right to a fair hearing without unreasonable delay: in summary

There is an implicit requirement in s 24(1) for a hearing to be conducted without unreasonably delay. The question of expedition cannot be approached directly, but it is a component of what fairness requires. The extent of the expedition and hence what amounts to unreasonable delay depends on the circumstances.

Once a certain threshold is reached, delay must be justified. There is no formula for determining what unreasonable delay is. Each case has to be considered according to its circumstances. The general considerations are the nature of the case (including its complexity) and the behaviour of the parties. What is at stake for the applicant is an important consideration. The interests which the right to a fair hearing protects in the particular case should be identified and considered. Inappropriately fixed or generalised approaches to dealing with expedition issues will not be given much weight. When deciding whether there has been unreasonable delay, you consider the length of the delay, any waiver of the time periods, the reasons for the delay and any prejudice suffered by the applicant.

It is now time to look closely at the delay that occurred and the reasons offered for it.

(c) Delayed reviews in present case

Mr Kracke was placed on an involuntary treatment order under s 12 on 1 April 2005. It did not have an expiry date because such an order continues until it is discharged by force of statute. It is not contended that the initial review under s 30(1) was done outside time. The 12 month periodic review under s 30(3) was conducted within time on 19 April 2006, when the order was confirmed. The next periodic review had to be conducted by 19 April 2007. It was not conducted by that date. If conducted by that date, the next periodic review would have been due by 19 April 2008. It was not conducted by that date. Thus Mr Kracke's involuntary treatment order should have been periodically reviewed at least twice between 19 April 2006 and 19 April 2008, but it was not reviewed in that period.

The board's decision to confirm Mr Kracke's community treatment order was given on 3 June 2008 for reasons given in writing on 8 July 2008. The decision and reasons refer to the community treatment order but I am prepared to assume the board also implicitly conducted the overdue periodic review of, and confirmed, Mr Kracke's involuntary treatment order. If it did not, it makes matters worse. The review conducted on 3 June 2008 was more than 12 months overdue and more than two years since the last review.

Mr Kracke was placed on a community treatment order under s 14 on 8 December 2005 until 31 March 2006. This allowed him to be treated in the community by a treating mental health service, the Mid West Area Mental Health Service. It was first extended under s 14B on 8

March 2006 until 7 March 2007. The eight week review under s 30(4) was conducted within time on 19 April 2007. It was extended a second time on 15 February 2007 until 14 February 2008. The eight week review under s 30(4) had to be conducted by 12 April 2007. It was not conducted by that date or at all before it was replaced with the third extended order on 17 January 2008 until 16 January 2009. The eight week review of the third extension had to be conducted by 13 March 2008. It was not done by that date. It was conducted on 3 June 2008 when the board confirmed the community treatment order.

Mr Kracke's extended community treatment order should have been reviewed at least twice between 15 February 2007 and 13 March 2008, a period of about 13 months, but that did not happen. The review conducted on 3 June 2008 was about 14 months overdue for the second extension and about 3 months for the third.

(d) Board's reasons for delay

On the facts just recounted, the board had to conduct a 12 month periodic review of Mr Kracke's involuntary treatment order by 19 April 2007 and an eight week review of the second extension to his community treatment order by 12 April 2007. The board scheduled a hearing for 4 April 2007, which would have allowed it to conduct the reviews in time. On 20 February 2007 it send a notice of hearing to the mental health service. Over a month later, on 29 March 2007, the service sent Mr Kracke a letter notifying him of the hearing scheduled for 6 days later on 4 April 2007. The facts do not reveal when Mr Kracke got that letter. There is no evidence of any other form of notice being given by the board to Mr Kracke, such as a notice of hearing sent to him directly.

At a hearing on 4 April 2007, the board adjourned the review "to a date to be fixed to enable the patient to obtain an independent psychiatric opinion". There is no record of who, if anyone, attended the proceeding. I infer that Mr Kracke did not attend and that the adjournment was at his request for the stated reason.

The board took the initiative and rescheduled the hearing for 2 May 2007, which was not a month after the adjourned hearing, but some three weeks after the expiry of the eight week review period on 12 April 2007. It sent a hearing notice to the mental health service on 10 April 2007. The Mental Health Legal Centre had been assisting Mr Kracke since January 2007. It contacted the board's registry on 16 April 2007 and asked for the matter to "be taken off the list". On 23 April 2007 the mental health service also asked for the hearing to be rescheduled. On a date unknown, but probably in late-April, the board rescheduled the hearing of 2 May 2007 to "a date to be fixed". By that date the last day for the timely conduct of the review of the involuntary treatment order (19 April 2007) and the community treatment order (12 April 2007) had passed. Adjourning the hearing to a date to be fixed allowed the delay to increase.

From the agreed facts it is clear Mr Kracke knew of and was happy with the further adjournment as it allowed him time to obtain a second psychiatric report. Doing so remained his on-going intention, but there is no evidence that he ever obtained a second report until about April 2008.

It was not until the second half of February 2008 that the board took further action, and initially on a false premise. By facsimile transmission dated 22 February 2008, the board contacted the mental health service because Mr Kracke was "listed as being AWOL with a pending hearing". There are provisions in the Mental Health Act dealing with persons absent without leave, but it is unnecessary to go into them.

The service told the board by facsimile transmission dated 25 February 2008 that Mr Kracke had "now returned". To suggest he had returned from being absent without leave is not correct. Mr Kracke had never been absent without leave. The board's suggestion he had been was quite offensive to Mr Kracke and should have been quashed by the service. He was regularly attending the service involuntarily to take medication he did not want under the terms of the community treatment order. Indeed, on 17 January 2008, Mr Kracke's community treatment order had been extended a third time. Why the service didn't just tell the board the actual facts doesn't emerge from the evidence.

A little later the board rescheduled the review hearing for 19 March 2008. That probably happened about 25 February 2008 when the service advised the board Mr Kracke had "returned".

From mid-April 2007 (when the board adjourned the hearing to a date to be fixed) to late-February 2008 (when it re-listed the hearing) the board did not take any action to review the second extension of Mr Kracke's community treatment order. The board allowed the review to drift.

The eight week review of the third extension of Mr Kracke's community treatment order was due by 13 March 2008, before the date of the rescheduled hearing of 19 March 2008.

The board was actively progressing the review around the time of the rescheduled hearing of 19 March 2008. Mr Kracke was being represented by the Mental Health Legal Centre, which needed time to prepare his case. The hearing was adjourned at Mr Kracke's request. It became clear the next hearing would be a substantial one. Mr Kracke was raising significant arguments based on the construction of the Mental Health Act and the application of the Charter. The Attorney-General intervened and was joined as a party to the proceeding.

There were further short adjournments of the hearing at the request of the parties, until it was conducted on 3 June 2008. Mr Kracke did ultimately obtain a second psychiatric report which he relied on at the hearing.

The board's decision of 3 June 2008 was to confirm Mr Kracke's community treatment order (paragraph 4 of the determination). By then the second extension of the community treatment order (which was due to expire on 15 February 2008) had been overtaken by the third extension (which was issued on 17 January 2008). That is why I say the board conducted no review of the second extension of the order. Rather, it conducted a late review of the third extension.

The board's explanation for the delay in conducting the review of the second extension is that it adjourned the hearings scheduled for 4 April 2007 and 2 May 2007 at Mr Kracke's request so he could obtain the second psychiatric report. This was consistent with affording respect to Mr Kracke as a competent party to the review and also with affording him natural justice. The board relied on the expectation of the legislation that patients will, so far as possible,

fully participate in the hearing process, if that is their wish and it is not detrimental to their health.

An affidavit of the board's executive officer (filed at the request of the Secretary) describes its case load and practices. The board heard 7,355 cases and conducted 5,434 hearings in the 2007/2008 financial year, of which 85.5% were reviews of involuntary and community treatment orders and the remainder were appeals. A total of 5,849 cases were adjourned or administratively rescheduled for a variety of reasons. The recorded reasons including the absence of the statutory mental health practitioner, the non-readiness of the treating mental health service, the request of the patient's legal representative or the patient, and the absence of the patient. It appears most reviews of community treatment orders are not conducted within time. A large number of involuntary patients are discharged before their community treatment orders are reviewed.

The executive officer's affidavit emphasises the merits of a flexible approach to timetabling and conducting of hearings. Historically the wishes of the involuntary patient were respected unless there was good reason not to. Reasonable requests for adjournments were usually granted. Reliance was placed on parties notifying the board when they were ready to proceed. It had been acknowledged that preparing for a contested hearing could take many months, especially to obtain a second psychiatric report. This meant a large number of reviews of community treatment orders had to be conducted outside the eight week period specified in the legislation. Even though granting adjournments took the rescheduled hearing outside the specified time, it was the only way a patient could get the time to obtain a second psychiatric report.

The executive officer describes a range of measures taken by the board following a review of its procedures after the commencement of the Charter. Rescheduling of adjourned hearings is now monitored more closely. The board no longer adjourns matters to a date to be fixed. Rather, it adjourns matters to a date no later than a specified date, which will be a date not exceeding eight weeks from the date of the adjournment.

Some of the affidavit was really a submission against the strict compliance approach of construing s 30(3) and (4), which I will take into account on that basis.

(e) Why delay was unreasonable

I take fully into account that, when conducting reviews, the board is bound by the rules of natural justice.[640] It has wide procedural powers,[641] including a power of adjournment if the need arises.[642] The patient has a right to appear at hearings.[643] If a patient declines to do so, the board must be satisfied it is of their own free will.[644] The board may order a patient not to appear at a hearing only if it would be detrimental to their health.[645] Patients have document-inspection rights.[646] A patient is a party to reviews.[647]

These and other provisions of the Mental Health Act governing review and appeal proceedings show the legislation expects patients to be part of the hearing process. This is consistent with the respect for personal autonomy, individual integrity and human dignity that should be given to patients. Unless there are reasons to think otherwise, it must be assumed that patients have the capacity to represent their own interests, which should be respected and taken into account. Such is the policy the legislation, which respects the rights of people with

mental illness[648] and interferes with their personal decision-making as little as possible.[649]

Respecting the rights of patients to participate in the hearing process is thus important. But it cannot be accepted as an adequate explanation for the delays in this case. It is also a concern that delays are common after being a problem for some time.

For reasons I will go into later, going over the time limit, although regrettable, does not, of itself, defeat the jurisdiction of the board to carry out the review. The main reason I have so concluded is that the purposes of the Mental Health Act are protective. While exceeding the review time limits does not of itself make the treatment orders invalid, the legislation does not contemplate the board allowing reviews to drift. It expects the reviews to be conducted within the specified times because they are an important safeguard of the rights of patients.

On 2 May 2007 the board re-scheduled an already overdue hearing of the review of Mr Kracke's second extended community treatment order to a date to be fixed. The adjournment was at the request of those assisting Mr Kracke. I take this into account as an aspect of his behaviour in the hearing process. But the matter thereafter drifted into early 2009. At most, a very short adjournment, if any, was required. The review should have been completed by 12 April. There was a real question about when, if at all, Mr Kracke would have obtained a second opinion. The board should have given itself the earliest opportunity to inquire positively into that subject. Putting the matter off to a date to be fixed deprived it of that opportunity. I acknowledge the board has changed its practices in this regard.

The review safeguard is one of fundamental importance to the statutory scheme for the involuntary treatment of mentally ill people. The immediate interest which the right to a fair review hearing protects is the fairness of the hearing itself. Other important interests must also be taken into account. These include the human rights of the patient to personal autonomy, bodily integrity and liberty. The treatment overrides the patient's right to refuse medial treatment without their consent. As an important fundamental safeguard, it is the function of a review to protect these interests as well.

The stake Mr Kracke had in the review proceedings was thus very high. His several human rights should not be limited by the imposition of involuntary medical treatment unless it is justified as a medical necessity, as verified by the safeguards built into the system, of which mandatory and timely review of treatment orders is an important element.

Judging from the board's reasons for decision dated 8 July 2008, the nature of Mr Kracke's reviews was not particularly complex, and certainly not such as to explain the delay.

I cannot accept Mr Kracke's requests for adjournments as waiving of the time limits. As to those in the legislation, they were not his to waive. As to his fair hearing right, I have taken into account his requests as an aspect of his behaviour in the proceedings, but those requests did not amount to waiver of the period of delay that ultimately happened.

The length of the delay was considerable and unreasonable:

the involuntary treatment order dated 1 April 2005 should have been periodically reviewed twice between 19 April 2006 and 19 April 2008, but was not reviewed until 3 June 2008

the second extended community treatment order dated 15 February 2007 should have been reviewed by 12 April 2007, but it was not reviewed at all before it was replaced by the third extended order on 17 January 2008, which should have been reviewed by 13 March 2008, but was not until 3 June 2008

On the evidence, the main reason for the delays was administrative oversight on the part of the board. It is sufficient to focus on the events of 2007 and 2008. Having not completed the reviews by the due dates of 12 and 19 April, the board adjourned the hearing to a date to be fixed on 2 May 2007. It then lost track of Mr Kracke's case. What it should have been driving it allowed to drift. This emerges very clearly from the board thinking incorrectly, in February 2008, that Mr Kracke was AWOL. There is nothing to suggest it knew of the third extension of the community treatment order. It didn't seem to appreciate that it had delayed so long in reviewing one community treatment order that it had been overtaken by another. Losing track by administrative oversight of a review process which is an important safeguard in the system for giving involuntary medical treatment to mentally ill people is not a reasonable explanation for delay.

For all practical purposes, Mr Kracke's human rights under the Charter became operative when it came into force on 1 January 2008. I have taken into account the delay which occurred up to that date; but I have not approached the matter as if that pre-Charter delay transmuted into a human rights breach the moment it came into force. I have considered all the circumstances, including that the delay continued well into 2008.

I do not accept that, if the delay was unreasonable before the Charter came into force, I cannot consider whether the board acted incompatibly with Mr Kracke's human rights by failing to conduct the reviews within a reasonable time after it came into force. To do otherwise would be inconsistent with the purposes of the Charter as remedial and protective human rights legislation.

For these reasons, I conclude the board violated Mr Kracke's human right to a fair hearing under s 24(1) of the Charter by failing to conduct the review of his community treatment order within a reasonable time. This analysis, the facts and circumstances established and the submissions made by the parties necessarily subsume the position as regards the involuntary treatment order. For the same reasons, I also conclude the board violated Mr Kracke's human right to a fair hearing under s 24(1) of the Charter by failing to conduct the review of his involuntary treatment order within a reasonable time.

I will consider the issue of remedies separately.

F SCOPE AND NATURE OF THE HUMAN RIGHTS AT ISSUE

(1) How scope and nature arise

Mr Kracke submits the board's failure to complete the reviews of his involuntary and community treatment orders within the statutory time limits means, under the standard principles of interpretation, the orders became invalid. I do not accept that submission and will explain why later.

Mr Kracke alternatively submits the provision of the Mental Health Act must be interpreted according to the special interpretative obligation in s 32(1) of the Charter to produce the same result. He says several of his human rights would be violated unless the provisions are so interpreted. Mr Kracke makes a further submission. The board violated his right to a fair hearing in s 24(1). He submits that violation should be taken into account when applying the special interpretative obligation to the provisions, again with the same result.

It is therefore necessary to determine whether the board's failure to complete the reviews within the statutory time limits and within a reasonable time violated Mr Kracke's other human rights.

When determining whether human rights have been violated and how legislation should be interpreted, the steps are engagement, justification, reinterpretation and (for the Supreme Court alone) making (or not) a declaration of inconsistent interpretation. In this section of the decision I am concerned with engagement, which requires me to identify the scope of the rights involved. I will be going on to justification, which requires me to identify the nature of those rights. I will combine here the task of identifying the scope and nature of the rights, which are closely connected.

In the mental health context, the power of the authorities and the board are very substantial. There are several processes, and layers of process, involved. They all interact within the one system. In practical human rights terms, the patient experiences the impact of the system as a whole, not just as regards its individual parts.

When identifying what human rights may be engaged, we need to examine that whole system. For example, a review is a safeguard. It is meant to protect patients from misuse of the power to detain them under an involuntary treatment order and give them involuntary treatment under a community treatment order. For patients being treated in the community, those two orders go together. Thus the review safeguard can't be examined just in terms of the right to a fair trial. It has relevance to the way the other parts of the system engage other human rights.

To repeat, the scope of the human right at the engagement stage does not take account of specific limitations or to limits that may later be found to be justified. The issue is whether the legislation or act limits the right. That requires the identification of the scope of the right and the interpretation of the provisions according to the standard principles of interpretation. When identifying the scope of the right, a broad and purposive approach is taken. We want to look at the right in its plain state and in terms of the interests it protects. When identifying the nature of the right for the purposes of the engagement stage, the focus in on the cardinal values it embodies and the fundamental interests it was meant to protect.

(2) Right to protection from torture and cruel, inhuman or degrading treatment

(a) Charter

Here is s 10 of the Charter:

A person must not be –

(a) subjected to torture; or

(b) treated or punished in a cruel, inhuman or degrading way; or

(c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

Section 10(a) deals with torture separately. Under the Charter, this most extreme standard of abusive ill-treatment does not merge with the others in s 10(b) and (c). As we will see, there are reasons why the position is different under the comparable international instruments.

With this qualification, s 10(a) and (b) correspond to article 7 of the ICCPR and article 3 of the ECHR. Article 7 of the ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment ...". Article 3 of the ECHR provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Section 10(c) of the Charter goes significantly further than the ICCPR and the ECHR. Article 7 of the ICCPR says "no one shall be subjected without his free consent to medical or scientific experimentation." Article 3 of the ECHR contains no direct equivalent. Section 10(c) of the Charter prohibits not just medical or scientific experimentation, but also treatment, without full, free and informed consent. As regards these kinds of ill-treatment, this is protection of personal autonomy and integrity of the highest order and addresses, in Victoria, the subject better than the comparable provisions internationally.

The explanatory memorandum for the Charter says s 10 provides "for freedom from various forms of ill-treatment."[650] Section 10(a) was modelled on article 7 of the ICCPR. Under s 32(2), when examining whether conduct amounts to torture, courts and tribunals may consider article 1 of the Convention against Torture.[651] Section 10(b) was also modelled on article 7 of the ICCPR. (The text of s 10(b) is, in fact, identical to 12(1)(e) of the Constitution of the Republic of South Africa 1996.) The memorandum says s 10(c) expands on article 7 to include "a prohibition on medical or scientific treatment without consent."[652] Further, the text has been modified to provide that "consent must be full, free and informed", reflecting the requirements for consent in s 5(1) of the Medical Treatment Act 1988 (see below).

The explanatory memorandum goes on to describe how the rights in s 10 can be limited if demonstrably justified under s 7(2). The example given is one of treatment being administered to someone incapable of consenting where consent can be given by a substitute decision-maker, or under the procedures in Divisions 3 to 6 of Part 4A of the Guardianship and Administration Act 1986.[653]

The golden thread running through s 10(a)-(c), and the whole Charter, is protecting the right of the individual to personal dignity and integrity. Recently in RK v Mirik and Mirik[654] I said that fundamental value was expressed in international law, the common law and legislation (including the Charter):[655]

The bedrock value is that every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect. As Brennan J said in Marion's Case,[656] "[h]uman dignity is a value common to our municipal law and to international instruments relating to human rights", to which I would add certain pertinent legislation. It finds common law expression in the "fundamental right to personal inviolability ... which underscores the principles of assault, both criminal and civil".[657] It finds international law expression in the International Covenant on Civil and Political Rights[658] which (among other things) protects "the right to ... security of the person".[659] It finds legislative expression in (for example) the Crimes Act 1958 and now also in the Charter of Human Rights and Responsibilities Act 2006, which gives several recognition to the human right to personal integrity.[660]

It is an obvious interference with a person's dignity and integrity to give them medical treatment without their consent. While the ICCPR and ECHR do not have an express prohibition on doing so, it is regarded as implicit. Cases concerning the administration of medical treatment without consent have come to be considered under (respectively) articles 7 and 3 (inhuman or degrading treatment), articles 9 and 5 (liberty and security) and articles 17 and 8 (privacy).

This should not be necessary under s 10(c) of the Charter. It should not be necessary to call involuntary medical treatment inhuman or degrading to address the human rights problems it raises. It should not be necessary to risk mocking the horror of torture by calling it that. But, for completion, and because the submissions dealt so extensively with all aspects of it, I will deal with s 10 as a whole.

(b) Human Rights Committee

General Comment 20[661] deals with article 7 of the ICCPR. It states the aim of article 7 is "to protect both the dignity and the physical and mental integrity of the individual."[662] In the ICCPR, it is an absolute right, permitting of no limitation. The ICCPR does not define torture. General Comment 20 says it is not necessary "to draw up a list of prohibited acts or to establish sharp distinctions ... the distinctions depend on the nature, purpose and severity of the treatment applied."[663] The prohibition in article 7 relates to "acts that cause physical pain but also to acts that cause mental suffering to the victim."[664] Compliance with article 7 may require a state to act positively, as by having safeguards for the "special protection of particularly vulnerable persons."[665]

(c) Torture

Of the three standards of treatment proscribed by s 10(a) and its international equivalents, torture is the most abhorrent. The definition of "torture" in article 1 of the Convention against Torture is relevant to "torture" in s 10 (a). Here it is:[666]

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

There is substantial jurisprudence in the Human Rights Committee in cases involving torture. It is thoroughly reviewed in Joseph et al.[667]

The United Nations has caused a special rapporteur to report on protecting persons with disabilities from torture. As the report points out, extreme forms of unjustified medical ill-treatment can be a tool of torture.[668]

The European Court of Human Rights has put "torture" in article 3 of the ECHR in an extreme category of severity of its own. In Ireland v United Kingdom[669] the court said torture should be distinguished from inhuman or degrading treatment. The intention of the ECHR was to stigmatise torture as "deliberate inhuman treatment causing very serious and cruel suffering."[670] The court has expressed the view that article 3 of the ECHR could be interpreted differently as social conditions evolve.[671] Thus "it would ... be wrong to regard as immutable the standard of what amounts to torture." So said Lord Bingham in A v Secretary of State for the Home Department (No 2),[672] who was influenced by that view.

(d) Cruel, inhuman or degrading treatment or punishment

Section 10(b) covers treatment or punishment that is "cruel, inhuman or degrading". Since it mirrors the South African provision, Dodo v The State[673] is relevant. The facts are not material, but it was a criminal sentencing case. Ackermann J said the three concepts have been "employed disjunctively".[674] His Honour said "the impairment of human dignity, in some form and to some degree, must be involved in all three."[675] We should not, he said,[676] "lose sight of the fact that the right relates, in part at least, to freedom."

The words of s 10(b) are "cruel, inhuman or degrading" (emphasis added). This is not a collocation. There is a right not to be treated or punished in any of the three ways.

"Treated" in s 10(b) is a broad word whose ordinary meaning encompasses behaving towards or dealing with someone in a certain way, giving medical care or attention or applying a process or substance to someone (OED). Punishment is a different concept altogether and is separately specified. As the cases decided under the ECHR show, treatment picks up a broad

range of governmental and other action and decision-making towards people, consistently with the fundamental purposes of the right. For example, the imposition of a regime on asylum seekers whereby they cannot obtain the barest necessities of life is "treatment" under article 3 of the ECHR.[677]

The Human Rights Committee has decided that, under article 3 of the ICCPR, the administration of anti-psychotic medication to a person without their consent is not inhuman or degrading treatment if done for a justified medical purpose.[678] The same can be said of s 10(a) of the Charter. Of course, to be compatible with human rights, it must be done under law and justified. [679]

The European Court of Human Rights has decided that, under article 3 of the ECHR, the standard of ill-treatment must attain a minimum level of severity before it can amount to cruel, inhuman or degrading treatment.[680] The jurisprudence needs some examination.

An early case was Ireland v United Kingdom.[681] The applicants alleged ill-treatment at the hands of British interrogators. They were subjected to various harsh techniques.[682] Here is the principle applied by the court:[683]

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 ... The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

The court said the distinction between torture on the one hand and inhuman and degrading treatment on the other "derives principally from a difference in the intensity of the suffering inflicted."[684]

The court has examined what is "degrading" within article 3 in the context of the treatment of a mentally ill prisoner. In Keenan v United Kingdom[685] the prisoner had been very harshly treated by the authorities. There were serious deficiencies in the standard of his medical care. In considering "degrading" conduct, the court said it would have regard "to whether its object is to humiliate and debase the person concerned and whether ... the consequences ... adversely affected his or her personality..."[686] This might involve "treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance or driving the victim to act against his will or conscience."[687] The prisoner's claim of breach of article 3 of the ECHR was upheld.

Extreme kinds of treatment of mentally ill patients can rise above the minimum level of severity and violate their right not to be subjected to inhuman or degrading treatment. The applicant in Herczegfalvy v Austria[688] suffered compulsory injections, force-feeding and secluded detention. The court found this amounted to inhuman and degrading treatment in violation of the applicant's rights under article 3 of the ECHR. The medical treatment did not pass the test of being "necessary from the medical point of view and carried out in conformity with standards accepted by medical science."[689] The other actions were also violations, considering "the surrounding circumstances including the particular conditions, the

stringency of the measure, its duration, the objective pursued and its effects on the person concerned".[690]

The mentally ill prisoner in Ciorap v Moldova[691] was also a force-fed. He strongly resisted, which lead to the use of hand-cuffs and other equipment.[692] Applying Herczegfalvy v Austria and examining the individual circumstances, the court said the force-feeding was medically justified as the applicant's life was in danger after hunger-striking for thirty days.[693] The manner of force-feeding did not "trespass the threshold of the minimum level of severity"[694] envisaged under article 3.

In cases brought under the Human Rights Act based on violation of article 3 of the ECHR, the United Kingdom courts apply the Strasbourg jurisprudence. So, in R (Limbuela) v Secretary of State for the Home Department,[695] by the deliberate action of the government under legislation, a late applicant for asylum could not obtain the accommodation and bare necessities of life normally open to applicants applying within time. Following Pretty v United Kingdom,[696] which we will get to soon, the House of Lords held the applicants had been treated in an inhuman and degrading way.

Lord Bingham said treatment was inhuman or degrading "if, to a seriously detrimental extent, it denies the most basic needs of any human being ... [but] must achieve a minimum standard of severity ..."[697] Lord Hope agreed and said "it is impossible by a simple definition to embrace all human conditions that will engage article 3."[698] As in the case before it, the court held this negative right can, in extreme cases, operate positively. In the words of Lord Hope, it can "require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article."[699]

In R (Munjaz) v Mersey Care NHS Trust,[700] which we have seen in the context of proportionality, the patient did not succeed in establishing his seclusion constituted inhuman and degrading treatment. It did not attain the necessary "minimum level of severity" when regard was "had to the particular conditions".[701] We will look at this case more closely in relation to the right to respect for private life.

Many complaints about the administration of involuntary medical treatment are brought under other articles of the ECHR, including the right to liberty (article 5) and the right to respect for private life (article 8). I will deal with those later.

Nothing in the present case comes near an actual or potential violation of Mr Kracke's right not to be treated in an inhuman or degrading way contrary to s 10(b) of the Charter. That right is not engaged in the circumstances of the present case.

(e) Medical or scientific treatment without full, free and informed consent

"Personal autonomy is a value that informs much of the common law."[702] An example is that, when the common law is considering the duty of a doctor to warn a patient about the possible adverse effects of medical treatment, the starting point is "the paramount consideration that a person is entitled to make his own decisions about his life".[703] That should be the starting point under s 10(c) of the Charter. Forcing a person of full mental capacity to have unwanted medical treatment is a serious affront to their personal dignity and

autonomy in itself.[704] The fact the treatment may be medically warranted is not at this stage the point. Remember, we are dealing here with people who, though mentally ill, still have full legal capacity. The right to refuse unwanted treatment respects the person's freedom to choose what should happen to them, which is an aspect of their individual personality, dignity and autonomy.

The right is especially important in the context of treating someone for mental illness. People can be extremely sensitive about taking the powerful drugs that are often prescribed. However medically necessary they may be, the drugs can cause alterations to mood, behaviour and body weight, as well as personal appearance, which can be very distressing. As the Commission has submitted, such drugs can affect the very "reality" in which a person lives. Section 10(c) of the Charter recognises the importance of this right to refuse, because it respects the personal dignity and autonomy of people with mental illness.

The same values run through the Medical Treatment Act 1988. The purposes of the Act are to clarify the law relating to the right of patients to refuse medical treatment, to establish a procedure for clearly indicating a decision to refuse such treatment and to enable an agent to make such decisions on behalf of incompetent persons.[705] It "does not affect any right of a person under any other law to refuse medical treatment."[706] Therefore the Act does not affect the operation of the Charter with respect to the right to refuse unwanted medical treatment. Section 5 of the Act creates a procedure whereby a patient may clearly indicate a refusal of treatment in a certificate. Section 6 creates the offence of medical trespass which a medical practitioner commits by undertaking or continuing to undertake medical treatment which, in a certificate, the patient has refused. Section 9 gives protection to medical practitioners who decline to do so.[707]

(f) Scope and nature

(i) Torture

The purpose of the right to freedom from torture is to protect people from deliberate inhuman treatment covering very serious and cruel suffering. It is directed at preventing treatment of the most severe kind such as that specified in the Convention Against Torture.

The fundamental value which the right expresses is the personal dignity and integrity of the individual and the physical and psychological inviolability of their person.

(ii) Cruel, inhuman and degrading treatment or punishment

The purpose of the right to freedom from cruel, inhuman or degrading treatment or punishment is to protect people from various forms of ill-treatment which, although not torture, still attain a minimum level of severity and intensity in the suffering inflicted.

The right expresses the fundamental values of the personal dignity and integrity of the individual and the physical and psychological inviolability of their person, but on a broader plane than the right to freedom from torture.

(iii) Medical or scientific experimentation or treatment without full, free and informed consent.

The purpose of this right is to protect people from medical or scientific experimentation or treatment without their full, free and informed consent. It is directed at such experimentation or treatment of any kind, even that which is beneficial to the individual.

The right expresses the fundamental value of the personal dignity and integrity of the individual and the physical and psychological inviolability of their person in this specific context. It also expresses the fundamental value of the autonomy of the individual, the authority of people to make decisions in matters that affect themselves and the importance of such decisions being full, free and informed.

(3) Right to freedom of movement

(a) Charter and international jurisprudence

This is s 12 of the Charter:

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

Section 12 is a plain-speaking version of article 12(1) of the ICCPR and just as strong. Article 12(1) provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." It contains a specific limitation in article 12(3). Under the Charter, that work is done by the general limitations provision in s 7(2).

The explanatory memorandum for the Charter says s 12 establishes the right to freedom of movement within Victoria and was modelled on article 12 of the ICCPR.[708]

Freedom of movement is not just being able to move freely. As the Human Rights Committee says in General Comment 27,[709] it "is an indispensable condition for the free development of a person." I would add it is therefore indispensable for the development of society. As the committee explains, limitations on the right to freedom of movement must, under article 12(3), be for permissible purposes, necessary and proportionate:[710]

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

These principles will be relevant to the application of s 7(2) of the Charter.

The right to freedom of movement in s 12 is connected to the right to liberty in s 21. It is concerned with restrictions on the liberty of movement of the individual. The right to liberty is concerned with the physical detention of the individual in the classic sense.

I analyse the right to liberty below. On that analysis, the difference between the right to freedom of movement and the right to liberty is one of degree or intensity, not of nature or substance.

The cases decided at Strasbourg arise under article 2 of Protocol 4 of the ECHR. The leading cases are dealt with in my analysis of the right to liberty. When imposed, restrictions on the right to freedom of movement are relatively easy to establish. Therefore the cases have mostly concerned whether the restrictions are justified as proportionate to the legitimate aim of the law or measure at issue.

The general principle of the right to freedom of movement and how it is applied is well explained in the Strasbourg court's judgment in Baumann v France:[711]

The Court notes that the purpose of the right to liberty of movement as set forth in Articles 1 and 2 of Protocol No 4 is to ensure the right in space guaranteed to everyone, to move within the territory in which he is in as well as to leave it; this implies a right to leave for such country of the person's choice to which he may be admitted. It results from the foregoing that freedom of movement requires the prohibition of any measure likely to violate this right or restrict the exercise of this right where it is not a measure likely to be considered "necessary in a democratic society" for the pursuit of legitimate aims covered by paragraph 3 of the abovementioned Article.

The United Kingdom has not ratified article 2 of Protocol 4 of the ECHR. The courts do, however, acknowledge or apply the Strasbourg jurisprudence on this subject where relevant, particularly where it assists in marking out the scope of the right to liberty.[712]

Axiomatically, the right to freedom of movement can only be limited under law and when demonstrably justified. That principle has been applied in the mental health context in Canada. An example is In the matter of Ms C.A.,[713] which held:

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

(b) Scope and nature

The purpose of the right to freedom of movement in s 12 is to protect the individual's right to liberty of movement within Victoria and their right to live where they wish. It is directed to restrictions on movements which fall short of physical detention coming within the right to liberty in s 21. The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.

(4) Right to privacy

(a) Charter

Here is s 13 of the Charter:

A person has the right –

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have his or her reputation unlawfully attacked.

When it created the right to privacy, the Parliament did so in terms a little different to the ICCPR and the ECHR. Article 17(1) of the ICCPR provides that: "No one shall be subjected to arbitrary or unlawful interference with his privacy ..." Article 17(2) provides: "Everyone has the right to the protection of the law against such interference or attacks." Article 8(1) of the ECHR provides: "Everyone has the right to respect for his private and family life..." Article 8(2) prohibits interference with this right unless it is "in accordance with the law and is necessary in a democratic society ..." Section 13 of the Charter does not include the "right to protection" in article 17(2) of the ICCPR and the "right to respect" in article 8(1) of the ECHR.

The second reading speech and explanatory memorandum are descriptive of the right in s 13. The explanatory memorandum states: "This provision is modelled on article 17" of the ICCPR.[714] I do not think there is any difference between the scope of article 17(1) of the ICCPR and s 13 of the Charter. Section 13 is a condensed re-expression of article 17(1).

(b) Human Rights Committee

General Comment 16 on article 17 of the ICCPR stresses that this article "deals with protection against both unlawful and arbitrary interference."[715] We have seen how it describes "unlawful" and "arbitrary".

Only the privacy aspect of s 13(a) is relevant in the present case. "Privacy" (like "private life") is regarded, in human rights, as "a broad term not susceptible to exhaustive definition."[716] It embraces the personal autonomy of the individual.[717] It does not just mean being left alone.

The broad personal nature of the right to privacy emerges clearly from two cases decided by the Human Rights Committee: Toonen v Australia[718] and M.G. v Germany.[719] I have dealt with the former under the legality requirement in s 7(2) and will deal with the latter here.

In M.G. v Germany a court, without seeing or hearing MG, ordered her compulsory medical examination by a psychiatrist. It based its decision purely on her procedural conduct and voluminous submissions in the litigation concerned. The committee upheld her complaint of breach of her article 17 rights. It said plainly: "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 or her honour and reputation."[720] The interference was lawful as it was ordered by a court. But it was arbitrary to order MG's examination without seeing or hearing from her. The interference "was disproportionate to the end sought and therefore 'arbitrary'".[721] This case is also relevant because the court found the substantive right to privacy was limited because the procedural safeguard or requirement of a proper hearing failed, rending the limitation arbitrary.

On the jurisprudence of the Human Rights Committee, the administration of involuntary medical treatment to a competent individual is an interference with their privacy. The question usually is whether it is justified, unlawful or arbitrary, which are overlapping concepts.

(c) Strasbourg

The general scope of the right in article 8(1) of the ECHR has been outlined by the European Court of Human Rights. A significant decision is Bensaid v United Kingdom.[722] The applicant was suffering from a mental illness. He opposed his deportation on the grounds it would (among other things) violate his right to respect for private life in article 8(1) of the ECHR.

The court did not agree.[723] In doing so it gave an important description of the general concept of "private life" in article 8(1). The description is, I think, applicable to the general concept of "privacy" in article 17(1) of the ICCPR and s 13(a) of the Charter. Here it is:[724]

The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside

world. The preservation of mental stability is in that context an indispensable pre-condition to effective enjoyment of the right to respect for private life.

It is here we examine Pretty v United Kingdom.[725] The applicant suffered from motor neurone disease. To avoid an undignified death and to control how she was to die, the applicant wanted her husband to assist in her suicide. The authorities in the United Kingdom declined to grant him immunity from prosecution. The court upheld this as justified under article 8(2).[726] Building on previous decisions, the court gave this articulation of the scope of the right to private life, which I also endorse as equally relevant to our right to privacy:[727]

As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

Administering medical treatment or sustenance to non-consenting patients is not a breach of article 8 of the ECHR if it is a medically necessary and proportionate measure. That is why the court dismissed the complaint of breach of the right to respect for private life in Herczegfalvy v Austria.[728] As you know, the applicant was being force-fed and given involuntary medical treatment because of his own aggression. He had also been hand-cuffed and confined to a security bed for lengthy periods. The court held "medical necessity justified the treatment in issue".[729]

It can be a violation of the right to respect for private life in article 8 to fail to prosecute an offender and to subject somebody to an unjustified search of their person or home. It is the interference with personal autonomy in the private realm that these cases have in common. Like other negative rights in the ECHR, the right to respect for private life can operate positively, but within definite limits. I will illustrate these propositions by reference to some of the leading cases.

A mentally defective girl aged 16 years was sexually assaulted in X and Y v The Netherlands.[730] The perpetrator was not prosecuted because the girl could not bring the complaint herself, which was then a legal requirement. Her father said the girl's article 8 rights had been violated. The court agreed. "Private life", it held, was "a concept which covers the physical and moral integrity of the person, including his or her sexual life."[731] It could have a positive as well as a negative component:[732]

The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

In the case before it, the requirement that the victim make the complaint meant "effective deterrence" was lacking, thus undermining the "fundamental values and essential aspects of private life" at stake.[733]

In Wainwright v United Kingdom[734] a mother and son (who was mentally retarded) were subjected to a highly invasive strip-search when visiting another sibling in prison. The mother's sexual organs and anus were examined. The first son was stripped naked. His foreskin was pulled back and inspected. Both were told that, if they did not consent, their visit would be denied. They were very shaken by the experience and alleged violation of their article 8 rights (among others).

The court held the applicants' treatment did not rise as high as inhuman or degrading treatment contrary to article 3 of the ECHR,[735] but it still could and did fall foul of article 8, which protected the "physical and moral integrity" of the person. A strip-search would generally constitute an interference with private life, and must be justified as lawful and necessary by the state.[736] Necessity implied that "the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued."[737] The court said it was satisfied the searches were lawful, but not that they were necessary, and upheld the complaint.[738]

In YF v Turkey[739] a husband and wife, suspected of aiding terrorism, were taken into custody and subjected to undignified treatment. The wife was subjected to involuntary gynaecological examination and threatened with rape. The applicants were both later released without charge.

The court found article 8 to be clearly applicable:[740]

"private life" ... covers the physical and psychological integrity of a person. It reiterates in this connection that a person's body concerns the most intimate aspect of one's private life. Thus, a compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right.

It stressed the importance of the lawfulness requirement:[741]

any interference with the physical integrity of a person must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts.

It held the compulsory gynaecological examination to be a violation of the wife's article 8 rights because it was unlawful. Neither medical necessity nor circumstances defined by law justified the examination.

The definite limits to the positive operation of article 8 of the ECHR, are shown by Stubbings v United Kingdom[742] and Botta v Italy.[743]

The problem in Stubbings v United Kingdom was that the adult complainant, when allegedly sexually abused as a child, wanted to bring a statute-barred civil claim against the perpetrator. There was no statue-bar on a criminal prosecution. The court dismissed the complaint because the positive obligation of a state under article 8 did not require it "to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation."[744]

In Botta v Italy the applicant was physically disabled and wanted to bathe at a seaside resort far from his home. The resort lacked disabled access to the beach and sea, in breach of Italian legislation. The authorities did not follow through on the applicant's complaints.

The court decided there had been no violation of article 8. Following its previous cases, it said:[745]

private life ... includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.

Also following its earlier decisions, the court said the concept of "respect for", while not precisely defined, may involve positive obligations.[746] But there had to be "a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life."[747] The touchstone was balance:[748]

In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation.

The court held the applicant had taken the right to respect for private life too far.[749] It held "there can be no conceivable direct link between the measures that the State was urged to take ... [in] the applicant's private life."[750]

Turning to the United Kingdom jurisprudence, it has followed the Strasbourg court.

(d) United Kingdom

Harrow London Borough Council v Qazi[751] concerned the application of article 8(1) of the ECHR in the context of the Human Rights Act, but with the right of respect for "home", not "private life". There is an extensive analysis of justification under article 8(2) to which I will return.

Anufrijeva v Southwark London Borough Council[752] was about the several aspects of article 8(1). Lord Woolf CJ said the nature of the right was "in essence... to live one's personal life without unjustified interference; the right to one's personal integrity."[753] It could give rise to positive obligations, but not conceivably to require the provision of welfare support,[754] and never in absolute terms.[755] Breach could be constituted by government action that involves "an element of culpability", such as maladministration of a scheme imposing positive obligations to provide welfare support.[756]

R (Razgar) v Secretary of State for the Home Department[757] was an asylum case which concerned the right of respect for private life. The applicant said he would not get essential medical treatment for his psychiatric illness if deported to a third country under an international treaty. The House of Lords endorsed the Strasbourg jurisprudence and (by a majority) held the applicant's complaint of human rights violation was not manifestly unfounded.

Lord Bingham gave the leading judgment for the majority. His Lordship said: "It is plain that 'private life' is a broad term, and the court has wisely eschewed any attempt to define it comprehensively."[758] It encompassed "mental stability", which is "an indispensable precondition to effective enjoyment of the right to respect for private life."[759] After citing Pretty v United Kingdom,[760] Lord Bingham said:[761]

Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person.

His Lordship endorsed[762] this remark, as do I, made in 1997 by Professor Feldman:[763]

Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security.

Lastly, the applicant in R (Wilkinson) v Broadmoor Special Hospital Authority[764] was a convicted mental patient compulsorily detained at a secure hospital. Under the mental health legislation, the medical authorities decided he would be given anti-psychotic medication without his consent. He sought judicial review, claiming breach of his article 8 rights. When

the trial judge refused to order the doctors concerned to be present for cross-examination, he appealed. The Court of Appeal[765] upheld the appeal on the basis that the court, on judicial review, was entitled itself to determine if the applicant's human rights were being breached. This meant the applicant could legitimately require the doctors to be present for cross-examination.

Reflecting the Strasbourg jurisprudence, the court recognised (in the words of Simon Brown LJ) that forced treatment would have an "immense" impact on the applicant's rights "above all to autonomy and bodily inviolability".[766] His Lordship went on to say, following Herczegfalvy v Austria,[767] that treatment could only be administered to an incompetent patient on grounds of medical necessity, convincingly shown.[768]

(e) Scope and nature

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.

The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

(5) Right to liberty and security

(a) Charter

Section 21(1) of the Charter states: "Every person has the right to liberty and security." Under s 21(2), a "person must not be subjected to arbitrary arrest or detention." By s 21(3), a person cannot be deprived of their liberty "except on grounds, and in accordance with procedures, established by law." Persons arrested on criminal charges must brought promptly before a court,[769] tried without unreasonable delay or otherwise released: s 21(5). Here is s 21(7), which specifies the right of access to a court:

Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must –

(a) make a decision without delay; and

(b) order the release of the person if it finds that the detention is unlawful.

Mr Kracke relies on the right to liberty and security to submit the board's failure to conduct timely reviews of the extensions to his community treatment order rendered the order invalid. The right is engaged because he is liable to apprehension and detention in a mental health service under s 43 of the Mental Health Act if the order is revoked by an authorised psychiatrist under s 14D. That could not happen on review under s 30(4). Section 14(5) brings to an end the involuntary treatment order of a discharged patient. Mr Kracke also submits the eight week time limit in s 30(4) should be strictly interpreted because it is an important safeguard in a scheme under which his liberty may be violated.

The Commission submits the requirement of the community treatment order that Mr Kracke take medication involuntarily is a violation of his liberty. Therefore the right to liberty and security in s 21(1) of the Charter is engaged, specifically in respect of the provisions of the Mental Health Act that allow community treatment orders to be imposed, but also in respect of those provisions requiring the board to review such orders. They must be strictly construed, consistently with Mr Kracke's human rights.

The amicus, like Mr Kracke, submits a community treatment order violates his rights to liberty because he is liable to detention if it is revoked under s 14D. It further submits the order violates Mr Kracke's right to liberty because it allows the treating doctor to assume control over his person.

The contradictor and the Attorney-General oppose these submissions. They also submit the provisions governing review of involuntary and community treatment orders do not engage Mr Kracke's right to liberty.

Everyone agrees the provisions of the Mental Health Act for the making of involuntary treatment orders engage the right to liberty. That is because such orders result in the detention of the patient. The difference between the parties principally concerns the application of the Charter to the provisions governing review by the board of involuntary and community treatment orders, and the making of community treatment orders. Only Mr Kracke and the amicus submit the right to liberty is engaged by the provision for the making and reviewing of community treatment orders and for reviewing involuntary treatment orders.

Broadly, the right to liberty and security in s 21(1) correlates with article 9(1) of the ICCPR and article 5(1) of the ECHR. The right against arbitrary arrest and detention in s 21(2) of the Charter correlates with article 9(1) of the ICCPR and article 5(1) of the ECHR. The requirement for grounds and procedures established by law in article 21(3) of the Charter correlates with article 9(1) of the ICCPR and article 5(1) of ECHR. The right to be brought before a court and tried speedily in s 21(5) of the Charter correlates with article 9(4) of the ICCPR and article 5(3) of the ECHR. The right to challenge deprivation of liberty in a court in s 21(7) of the Charter correlates with article 9(4) of the ICCPR and article 5(4) of the ECHR.

The explanatory memorandum for the Charter is very explicit about the terms of s 21. It was "modelled" on article 9 (and article 11) of the ICCPR.[770] It describes the right to liberty and security as being "concerned primarily with physical liberty".[771] We will look at the European jurisprudence, which bears that comment out. The explanatory memorandum states

s 21 is intended to operate differently to the correlative right in article 7 of the Canadian Charter of Human Rights and Freedoms, because "the Victorian provision is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures."[772] These matters are picked up under other rights.

(b) Human Rights Committee

General Comment 8 concerns article 9 of the ICCPR.[773] It clarifies that article 9(1) "is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."[774] It refers to the right of access to a court in art 9(4) as "the right to control by a court of the legality of the detention, [which] applies to all persons deprived of their liberty by arrest and or detention."[775]

The scope of the right to liberty and security under article 5 of the ECHR has been extensively examined by the Strasbourg court and the courts in the United Kingdom, both before and since General Comment 8. Many of the cases concern infringements of the right of liberty of mentally ill patients. I will start with Strasbourg.

(c) Strasbourg

Winterwerp v The Netherlands[776] is a leading case. We saw it in the context of what is a procedure prescribed by law. To recall, the applicant was deprived of his liberty under the mental health legislation of The Netherlands. He claimed breach of article 5 of the ECHR. The court upheld the legislation as consistent with human rights. It dealt with important aspects of the rights conferred by article 5. Except in an emergency case, "the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'."[777] Thus the legislation cannot reverse the onus of proof, which must be on the medical authorities, not the patient. After considering the domestic legislation, the court held Mr Winterwerp's confinement was a lawful detention of a person "of unsound mind" within article 5(1)(e)[778] and a detention "in accordance with a procedure prescribed by law" within article 5(1).[779]

As access to a court under article 5(4) of the ECHR is a free-standing right, the court went on to examine this issue separately. There was a right to take domestic proceedings, but it lacked the essential attributes of a proceeding in "a court". The legislation did not require the domestic court to hear from the applicant personally.[780] Mr Winterwerp was never associated with the proceedings concerning him, personally or by legal representative, and was not notified of the proceedings or their outcome.[781] Therefore Mr Winterwerp's right of access to a court was breached – he was not "entitled to take proceedings" challenging the lawfulness of his detention before "a court".

In proclaiming the right to liberty, said the court in Engel v The Netherlands (No 1),[782] article 5(1) of the ECHR "is contemplating individual liberty in its classic sense [and] it does not concern mere restrictions upon liberty of movement". The court went on to determine whether the facts involved a restraint on freedom of movement or a deprivation of liberty. The starting point it adopted was the "concrete situation" of the applicants.[783] They were

military officers subjected to certain forms of discipline known as light and strict arrest. The application of article 5(1) depended on the degree of the restraint. The court held only strict arrest fell within it. In a military setting, some limitations on freedom of movement for disciplinary reasons were to be expected and did not amount to deprivation of liberty.[784]

Awaiting trial on serious criminal charges, the Mafioso suspect in Guzzardi v Italy[785] was confined to a small village on a tiny island. He complained his article 5(1) rights were being violated. The court gave this helpful summary of the correct approach, which is still current:[786]

The Court recalls that in proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.

So examined, the court considered, on balance, "the present case ... to be ... one involving deprivation of liberty."[787] Deprivation of liberty was not confined to classic detention in prison in the strict arrest:[788]

Deprivation of liberty may ... take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States.

It held the deprivation in the case before it was not justified by article 5(1) because it was carried out under a discretionary policy aimed at Mafioso as a class, not under a law aimed at preventing criminal behaviour in general.

In Ashingdane v United Kingdom[789] the questions were, one, whether the applicant's detention was warranted under article 5(1)(e) of the ECHR and, two, whether his right to liberty had been circumscribed because he could have been kept in more liberal detention.

The patient had been kept at various hospitals in the United Kingdom, each having different degrees of restraint.

Article 5(1)(e) allows the lawful detention, in accordance with a procedure prescribed by law, of "persons of unsound mind". The court stated three minimum criteria for determining that issue, which are still applied:[790]

except in emergency cases, a true mental disorder must be established before a competent authority on the basis of objective medical evidence; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity or continued confinement depends upon the persistence of such a disorder.

On this issue, the court held it had no reason to doubt the objectivity and reliability of the unanimous opinions of the medical authorities in this regard.[791]

The applicant also argued he should have been kept at one institution, which was liberal, rather than another, which was strict. As the authorities were making arbitrary choices between the two, he was not being lawfully detained. This submission required the court to determine whether the conditions in the liberal institution amounted to restrictions on his liberty.

The court stated the fundamental principle, established by its case-law, that article 5(1)(e) was "not concerned with mere restrictions on liberty of movement",[792] these being governed by another right. Here is the test it applied for identifying deprivation of liberty:[793]

In order to determine whether circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such the type, duration, effects and manner of implementation of the measure in question. The distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.

The applicant was found not to have been detained.

The same conclusion was reached in HM v Switzerland.[794] An elderly woman had been placed in a foster home on account of serious neglect. She was not in a closed ward, had freedom of movement and could entertain social contact with the outside world. The court affirmed the principle stated in Ashingdane v United Kingdom.[795] It referred to Nielsen v Denmark,[796] where the court held the placement of a boy aged twelve years, at his mother's request, in a psychiatric ward, was not a deprivation of his liberty. It held the elderly woman's placement in a foster home, for her own care, and in hygienic conditions, was a responsible measure taken by competent authorities which did not engage the right to liberty.[797]

In Megyeri v Germany,[798] the applicant was placed in criminal detention in a psychiatric hospital under the mental health legislation in Germany. He challenged the detention before a court, but was not allocated a public lawyer, and claimed breach of the right to access a court in article 5(4) of the ECHR.

In an influential judgment, the court summarised the principles emerging from its case-law on article 5(4). The domestic scheme would be compatible with that right if it had four attributes.[799] To begin, detained persons must be entitled to take proceedings at reasonable intervals before a court to test the continuing lawfulness of their detention, at least where this does not happen automatically. Next, the procedure in the court must be of a judicial character, with guarantees appropriate to the kind of deprivation of liberty, and particular circumstances, in question. Then the detained person must have a right to be heard in person or, where necessary, by some form of representation, and special procedures may be called for to protect the interests of people with mental disabilities who cannot fully represent themselves. Last, persons detained for being of unsound mind should not have to take the initiative to obtain legal representation.

The court held Mr Megyeri's right of access to a court was breached because he was not assigned legal representation.[800]

The applicant in Rakevich v Russia[801] complained about her compulsory placement in a mental hospital. A doctor found she was suffering from a grave mental illness. Her detainment was confirmed by a court. She claimed she was not mentally ill, was being detained under vague and imprecise laws and had no access to a court.

The court applied the three criteria stated in Winterwerp v The Netherlands[802] to find she had been validly certified[803] and her detention was "lawful" under precise law.[804] However, under the legislation in Russia, she could not apply to a court personally. "The initiative lay solely with the medical staff", said the court.[805] This did not satisfy article 5(4), which could "not depend on the good will of the detaining authority."[806] It was not enough for the legislation to require a mental patient to be brought before a court automatically, important as this safeguard was. The basic guarantee in article 5(4) was the applicant's access to a court: "Surplus guarantees do not eliminate the need for fundamental ones."[807] The court found a violation of the applicant's right of access to a court.

Turning to the United Kingdom, when applying the ECHR under the Human Rights Act, the courts in that country have followed the law stated by the Strasbourg court.

(d) United Kingdom

R (H) v London North and East Region Mental Health Review Tribunal[808] was an early case on the right to liberty and security concerning a patient said to be mentally ill. The then legislation effectively imposed on the patient the burden of establishing before the tribunal that their detention was not justified. The patient submitted this was a violation of his right of access to a court under article 5(4).

The Court of Appeal[809] held the tribunal was a "court" for the purposes of article 5(4), since it had full authority to review the case and order the patient's discharge.[810] It then

followed Winterwerp v The Netherlands[811] and Johnson v United Kingdom[812] to hold it was a violation of the patient's human rights to reverse the onus:[813]

So far as article 5(4) is concerned, it seems to us axiomatic that if the function of the tribunal is to consider whether the detention of the patient is lawful, it must apply the same test that the law required to be applied as a precondition to admission, unless it be the case that a patient once admitted can be lawfully detained provided that some other test is satisfied. We endorse the common submission of [counsel] that it is contrary to the Convention compulsorily to detain a patient unless it can be shown that the patient is suffering from a mental disorder that warrants detention.

The court held the legislation was incompatible with the applicant's right of access to a court and could not be read compatibly any other way pursuant to the special interpretative obligation in s 3(1) of the Human Rights Act. It issued a declaration of incompatibility.

The patient in Secretary of State for the Home Department v Mental Health Review Tribunal and 'P.H.'[814] was confined to an institution. Pending his full discharge, the tribunal had ordered the applicant's release on conditions, one of which was he could go out with an escort when one was available. The Secretary appealed. The trial judge[815] upheld that order.

The Secretary appealed again. One ground was the condition requiring the applicant to reside at the institution and not leave without an escort violated article 5(1) and made the tribunal's order unlawful.

The Court of Appeal[816] applied[817] the principles expressed in Guzzardi v Italy,[818] Ashingdane v United Kingdom,[819] HM v Switzerland[820] and Nielsen v Denmark.[821] Thus article 5(1) was held to apply to deprivations of liberty, not restrictions on freedom of movement.[822] The distinction between the two was "one of fact and degree".[823] The court upheld the tribunal's power to impose the conditions, as they did not "inevitably mean that this man would be in a regime so restrictive that he would be deprived of his liberty."[824]

In R (H) v Secretary of State for the Home Department[825] a patient was in criminal detention for having, when insane, severely mutilated his three year old son. A mental health review tribunal under the legislation made a very specific and conditional finding: the patient was not suffering from a current mental illness requiring his detention in hospital for treatment so long as he was being supervised by a forensic psychiatrist. It ordered his release on that condition. However, the health authorities could not make the necessary arrangements for the provision of the supervision. The patient was left in limbo. His release was deferred until a suitable psychiatrist could be found. He claimed violation of his article 5 rights and sought judicial review, which was refused.

On appeal to the House of Lords, the patient submitted his article 5(1) rights were violated because he was detained when not mentally ill. He claimed his article 5(4) rights were violated because the tribunal did not have the power to enforce the condition for supervision by a forensic psychiatrist, and thus it was not a "court". He relied on the decision of the

European Court of Human Rights in Johnson v United Kingdom,[826] where a patient, found not to be mentally ill, was not released pending the implementation of conditions. In that case, the court upheld the patient's article 5(1) complaint, without determining his article 5(4) complaint.[827]

The House of Lords upheld the tribunal's capacity as a court within article 5(4). Lord Bingham said the right of access to a court required that "a person of unsound mind compulsorily detained in hospital should have access to a court with power to decide whether the detention is lawful and, if not, to order his release. This power the tribunal had."[828] The court rejected the applicant's submission that his article 5(1) rights had been violated. This was not a case, like Johnson, where the patient had been found not to be mentally ill. The applicant was found to be mentally ill unless supervised by a forensic psychiatrist, for whom arrangements could not be made.[829]

The scope of the right to liberty and security was considered in R (Gillan) v Commissioner of Police of the Metropolis[830] in the context of stop and search powers conferred on police to combat terrorism. We have already looked at the case in the context of the legality requirement in article 5(1). On the substantive issues, the House of Lords again applied the principles expressed in Guzzardi v Italy[831] and HL v United Kingdom.[832] It was held a person stopped and searched, although detained in a certain sense, was not being confined, kept in custody or deprived of his liberty within article 5(1).[833]

The House of Lords returned to the subject of the right to liberty and security in the context of terrorism legislation in Secretary of State for the Home Department v JJ.[834] The judgments of the court, approving Guzzardi v Italy,[835] and reflecting the dynamic way human rights instruments are interpreted, stressed the evolving concept of what forms deprivations of liberty could take. This is Lord Bingham:[836]

The variety of such forms is being increased by developments in legal standards and attitudes, and the Convention must be interpreted in the light of notions prevailing in democratic states ...

As to the difference between depriving someone of their liberty and restricting their freedom of movement, that was one of degree or intensity, not nature or substance, and "there is no bright line separating the two."[837]

The court held the relevant control orders violated the applicants rights to liberty under article 5(1) because of the invasive restrictions they imposed.[838] As the legislation did not permit orders incompatible with the right to liberty in article 5 to be imposed, they were invalid.[839]

Lastly in Austin v Commissioner of Police of the Metropolis[840] the House of Lords dealt with the human rights implications of crowd control. To prevent violence, the police cordoned off thousands of protesters who were only allowed to leave a confined area over a period of several hours. The protesters alleged their right to liberty had been infringed.

The court held proportionate restrictions on individual liberty for the legitimate purpose of maintaining public safety did not constitute a deprivation of liberty which had to be justified.[841]

The difficulty in Austin was that article 5 of the ECHR was not supported by a limitations provision covering the case and the Human Rights Act did not contain a general limitations provision like s 7(2) of the Charter. In Victoria, I would expect the proportionality issues raised by such circumstances to be addressed under s 7(2) rather than at the engagement stage.

(e) Canada

In Canada, s 10(b) of the Canadian Charter of Rights and Freedoms provides: "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right". R v Therens[842] illustrates its operation.

A driver was subjected to a compulsory breath-test at a police station and subsequently charged with drink-driving. He applied to exclude the certificate of analysis on the ground he had been detained without being informed of his right to retain and instruct counsel. The Supreme Court of Canada upheld the trial court's exclusion of the certificate. Detention involved compulsory restraint, but that could be achieved by a number of means:[843]

There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the Charter. The issue ... is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the state may reasonably regard himself or herself as free to refuse to comply ... Detention may be effected without the application of threat or application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

Section 9 of the Canadian Charter provides: "Everyone has the right not to be arbitrarily detained or imprisoned." In McCorkell v Director of Riverview Hospital Review Panel[844] it was held the relevant law had to be precise enough to give sufficient guidance for legal debate.[845] That test was satisfied. There needed to be adequate safeguards, but these were also satisfied by reason of the presence of a right of patient-initiated (not automatic) review.[846]

(f) Scope and nature

The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic

sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.

The fundamental value which the right to liberty and security expresses is freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy.

The scope and nature of the several rights I have now identified will form the basis of the analysis that follows, beginning with the validity of the treatment orders under the standard principles of interpretation.

G VALIDITY OF TREATMENT ORDERS UNDER STANDARD PRINCIPLES OF INTERPRETATION

(1) Mr Kracke's submissions

Mr Kracke submitted the failure of the board to review his involuntary and community treatment orders within the specified time has rendered them invalid. According to the standard principles of interpretation, compliance with the time limits was a condition precedent to the jurisdiction of the board to review the orders. It was also a condition of the ongoing validity of the orders themselves. He sought declarations that the orders are invalid.

The Commission and the amicus supported those submissions. The contradictor opposed them.

I am here interpreting the provisions of the Mental Health Act according to the standard principles of interpretation as part of the first stage of the Charter analysis. I am determining whether Mr Kracke's Charter rights are engaged. I must identify the scope of Mr Kracke's human rights and then interpret the provisions to see if they are limited. The rights will be engaged to the extent of any such limitation.

I have considered the scope and nature of the Charter rights that may be in issue, which are also relevant to the interpretative task I am conducting here. If the involuntary and community treatment orders are invalid when interpreting the provision according to the standard principles of interpretation, that will be the end of the matter. If they are not, I will move through the subsequent stages of the Charter analysis.

(2) Principles governing expiry of time limits

The standard principles of interpretation examine the language of the provisions in their context and according to their purpose, take account of Australia's international obligations and require express words to derogate from fundamental rights and freedoms. These general principles are relevant at this stage.

Exceeding statutory time limits is part of the wider problem created when conditions regulating the exercise of statutory power are not observed. The principles governing the resolution of a problem of that kind are not in dispute. According to Project Blue Sky Inc v Australian Broadcasting Authority,[847] this is the general starting point:[848]

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

Therefore:[849]

A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.

That takes me to the purpose of the Mental Health Act, which I will consider as a general subject on which I will later draw.

(3) Purposes of the Mental Health Act

According to s 1, the purpose of the Mental Health Act "is to reform the law relating to mental health." The reforms were a fundamental break with the past. They were intended significantly to improve the position of people with mental illness, consistently with respect for their dignity and human rights. This is apparent from the objects in s 4(1), which are:

(a) to provide for the care, treatment and protection of mentally ill people who do not or cannot consent to that care, treatment or protection; and

(ab) to facilitate the provision of treatment and care to people with a mental disorder; and

(ac) to protect the rights of people with a mental disorder; and

...

(e) to ensure that people with a mental disorder are informed of and make use of the provisions of this Act.

Consistently with those objects, and twenty years before enacting the Charter, Parliament stated the human rights principles pursuant to which the various powers in the Act had to be exercised. This is s 4(2):

It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that –

(a) people with a mental disorder are given the best possible care and treatment appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment; and

(b) in providing for the care and treatment of people with a mental disorder and the protection of members of the public any restriction upon the liberty of patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances.

The objectives of the department in s 5 reflect the same principles. So do the important principles of treatment and care specified in s 6A.

The second reading speech[850] is very strong on the need to reform the mental health system to take better care of patients in a way that respects their human rights. It reinforces this in the emphasis it places on the review powers of the board[851] in providing "checks and balances"[852] in the system. The explanatory memorandum[853] likewise highlights the review role of the board[854] and the importance of time limits[855].

The Mental Health Act was amended by the Health and Community Services (General Amendment) Act 1993 to extend the review time limits in the original Act to eight weeks. That is not a short period for such a review.

The Mental Health Act was amended again by the Mental Health (Amendment) Act 2003. The new legislation enhanced the role of the board in significant ways. For example, it conferred responsibility on it independently to review the patient's psychiatric treatment.[856] The amendments also confirmed in legislation the decision in RW v Mental Health Review Board[857] that an involuntary treatment order is automatically discharged when a community treatment order expires without having been extended.[858]

To repeat, under the legislation, subject to carefully specified criteria and procedures, people appearing to be mentally ill can be placed on involuntary and community treatment orders. An involuntary treatment order results in the patient being treated in detention in a mental health service. A community treatment order results in a patient on an involuntary treatment order being treated in the community.

The powers under the Mental Health Act to place people on such orders plainly interfere with their human rights and fundamental rights and freedoms in substantial ways. For example, detaining someone against their will is a denial of their right to liberty recognised in article 9(1) of the ICCPR. Treating someone against their will is a denial of their right to personal integrity and autonomy as recognised in the right to privacy in article 17(1). Both deny the right to freedom of movement as recognised in article 12(1). Very important human rights of the same kind are recognised in respect of mentally ill people in the Convention on the Rights of Persons with Disabilities.[859] These are material considerations in the interpretation of the legislation under the standard principles of interpretation. As O'Bryan J said of involuntary treatment orders in RW v Mental Health Review Board:[860]

The status of an involuntary patient with, or without, leave is a restriction upon the liberty of a person and an interference with their rights, privacy, dignity and self-respect.

The General Assembly of the United Nations has adopted important principles which also underscore the importance of human rights for mentally ill people. Called the MI principles,[861] I was told they have been adopted by all federal and state and territory governments.

Principle 1.1 is that people have the right to the best available health care, which should be part of the health and social care system. The principles stress the importance of human rights of people with mental illness repeatedly. The principle of least restrictive treatment is stated in principle 9.1, regular review of treatment in 9.2, involuntary treatment only as decided by an independent medical authority in principle 11.6(b) and periodic review of cases of involuntary administration by an independent review body in principles 17.3 and 17.5.

Under the Mental Health Act, nobody can be made subject to involuntary treatment unless the criteria specified in s 8(1) and (1A) are satisfied. These are the criteria:

(1) The criteria for the involuntary treatment of a person under this Act are that –

(a) the person appears to be mentally ill; and

(b) the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order; and

(c) because of the person's mental illness, involuntary treatment of the person is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public; and

(d) the person has refused or is unable to consent to the necessary treatment for the mental illness; and

(e) the person cannot receive adequate treatment for the mental illness in a manner less restrictive of his or her freedom of decision and action.

(1A) Subject to subsection (2), a person is mentally ill if he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.

The criteria have to be applied with general objects in s 4(2) in mind.

There are provisions for making involuntary treatment orders,[862] for the examination of people on an involuntary treatment order by the authorised psychiatrist,[863] for their treatment (which must be given),[864] for their detention in the mental health service[865] and for their admission to a general hospital or emergency department.[866]

A community treatment order requires the person to obtain treatment while not detained.[867] Under s 14(1), community treatment orders can be made in respect of people on involuntary treatment orders if an authorised psychiatrist is satisfied:[868]

(a) the criteria in s 8(1) apply to the person; and

(b) the treatment required for the person can be obtained through the making of a community treatment order.

A community treatment order must have a specific duration not exceeding twelve months and may specify where the patient must live.[869] It can be extended before its expiry[870] by an authorised psychiatrist who has examined the person and is satisfied the criteria in s 8(1) continued to apply and can be obtained by extending the order.[871]

The authorised psychiatrist must prepare and regularly review and revise as required a treatment plan for each involuntary patient, including those on a community treatment order.[872] A range of matters must be considered, including the patient's wishes and any beneficial or alternative treatments available.[873] It must specify the treatment the patient is to receive.[874] For patients on community treatment orders, it must also specify the place and time at which the patient is to receive the treatment.[875]

A community treatment order must be revoked if the criteria in s 8(1) no longer apply to the person or the treatment cannot be obtained in the community.[876] It may be revoked by an authorised psychiatrist if there is non-compliance by the patient with the order or treatment plan, if reasonable steps to ensure compliance have failed and there is a significant risk of the mental or physical condition of the patient deteriorating.[877] As noted, an involuntary treatment order ends when a community treatment order expires without extension.[878]

The policy of the legislation is giving the least possible restrictive and intrusive treatment and doing so in the community if possible.[879]

Involuntary[880] and community treatment orders[881] must be reviewed by and can be appealed[882] to the board. On appeal or review of an involuntary[883] or community treatment order,[884] the board can discharge the patient from the order. The critical consideration is whether the criteria in s 8(1) continue to apply. If not, discharge is mandatory.[885] A community treatment order may also be revoked because the treatment cannot be obtained in the community[886] or for patient non-compliance as above.[887] On appeals and reviews, the board must also review the patient's treatment plan[888] and can order its revision.[889] The board must have regard primarily to the patient's current mental condition and consider their medical and psychiatric history and social circumstances.[890]

Because the provisions with respect to treatment orders form part of a scheme, I think I should take a global view of the purposes of the legislation.

The purposes of the Mental Health Act are to ensure mentally ill people who cannot or do not consent get medically necessary care, treatment and protection. Since the treatment will be involuntary, achieving that purpose will seriously interfere with the human rights of patients. Consistently with its purposes, the legislation attempts to protect those rights as far as possible. The purposes of the legislation are therefore to ensure that such treatment is given only, first, when medically necessary according to definite criteria and, second, subject to strict safeguards that protect the human rights of patients as far as possible.

At all levels of decision-making these purposes are very evident. The system contains many safeguards, and they operate at different levels. The legislation expects all to operate as intended but trusts none individually to be necessarily sufficient.

The safeguards include:

the objects provisions in s 4(2)

the principles of treatment and care in s 6A

the strict criteria for involuntary treatment in s 8(1), which are based on medical necessity

the role of the registered medical practitioner in ss 12(5) and 12AA(6)

examination of the patient by the authorised psychiatrist under s 12AC(1)(b) within 24 hours

the limited duration of a community treatment order under s 14(3)

the automatic expiry of an involuntary treatment order when a community treatment order is not extended under s 14(5)

the regular monitoring of people on community treatment orders by the supervising medical practitioner under s 14A(1)

the powers of the board in appeals under ss 29 and 36C

the powers of the board in compulsory reviews under ss 30 and 36C.

Those are the purposes of the Mental Health Act. We now turn to the validity of Mr Kracke's orders.

(4) Validity of Mr Kracke's involuntary treatment order and community treatment order

Under s 30(3) of the Mental Health Act, the board was required ("must") to conduct a periodic review of Mr Kracke's involuntary treatment order "at intervals not exceeding 12 months following the initial review", which is conducted within eight weeks after the order is made.[891] As to reviewing Mr Kracke's community treatment order, this is s 30(4):

The Board must conduct a review of the extension of a community treatment order within 8 weeks after the order is extended.

Must means must. The time limits are not guidelines or aspirational. Conducting these reviews within the specified time is not optional. Doing so is mandatory and what the legislation expects to happen. Parliament could hardly have made its expectation any clearer.

I reject the submission that commencement of a review within time is good enough. When the legislation deals with commencement, it uses that word.[892] Conducting a review within 12 months or eight weeks means what it says. Since clarification is obviously needed, it means completing the review within that time. That interpretation is demanded by the protective function of reviews. They are a significant safeguard in the system for giving involuntary treatment to patients.

Everybody involved in making, administering and reviewing involuntary treatment orders and plans needs to work within that framework. The time limits in the legislation must be respected. Treating practitioners and other professionals must put the board in a position where it can fulfil its legislative responsibilities in this regard.

The board is constituted by statute as an independent, expert tribunal with substantial powers, including procedural powers. The legislation expects the board to carry out its review (and appeal) functions with positive vigour. That is the assumption underlying the time limits, which the legislation expects the board to drive. The board must be inquisitorial, proactive and oriented towards effective and timely case-management. It should arrange its administration accordingly.

Appeals are for the patient (or others) to initiate. Such appeals are an important right of patients. But the legislation does not rely on them for good reason. It is dealing with people who are or may be mentally ill. It is no disrespect to them to say that sometimes they may not be able to act in their own best interests. There could be many reasons, including their illness, social isolation, other illnesses, lack of resources, advice and assistance, not knowing what to do or where to go for help and making poor judgments. Therefore the legislation has not made patient-initiated appeals the only safeguard. It has included mandatory, board-initiated reviews as an important safeguard. Reviews are the responsibility of the board to commence, conduct and complete within the specified time limits. The terms of the legislation and the human rights of people with mental illness deserve nothing less.

This will make some patients unhappy as it will make it more difficult, and perhaps impossible, to organise second opinions in time for the review hearing. The policy of the

legislation is that it is better for the review to be done on time. At least then there is independent oversight of what is being done to the patient. Otherwise their reviews can drift, which is what happened to Mr Kracke. Patients can always fall back on appeals, which must be commenced without delay,[893] and can then be completed within a more flexible time, although always within a reasonable time.

The system failed Mr Kracke as his involuntary and community treatment orders were reviewed way out of time. The legislation does not deal with the consequences of not complying with the time limits. The governing principles require me to consider the purposes of the legislation.

The criteria for making an involuntary treatment order are those specified in s 8(1). Those criteria are inherently beneficial. People are not put on involuntary treatment orders to protect the community. It is done when necessary in their own medical interests. The continuance of an involuntary treatment order is not made dependent on the conduct of a review. The legislation just expects it to happen. Involuntary treatment orders continue until discharged by force of statute, say on the expiry of a community treatment order or discharge on appeal or review.

Making a community treatment order is likewise beneficial, because it ensures the patient is treated in the community rather than in detention. A community treatment order ends on expiry, revocation or discharge. Again, its continuance is not made dependent on the conduct of a review.

The subject of the legislation is a person who does not agree with a medical assessment that they need medical treatment and who therefore has refused to give consent for the treatment. Thus the primary objective of the legislation is to provide for the care, treatment and protection of mentally ill people who do not or cannot consent.[894] This is reflected in the criteria specified in s 8(1)(d).

Because treatment orders authorise giving involuntary medical treatment, they necessarily involve serious human rights breaches. The medical authorities and others involved in making orders and giving treatment are therefore in an extremely powerful position. The patients are in a very vulnerable position. If the medical opinion is wrong, in full or even in part, the consequences for the individual can be profound. Sadly, history tells us tragic cases can occur in which unwarranted treatment is forced on people for the wrong reasons. To prevent departure from the legislative purposes and strict criteria, even if not deliberate, the patients need the safeguards in the system to operate effectively as Parliament intended.

The fundamental difficulty is that the purposes of the Mental Health Act are beneficial, as in the making of treatment orders. If the orders become invalid when the review time limits are exceeded, the treatment which has been judged to be medically necessary can no longer be given involuntarily to the patient. It is no answer to say this is the patient's choice. That does not change the medical necessity for the treatment.

I have examined RW v Mental Health Review Board[895] carefully. O'Bryan J took the human rights of patients into account in deciding involuntary treatment orders became invalid when a community treatment order expired. There was a gap in the legislation which could be filled. It was open to do so with an interpretation consistent with maintaining the human rights of patients. This is an excellent example of the application of the principle of legality.

The position before me is different. Mr Kracke's community treatment order was valid at all material times. Although the order was not reviewed until 3 June 2008 after it was extended a third time on 17 January 2008, it had been renewed on that occasion against the criteria in s 8(1). This is not a case of having to decide what is to happen to an involuntary treatment order after a community treatment order has expired without renewal. It is a case of having to decide whether an otherwise valid community treatment order becomes invalid when it is not renewed within time. The same analysis applies to the involuntary treatment order.

The present case is a serious departure from the statutory requirements because the board did not just fail to conduct the reviews of the involuntary and community treatment orders within time. As you know, the involuntary treatment order went for over two years between April 2006 and June 2008 before being reviewed. Two annual reviews were missed (the second being conducted late). The community treatment order went for over one year between February 2007 and June 2008 before being reviewed – but not until it was extended a third time. The second extended community treatment order was not reviewed at all. Accordingly, the matter must be approached on the basis that in these respects the reviews were not done at all, not just late.

This failure is to be deplored. But the purposes of the legislation are to ensure mentally ill people get the care, treatment and protection which are medically necessary. Mr Kracke is on involuntary and community treatment orders because the medical authorities have personally examined him, against the criteria in s 8(1), and found he needs that treatment. As the board did not conduct the reviews required within the specified times, an important statutory safeguard on these decisions has failed in that respect. This does not mean Mr Kracke does not need the medical treatment which has been judged necessary. It means the safeguard failed in that respect.

It is not consistent with the purposes of the Mental Health Act for the involuntary and community treatment orders to be rendered invalid by the failure of the board to conduct the reviews, late or at all. The review time limits do not operate like a dead-man's handle which stops the treatment as it would a train.

The human rights recognised in the ICCPR, the CRPD and the MI principles assist Mr Kracke's submissions only to a certain degree. None of the rights expressly require a review of community treatment orders. The MI principles require a review of involuntary treatment orders. The need for safeguards is implicitly recognised in all of the instruments. But none deal with the consequence of one failing. None say, if one safeguard fails as here, the treatment to the patient, which has been judged to be medically necessary, and which would otherwise be lawfully given, must stop.

The authorities on non-compliance with legislative conditions in cases concerning mentally ill patients do not support Mr Kracke's submissions on this point.

Sestan v Director of Area Mental Health Services[896] concerned the requirement in the New Zealand mental health legislation that a family member be present at the assessment examination of a proposed patient.[897] The legislation provided the director "shall make the necessary arrangements",[898] including that one. A family member was not present when the patient was examined. His mother declined to attend and the authorities agreed with the patient's request to continue with the examination. The patient was committed and sought a writ of habeas corpus.

The Court of Appeal[899] applied the principle that non-compliance with a mandatory provision did not necessarily invalidate official action.[900] It was necessary to consider the requirements of the legislation and the degree and seriousness of the breach.[901] The court considered the purpose of requiring a family member to be present, which was to give comfort, reassurance and further explanation to the patient.[902] It held the legislation did not intend that those requiring compulsory treatment should be released because of such a procedural defect.[903]

The court noted the importance of the legislative safeguards[904] but held it was in the nature of the jurisdiction that some deviations may occur from the strict statutory requirements. The consequences depended on a consideration of "what happened, why it happened and how it happened, remembering that the protection of a vulnerable person, and potentially the community, is at the heart of the legislative framework."[905] The court did not consider the New Zealand Bill of Rights Act 1990, beyond deciding there was no breach of any particular provision.

This decision supports my reasoning here.

In R (DB) v Nottinghamshire Healthcare NHS Trust[906] the patient was not admitted to hospital within 28 days as specified in the mental health legislation, and ordered by a judge.[907] The Court of Appeal decided the judge's order expired with the 28 days by reason of the statutory specification of that time limit.[908] This is a case where the legislation expressly stipulated compliance with the time limit for implementing the order was a condition of the validity of the order itself. The analogy with the present case would be the expiry of Mr Kracke's community treatment order after its duration of twelve months, unless extended. R (DB) is distinguishable in respect of the board's failure to conduct the reviews within time.

As I said, there was in New Zealand a case remarkably like the present. It supports the conclusion I have reached. In Re EC[909] the mental health tribunal failed to review a compulsory treatment order within three months as required by the legislation, but it ultimately did so. Section 6 of the Bill of Rights Act required the legislation to be given a meaning consistent with human rights if it could be preferred. Judge Ellis decided, on the standard interpretation of the legislation, that the compulsory treatment order was valid despite the delay, and that the application of s 6 required no different result.[910]

With respect, there is not a great deal of analysis of the human rights engaged in Re EC. I do think such an analysis is required in cases like this. Without appreciating the scope and application of the human rights engaged, it will be difficult to determine, under the standard principles of interpretation, whether the legislation is inconsistent with relevant human rights and, if so, how the application of the special interpretative obligation might lead to a consistent result. Having carried out that analysis, I do not find anything in the scope and application of the relevant rights (as they are recognised in the Bill of Rights Act) to doubt the conclusion reached by Judge Ellis.

I therefore conclude that, interpreted according to the standard principles of interpretation, the failure by the board to conduct the reviews of Mr Kracke's involuntary and community treatment orders within the time periods specified in the provisions of the Mental Health Act did not render the orders invalid.

H VALIDITY OF TREATMENT ORDERS UNDER CHARTER

(1) Engagement

The parties made opposing submissions as to what human rights were engaged, from the full suite of personal integrity rights plus the rights to liberty, freedom of movement and a fair hearing, to just the latter.

Rights are engaged by limitations on the essential interests protected by the right. The subject of the analysis is a person, whose human dignity it is the function of human rights to protect. People do not experience limitations piecemeal, but in the overall situation in which they find themselves. It is a simple point frequently made but so important: human rights are about the rights of people and the further you get away from the human dimension of the impact of the limitations the less likely you are properly to apply the rights.

Mr Kracke complains the board failed to conduct the reviews of his involuntary and community treatment orders within the statutory time limits. On this particular basis, he makes a general attack on the orders. In his submission, they expired with the time limits.

What Mr Kracke is saying is that the system should be held to account according to its own terms. If very serious breaches of his human rights are to be justified on the basis they are safeguarded against misuse, there must be consequences for a breach of the safeguards. Independent review of treatment orders is a very important safeguard. The proportionality of the limitations on Mr Kracke's human rights largely depends on such review. If this safeguard fails, that means the system has failed. The treatment orders lose their legitimacy when the safeguards on their misuse are not properly applied. The orders must be invalid in that event. Otherwise the legitimacy of the whole system is undermined and the safeguards become window dressing.

Those powerful submissions can only be answered by focusing on the whole system as it acted on Mr Kracke's human rights. To do otherwise would not respond to the total situation in which he found himself.

Mr Kracke's total situation is that he is the subject of involuntary and community treatment orders pursuant to which he is given involuntary treatment. Those orders are meant to be protected by various safeguards which I have described. One of them – review of the orders – was not applied properly. To understand the human right consequences of the failure of this safeguard it is necessary to understand the human rights it was meant to protect. That takes us to the human rights engaged by the orders. The proper approach focuses on the interests which the rights protect and the cardinal values they express.

Taking the involuntary treatment order first, such an order renders the patient liable to detention and involuntary medical treatment.

Looking at detention first, Mr Kracke has an interest in his own liberty. The right to be free from interference with that liberty is protected by the various elements of s 21(1), (2) and (3), and also by the right to freedom of movement in s 12. Freedom is the cardinal value of the rights to liberty and freedom of movement. The right in s 21 is engaged by decisions which place a person in detention, such as the making of an involuntary treatment order. The

making of such an order necessarily engages Mr Kracke's interest in being allowed to move freely, as protected by the right in s 12. The right to liberty in s 21(1), (2) and (3) and the right to freedom of movement in s 12 are engaged.

Looking at the involuntary treatment next, giving Mr Kracke such treatment does not arguably engage the right to freedom from torture. It does not engage the essential interests which are attacked by deliberate inhuman treatment covering very serious and cruel suffering because that is not what is being done to him. Nor does it arguably amount to cruel, inhuman or degrading treatment. It does not engage Mr Kracke's interest in being free of ill-treatment of the necessary minimum level of severity because that is not the nature of the treatment he is being given. Therefore the rights in s 10(a) and (b) are not engaged.

Giving someone involuntary treatment seriously limits their interest in personal integrity and autonomy and in making medical decisions about matters affecting them. Making an involuntary treatment order engages this right, which is in s 10(c). The cardinal value it protects is the fundamental and unique dignity of every individual. The right to privacy also protects these interests. It goes further to protect everyone's interest in their own personal and social individuality and identity, to which their mental state is fundamental. The cardinal value protected by the right to privacy in these respects is also the dignity of the individual, but it protects that dignity in its broader personal and social dimensions. Making an involuntary treatment order thus engages the right to privacy in s 13(a).

When a community treatment order is made, the patient will be treated in the community and not in detention. But such an order has a connection with the detention of an involuntary patient in various ways. For example, if it is revoked,[911] the patient must go into detention in a mental health service.[912] On the other hand, if the community treatment order expires without being extended, the involuntary treatment order ends, and the patient is no longer liable to detention. Such is the case also if the patient is discharged on review.[913]

While a community treatment order thus forms part of a system which includes detention, I think making such an order is directed at respecting, and not at limiting, the patient's interests in their liberty. Making a community treatment order therefore does not engage the various aspects of the right to liberty in s 21(1), (2) and (3).

Making a community treatment order engages the patient's right to freedom from medical treatment without their full, free and informed consent in s 10(c) and their right to privacy in s 13(a), for the same reasons I gave with respect to involuntary treatment orders. The right to freedom of movement in s 12 is engaged because the community treatment order requires the patient, on pain of revocation,[914] to attend at specified places and times to receive treatment according to the treatment plan.[915] That is the case with Mr Kracke. It may also specify where the patient is to live. Conditions of this kind limit the patient's interest in being able to move freely at all times and places of their choosing. That interest goes beyond freedom of physical movement, for that freedom is indispensable for the development of the person.

Focusing now on the reviews of the involuntary and community treatment orders, these engaged Mr Kracke's right to a fair hearing in s 24(1). The board violated that right for reasons I have already given.

Involuntary and community treatments orders are connected in ways I have explained. Reviews of those orders are a mandatory mechanism under the legislation by which a patient

may become free of such orders. They are an important element in the system of checks and balances on the operation of the system for giving involuntary treatment to mentally ill people. In my view they engage the same rights as the substantive elements of the system against misuse of which they are meant to protect, namely the orders themselves.

In summary:

making an involuntary treatment order engages the patient's rights to freedom from medical treatment without their full, free and informed consent (s 10(c)), to freedom of movement (s 12), to privacy (s 13(a)) and the various aspects of the right to liberty in (s 21(1), (2) and (3))

making a community treatment order engages a patient's rights to freedom from medical treatment without their full, free and informed consent (s 10(c)), to freedom of movement (s 12) and to privacy (s 13(a))

reviewing (or failing to review) an involuntary or community treatment order engages the same rights as making an involuntary treatment order

(2) Justification

(a) "under law"

According to the general limitations provision in s 7(2), limitations on someone's human rights can only be justified if they are "under law". This legality requirement contains two elements. The limitation must be authorised by law. Not any law will do: it must have the minimum attributes we expect of a law.

As to the first, a limitation authorised by statute or the common law is made "under law". The limitations of Mr Kracke's rights all arise under the Mental Health Act and therefore are under law.

As to the second, the law concerned must be adequately accessible, not uncertain or vague and sufficiently precise to enable people to predict its application and foresee its consequences to a reasonable degree. The law should not be arbitrary, which means it should accord with the value system of the Charter and be reasonable (proportional to the legitimate end sought and necessary in the circumstances of the given case). Discretionary limitations should have safeguards which give individuals adequate protection from arbitrary interference. Specific limitations may be dealt with under the legality requirement or proportionality as appropriate.

The provisions of the Mental Health Act for making and reviewing treatment orders cannot be said to be inaccessible, uncertain or operate unpredictably. Nor can it be said they generally operate unlawfully, arbitrarily or not according to lawful procedures. Mr Kracke's submissions are put on a higher plane.

The right to privacy in s 13(a) of the Charter requires any interference not to be unlawful or arbitrary. In s 21(2), the right is to freedom from arbitrary detention. In s 21(3), the right is to freedom from deprivation of liberty except by procedures established by law. Mr Kracke

relies on these specific limitations, which invoke the same cognate concepts as the legality requirement in the general limitations provision, to submit that treatment orders operate unlawfully, arbitrarily and not according to lawful procedures if they remain valid despite not being reviewed within the specified time.

In these submissions about the specific limitations in sections 13(a) and s 21(2) and (3) and the legality requirement in s 7(2), Mr Kracke is making a global point about the impact of the failure of the review safeguard. The submission is that the proportionality of the limitations in the treatment orders largely depends on the proper application of that safeguard. That submission is more conveniently dealt with in the context of proportionality, to which we go next.

(b) Proportionality

(i) Paragraph (a) – nature of the rights

The rights engaged are Mr Kracke's right to freedom from medical treatment without full, free and informed consent (s 10(c)), to freedom of movement (s 12), to privacy (s 13(a)) and the various aspects of the right to liberty in (s 21(1), (2) and (3)).

I have described the nature of these rights elsewhere.

I have already decided the board breached Mr Kracke's right to a fair hearing.

(ii) Paragraph (b) – importance of the purpose of the right

The limitations in Mr Kracke's rights are all sought to be justified as being in his own interests for the necessary medical treatment of his mental illness. All of the provisions of the Mental Health Act allowing his rights to be limited are directed to that purpose. The importance of the limitations is therefore the importance of giving necessary medical treatment to people who are mentally ill.

The importance of this purpose cannot be doubted. It is recognised as the first object in s 4(1)(a) of the Mental Health Act. Under article 25 of the Convention on the Rights of Persons with Disabilities, people with a mental illness have a right to health. Everybody has the same right under article 12(1) of the International Covenant on Economic, Social and Cultural Rights.[916] The first principle of the MI principles is that "all persons have the right to the best available mental health care, which shall be part of the health and social care system."[917]

By its nature, the importance of this purpose is not reduced by the fact that Mr Kracke disputes the necessity for the treatment or otherwise disagrees with it being given involuntary to him.

(iii) Paragraph (c) – the nature and extent of the limitation

For reasons I have explained, Mr Kracke's liberty rights as well as his other rights have to be considered.

Mr Kracke is liable to detention under his involuntary treatment order, which is a potential limitation of his physical liberty and movement. If detained, it would act directly to interfere with his interest in his physical liberty and his freedom of movement, namely his interest in being free.

Mr Kracke is being given involuntarily medical treatment. He has to take Risperdal Consta and sodium valproate, which is a strong psychotropic drug. He is required to attend the Mid West Area Mental Health Service fortnightly where nursing staff administer an "intramuscular depot" of the Risperdal Consta. The sodium valproate is taken orally in tablet form, daily.

The involuntary treatment limits Mr Kracke's personal autonomy and decision-making because he is required to take medication he does not want and considers he does not need. Further, according to Mr Kracke, the medication has adverse side effects. I infer from the nature of the medication that it deprives him of full control of his own mental state and alters his mood and pattern of thinking. It leaves him with a sense that his own thoughts, and his very personality, are being influenced by the medication, which is something less than full personal autonomy and individual expression. I also infer it affects his social relationships because it alters the way he presents and relates to other people.

The fortnightly attendances at the mental health service interfere with his freedom of movement to that extent.

Under the legislation, the nature and extent of the limitations in all respects is mediated by various safeguards and checks and balances. These are multi-dimensional and have been described. In summary, involuntary treatment orders can only be made by doctors when medically necessary and the strict criteria in ss 8(1) and 14(1) are satisfied. There is a procedure for the examination of patients by the authorised psychiatrist within 24 hours.[918] The objects and principles of the legislation favour the least restrictive and intrusive treatment. Treatment in the community under community treatment orders is required where possible.[919] The board must conduct reviews of involuntary and community treatment orders within specified times.[920] Patients can appeal such orders.[921] The continuing application of the criteria in s 8(1) is a critical consideration at all points.

In Mr Kracke's case, these safeguards have resulted in him being treated in the community. He is only being given medication which a doctor considers he needs. Within the limits of his treatment plan, which requires his regular attendance at the mental health service, he is free to live his life as he pleases.

The difficulty is that the board's reviews of the treatment orders, which were meant to ensure Mr Kracke was being appropriately treated, were not conducted within the specified times. This alters the nature and extent of the limitations in his case from limitations safeguarded by timely reviews to limitations not so safeguarded. It does not alter the nature and extent of the limitations in any other respect. For example, it does not mean the involuntary treatment is not medically necessary. It does not mean the other safeguards have failed.

(iv) Paragraph (d) – relationship between the limitation and its purpose

Under the Mental Health Act, the limitations are connected, indeed inherently proportionate, to their purpose. The content and manner of involuntary treatment is mediated by the principles of medical necessity and least restriction and intrusion. The limitations vary according to the treatment needed by the patient and the options available for giving it least restrictively and intrusively. That means treatment is given in the community if possible.

As here, the legislation may not be applied properly in an individual case. If that happens, under the principles discussed earlier, it may be the decision which is incompatible with human rights, not the legislation. For example, the board breached Mr Kracke's right to a fair hearing. That of itself does not mean the provisions for making treatment orders are not a proper means of achieving their purpose.

If the board had reviewed Mr Kracke's treatment orders within time and authorised the continuation of his treatment in defiance of the criteria in s 8(1) and the principles in s 8(2), this would have been incompatible with his human rights. The limitations would not have been for the legitimate purpose. In such a case, the means would not have been for the legitimate ends.

The failure of the board to conduct the timely reviews does not fall into this category. Mr Kracke puts his case in a way that seeks to go around that problem. This is why he submits the reviews make the limitations disproportionate to the purpose of the limitations. If that were correct, the legislation would have to be reinterpreted such that unreviewed treatment orders became invalid, for the limitations would be disproportionate otherwise.

There may be cases where a safeguard is an indispensable ingredient to the proportionality of the limitation. A limitation may so interfere with a human right that, without the proper observance of the safeguard, the limitation becomes a manifestly excessive response to the pressing and substantial social need. Within a system of limitations, it may be the degree of the limitation must needs vary. The safeguard may be an indispensable ingredient in the mediating principle. In such cases, the proper operation of the safeguard may be critical to the proportionate relationship between the limitation and its purpose. It may also be necessary for the satisfaction of the legality requirement.

From this material, I can distil a principle for dealing with the human rights implications of the failure of a safeguard. If the safeguard is indispensable for the proportionality of the limitation, then the limitation will be incompatible with human rights if the safeguard fails.

It is therefore a necessary element of Mr Kracke's submissions that there is no proportionate relationship between the limitations on Mr Kracke's human rights and their purpose if the reviews of the orders are not conducted within time. I accept the principle on which this submission is based. But it is not offended by treating unreviewed treatment orders as valid.

Involuntary treatment given under a current order is based on a medical assessment not shown to be incorrect that the patient needs the treatment and this is the least restrictive and intrusive way of giving it. The proportionate relationship between the limitations on Mr Kracke's human rights and the purpose of appropriately meeting his necessary medical needs is supported by a number of conditions, mediating principles and safeguards. The board's

failure to conduct the reviews within time meant one of them did not operate properly. This weakened the proportionality of the limitations in the treatment orders but it did not render them disproportionate to their legitimate purpose.

For the same reason, and for the reasons given next, I conclude the legality requirement was not breached on that account.

(v) Paragraph (e) – less restrictive means reasonably available

Again, the focus here is on Mr Kracke's submission that the system for making involuntary and community treatment orders is not justified without the board's reviews being conducted within time. That is the single respect in which Mr Kracke submits the provisions would, without reinterpretation, impose unjustified limitations on human rights. On those submissions, the orders must be treated as invalid by the operation of the special interpretative obligation in s 32(1) on the provision of the Mental Health Act.

The submission fastens on the interpretation which produces the invalidity of unreviewed orders as a reasonably available and less restrictive means of achieving the purpose of the limitations in the orders. It may the former but it is definitely not the latter.

The purpose of involuntary treatment orders is giving necessary medical treatment to mentally ill people. In Mr Kracke's case, a doctor, applying the strict statutory criteria, has decided such treatment is warranted. The failure of the board to conduct the reviews within time does not show it is not warranted. To render unreviewed treatment orders invalid would result in patients not being given the involuntary treatment which a doctor considers they medically need.

The purpose of reviewing treatment orders is to provide expert and independent oversight of their making. Reviews are an important and necessary safeguard and deliberately not dependent on patient initiation. Patient-initiated appeals are also important and necessary but separate and additional safeguard. If reviews are not being done within time, the proportionate response to that problem would be to ensure delays do not occur in the future. I have made some remarks in this decision which I hope assist in that regard. Avoiding delays is an important part of achieving the purpose of involuntary treatment. If the delays prove to be intractable, that will be another matter. But to invalidate unreviewed treatment orders would not be a proportionate response to the problem of delays.

(vi) Overall proportionality assessment

Giving involuntary medical treatment to Mr Kracke engages his right to freedom from medical treatment without full, free and informed consent (s 10(c)), to freedom of movement (s 12), to privacy (s 13(a)) and to the various aspects of the right to liberty in (s 21(1), (2) and (3)).

These rights protect Mr Kracke's interest in his own personal autonomy and integrity. The rights respect his personal capacity to make decisions about his own medical treatment based

on full, free and informed consent. In particular, the rights respect Mr Kracke's inherent human dignity which is a fundamental value of the Charter. The rights also protect his interest in his personal liberty and freedom of movement, which express the cardinal value of freedom and is indispensable for the development of the person.

The Mental Health Act limits these rights in various ways, but especially in the making of involuntary and community treatment orders. The purpose of these limitations is to give necessary medical treatment to mentally ill people who cannot or will not consent to it. This is a pressing and substantial social need.

The limitations on Mr Kracke's human rights are that he is subject to involuntary and community treatment orders under which he is compelled to take strong medication for his mental illness. The medication has adverse side effects and undermines his sense of personal identity and self-control. One drug is administered by "intramuscular depot".

Mr Kracke's freedom of movement is restricted because he must attend a mental health service fortnightly. He is liable to detention if his community treatment order is revoked for non-compliance with its conditions.

The limitations on a patient's human rights should, under the legislation, be inherently proportionate to their medical needs. When properly applied, patients are only given such medication, and only by such means, for which there is not a reasonably available and less restrictive or intrusive alternative. They will be treated in the community, rather than in detention, if that is possible. There should, therefore, be a proportionate relationship between the limitations and their purposes.

The Mental Health Act contains a number of important safeguards for preventing misuse of involuntary treatment powers, which can greatly interfere with human rights. The safeguards are intended to prevent any limitations from going beyond their necessary purpose. One safeguard is review of treatment orders by the board within specified times, which did not occur in Mr Kracke's case. Having regard to the other safeguards and checks and balances in the system, the failure of the review safeguard did not destroy the overall proportionate balance between the limitations and their purposes.

Less restrictive means were not reasonably available for giving Mr Kracke the involuntary treatment, which doctors consider he medically needs. To invalidate the treatment orders because the reviews were not conducted within time, even though the delay breached his human right to a fair hearing, would be a disproportionate response to the problem of delay and would undermine the purposes of the limitations.

The provisions for making and reviewing involuntary and community treatment orders are accessible, clear, objective and predictable in result, and do not operate arbitrarily. As there are a range of safeguards, the operation of the provisions in those respects is not fundamentally altered if unreviewed treatment orders are valid.

The limitations on Mr Kracke's human rights imposed by the operation of the provisions of the Mental Health Act for making, maintaining and reviewing involuntary and community treatment orders are made under law, reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Therefore the provisions satisfy the general limitations provision in s 7(2) of the Charter. Unreviewed orders are not incompatible with human rights because the system contains a range of safeguards and

checks and balances of which reviews, although of considerable importance, are only one part. Thus the proportionality of the limitations in treatment orders does not depend on board review alone.

To interpret the treatment order and review provisions of the Mental Health Act compatibly with human rights, it is therefore not necessary to apply the special interpretative obligation in s 32(1) to make unreviewed orders invalid.

It remains to consider what orders the tribunal should be made in consequence of that conclusion and the board's breach of Mr Kracke's human right to a fair hearing.

I REMEDIES

(1) Preliminary objection of contradictor

The contradictor submitted there was a preliminary objection to the board and the tribunal determining the validity of Mr Kracke's treatment orders.

It was submitted the function of the board and the tribunal is to examine the decision to make the orders on the merits. Taking the community treatment order as an example, if the criteria in s 8(1) of the Mental Health Act were found not to be satisfied, then the patient must be discharged.[922] That would bring the involuntary treatment order to an end.[923] It was no part of the function of the board or the tribunal to determine the validity of the orders, including those based on human rights. That question was within the jurisdiction of the Supreme Court of Victoria, not them.

The contradictor supported this submission by reference to In the matter of XY.[924] In that case the board heard an appeal under s 29 of the Mental Health Act against the making of an involuntary treatment order. It adopted the plainly mistaken approach of determining whether the doctor had a bona fide belief that the statutory criteria applied, rather than considering the application of those criteria afresh and on the merits.[925] Fullagar, Brooking and Marks JJ said the detention of the patient could be justified "despite irregularities which may have occurred earlier at his de facto admission."[926]

The present case is to be distinguished from In the matter of XY. In that case the board had jurisdiction to conduct the appeal. What it did was to convert an appeal on the merits into a kind of judicial review. In the present case, the tribunal has to determine whether it has jurisdiction to review Mr Kracke's treatment orders on the merits. If they are invalid, it will not have that jurisdiction.

The tribunal possesses jurisdiction to determine all questions of law and fact going to its jurisdiction. I stated that general principle in Garde-Wilson v Legal Services Board[927] by reference to federal authorities of long standing. My judgment in that regard was confirmed by the Court of Appeal in Garde-Wilson v Legal Services Board,[928] which decided the tribunal "can decide all questions of jurisdiction and law as well as fact and merit."[929]

Mr Kracke submitted that, by reason of the operation of the special interpretative obligation in s 7(2) of the Charter on the provisions of the Mental Health Act, a treatment order reviewed outside the time specified in the legislation was invalid. He relied on human rights as part of that submission. I had to determine that submission before determining whether to go on and consider the merits of the orders. The board was in the same position and it correctly approached the matter in that way.

It is of the utmost importance that the human rights of the community, especially of those who are vulnerable, are applied to the fullest. The board and the tribunal are public authorities under the Charter. As such they are bound fully to apply the Charter in cases such as the present. By the direct application of the human rights in Part 2 on the exercise of their statutory powers and discretions,[930] and by interpreting legislation compatibly with human rights if possible,[931] the board and the tribunal will fulfil the fundamental purposes of the Charter, as well as their own responsibility to uphold the rule of law as it applies to them.

Human rights arguments based on the Charter come squarely within the authority of statutory tribunals to consider all the legal and factual issues which are relevant to the case before it. People must be able to come to tribunals and rely on human rights which are relevant to their case. It is contrary to the principle of access to justice that people should have to bring their administrative applications to a tribunal and take their Charter arguments somewhere else, such as a court. It is contrary to the principle of giving cheap, prompt and final resolution of legal problems to split cases up like that. The tribunal's decision should reflect the whole of the applicable law. All the issues should if possible be resolved in the one justice institution at the one time, subject only to merits or judicial review (including appeal) as allowed.

Of course there may be cases where it is appropriate for a tribunal to refer a question of law to the Supreme Court of Victoria under s 33 of the Charter. That is another matter. I declined to do so in the present case because the questions had not been properly identified and refined, the factual setting was not sufficiently clear and some aspects were in dispute and because the tribunal possessed all of the necessary jurisdiction fully to resolve the legal and factual issues, including the issues that arose under the Charter.

The issue of the competence of tribunals of limited statutory jurisdiction to address human rights issues arose in Tranchemontagne v Ontario (Director, Disability Support Program).[932] In that case the Supreme Court of Canada considered whether the Ontario Social Benefits Tribunal could determine a restriction on the availability of a benefit was not applicable by reason of the interpretative provision in the Ontario Human Rights Code. The tribunal decided it could not.

The court (by a majority) decided it could and should. For the majority,[933] Bastarache J said the tribunal "is presumed able to consider any legal source that might influence its decision on eligibility. In the present appeal, the Code is one such source."[934]

His Honour cited the judgment of Sopinka J in Zurich Insurance Co v Ontario (Human Rights Commission)[935] where that judge described human rights legislation as being the "final refuge of the disadvantaged and the disenfranchised" and the "last protection of the most vulnerable members of society". Bastarache J went on to say "this refuge can be rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective."[936] Of the power to decide, his Honour said that, where a tribunal was "properly seized of an issue", it would be "extremely rare" for it not to be the one "most appropriate to hear the entirety of the dispute."[937]

So much for the preliminary objection. Now to whether I should make declarations.

(2) Declarations

(a) Tribunal's power to make declarations

Adopting the submissions of the amicus, Mr Kracke submits I should make a declaration that the board violated his human rights to a fair hearing. The contradictor submits the tribunal has no jurisdiction to do so or should exercise its discretion not to do so.

As to remedies, the Charter is not a toothless tiger. It confers power on the Supreme Court of Victoria to make a declaration of inconsistent interpretation.[938] It extends the power of courts or tribunals to grant relief or remedies for unlawful acts or decisions of a public authority to a ground of unlawfulness arising under the Charter.[939] It expressly preserves the existing powers of courts or tribunals to grant relief or remedies, including declarations of unlawfulness, in respect of the acts or decisions of public authorities.[940] The existing powers of the tribunal to grant any remedies or relief in proceedings before it is thus in no way limited by the provisions of the Charter (except to the extent that granting any such remedy or relief itself might be incompatible with human rights).

The tribunal's power to make a declaration is conferred by s 124 of the Victorian Civil and Administrative Tribunal Act, which provides:

(1) The Tribunal may make a declaration concerning any matter in a proceeding instead of any orders it could make, or in addition to any orders it makes, in the proceeding.

(2) The Tribunal's power to make a declaration under subsection (1) is exercisable by a presidential member or a member who is a legal practitioner.

(3) The Tribunal's power under this section is in addition to, and does not limit, any power of the Tribunal under an enabling enactment to make a declaration.

Section 124(1) confers a general power to make a declaration concerning "any matter in a proceeding" and "instead of ... or in addition to" any order it could make in the proceeding. The purpose of the power is to confer jurisdiction on the tribunal to make declarations and it should be interpreted consistently with that purpose.

The expression "matter in a proceeding" in s 124(1) encompasses a question or issue of law, or of mixed fact and law, that is in issue in the proceeding. It must be genuinely in issue in the sense that it must properly arise in the proceeding. Further, the proceeding must be one that is otherwise within the jurisdiction of that tribunal. Section 124(1) specifies the power of the tribunal to make declarations in matters within its jurisdiction; it does not expand the jurisdiction which the tribunal otherwise has.[941] Within those boundaries, however, the authority of the tribunal to make declarations is limited only by the due exercise of the discretion.

It follows that s 124(1) confers a convenient jurisdiction to make declarations about matters in any proceeding before it where it could or will make any orders in those proceedings. It is

not necessary for the tribunal to make any other orders. It is enough that it could. It is not disqualifying that the tribunal does make such orders. A declaration can be made in addition.

The effect of the declaration may be the equivalent of a judicial declaration in equity. That is immaterial.[942] The declaration may be all the applicants want. It is no bar that they seek only a naked declaration.

As Chaney P (as his Honour now is) has said of the identical provision in s 91(1) of the State Administrative Tribunal Act 2004 (WA):[943]

Once it is open to the Tribunal to consider the matters referred to it, ... it follows that the Tribunal has jurisdiction to grant any of the remedies specified ..., including s 91.

It is correct, as the respondent submits, that s 91 is a statutory power which can only be exercised by the Tribunal "instead of any orders it could make, or in addition to any orders it makes" in the proceeding. The Tribunal must, therefore, have jurisdiction to deal with the matter, and make orders in relation to it, before it can utilise the power of s 91 to make a declaration. In other words, it is not open to a party to come to the Tribunal seeking a declaration under s 91 in respect of a matter which is not otherwise susceptible to the Tribunal's jurisdiction.

When exercising its power to make declarations under s 124(1), the tribunal applies the general discretionary principles developed by the courts.[944] When a declaration is called for, however, the power is there to be used:[945]

Section 124 ... is perfectly general in its terms giving a Tribunal constituted by a presidential member power to make a declaration in a proceeding. Inferentially, declarations under that section should be made, subject to the specific jurisdictional stipulations that the matter be in a proceeding where the Tribunal otherwise has jurisdiction to deal with, in accordance with ordinary equitable principles.

In the present case, the tribunal is exercising its review jurisdiction and could make orders affirming, varying or setting aside the decision of the board.[946] The question whether the board breached Mr Kracke's human right to a fair hearing under s 24(1) of the Charter was genuinely raised as a basis on which he contended his treatment orders were invalid. That was a matter in the proceedings within s 124(1). Therefore the tribunal can make a declaration in respect of that matter.

(b) Declarations of breach in human rights cases

In applying the normal discretionary principles as to making declarations, account needs to be taken of the special considerations that arise in human rights cases.

The normal discretionary principles have been frequently considered by the courts and many authorities could be cited. The principles were set out in Ainsworth v Criminal Justice Commission,[947] which is an especially apposite decision for present purposes.

The High Court made a declaration that the commission had "failed to observe the requirements of procedural fairness" in reporting to Parliament adversely on the applicant.[948] In the present case the issue is whether I should declare that the board violated Mr Kracke's right to a fair trial. The two things are comparable.

Brennan J wrote the leading judgment on this point. His Honour said "the making of a declaration and the terms in which, if made, it should be framed are in the court's discretion."[949] On the principles which governed the exercise of that discretion, his Honour cited with approval this statement of the Privy Council in Ibeneweka v Egbuna:[950]

After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

His Honour went on to say "the circumstances that call for the making of a declaration are not present if there be no real controversy to be determined".[951] As to when a controversy was fit for determination by declaration, his Honour cited with approval this statement of Viscount Dunedin in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd:[952]

The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

Brennan J then considered whether, in the circumstances of the case before the court, a declaration should be issued. The issue arose because the only relief that was being sought was the making of the declaration. As to whether a declaration should be issued for the sole purpose of vindicating the rights of a person who had been the victim of a public law wrong, his Honour cited with approval this statement of Lord Brightman in Chief Constable of North Wales Police v Evans:[953]

it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important a matter as the pursuit of his chosen profession, has to be sent away from a court of justice empty-handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

His Honour then decided that a declaration should be issued, for these reasons:[954]

Where an official entity, purportedly exercising a statutory power or performing a statutory function which requires it to observe the rules of natural justice, publishes a report damaging to a person's reputation without having given that person an opportunity to be heard on the matter, prima facie that person is entitled to a declaration that the report, so far as it damages his or reputation, has been produced in breach of the entity's duty to observe the rules of natural justice.

The vindication of the rights of someone whose human rights under the Charter have been breached may, I think, be equated with the vindication of someone whose reputation has been damaged by a breach of the rules of natural justice.

A formal finding of violation of breach of human rights is a remedy of great importance in jurisdictions where those rights have application. For example, article 41 of the ECHR empowers the court at Strasbourg to grant such relief or remedies as will accord just satisfaction to the injured party. In many cases the court has decided a formal finding of breach is sufficient just satisfaction. According to Beatson et al, that is because[955]

it represents an important acknowledgment that the individual has been wronged, so providing a measure of redress in itself as well as asserting state responsibility and underlining the supremacy of the rule of law.

In respect of the right to a fair trial in article 6, a finding of violation is, in itself, the remedy granted in the great majority of cases.[956] In R (Greenfield) v Secretary of State for the Home Department,[957] Lord Bingham said this reflected the point "that the focus of the convention is on the protection of human rights".[958]

This approach has been followed where the human rights of mentally ill people have been violated. Earlier in this decision I examined cases of this nature decided by the courts at Strasbourg and in the United Kingdom. Relief by way of formal findings of violation were frequently made in those cases. For example, in the United Kingdom there was R (KB) v Mental Health Review Tribunal.[959] That was the case concerning the failure of the tribunal in multiple cases to hear applications in respect of the detention of mentally ill patients within a reasonable time. Stanley Burton J issued declarations that the rights of the successful patients had been violated.[960] After hearing further submissions, his Honour awarded damages in some cases but not in others. Where he did not, he said "the finding of breach of his rights ... is sufficient just satisfaction, and no award of damages is necessary".[961]

Earlier in this decision I spoke about the individual and communitarian purposes of the Charter, which was enacted to strengthen society and every individual in society. When a human right is breached, the individual is injured. Because of the broader role of human rights, society is injured as well. Human rights protect interests and values which society in Parliament considers to be fundamental, both to the individual and to the maintenance of democratic society based on the rule of law. Where human rights are breached, both the individual and society have a strong interest in the remedy of a declaration, in which inheres their final vindication.

The concept of vindication in the human rights context was explained in the South African case of Fose v Minister for Safety and Security.[962] This is Didcott J:

the idea of vindication ... calls for some elaboration. One of the ordinary meanings which "to vindicate" bears, the apt test now so it seems to me, is "to defend against encroachment or interference". Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question.

In deciding whether to make a declaration of breach, I take into account that human rights are civil rights. Any remedy should be balanced, appropriate and proportionate to the circumstances. Vindication is an important consideration but this does not mean exacting punishment.[963]

The broader significance of declarations of breach in human rights cases was emphasised by the Supreme Court of New Zealand in Taunoa v Attorney-General.[964] According to McGrath J, this is the starting point:[965]

In determining the appropriate remedy in cases of breach, the court's focus must be on the fundamental nature of [human] rights in ... democracy and the need for their affirmation, promotion and protection in accordance with the principles of the Bill of Rights Act. The court's principal objective must be to vindicate the right in the sense of upholding it in the face of the state's infringement.

His Honour went on to say that "the remedy should be proportionate to the breach but also have regard to other aspects of the public interest. The remedy must also be directed to the values underlying the right."[966]

As to the significance of a declaration of breach, McGrath J said that it would often be all that was needed:[967]

The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. ... If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

Of course in New Zealand there is a public law action for a breach of human rights which might sound in damages.[968] Under the Charter no such relief is presently available.[969] I do not think that difference reduces the importance of his Honour's remarks in cases like the present where a declaration of violation of human rights is open.

In the present case, the review function of the board was an important safeguard in the protection of the human rights of Mr Kracke, who was being given involuntary medical treatment. In failing to conduct the reviews within a reasonable time, the board undermined that safeguard. Mr Kracke's human right to a fair hearing in s 24(1) of the Charter protected his fundamental interest in the fairness of the conduct of the reviews, and also the values protected by the other rights which were engaged. It was therefore important for the board to act compatibly with it. The board did not. In failing to do so, the board breached Mr Kracke's human right to a fair hearing. Mr Kracke is entitled to the tribunal's clear expression of disapproval of the breach, and to vindication of his rights, by the remedy of a formal declaration. Society has an interest in the declaration being made. A mere finding of breach would not be enough.

The board has improved its listing practices. But on the evidence delayed reviews are common after being a problem for some time, of which the tribunal should express its disapproval.

For those reasons there will be a declaration of breach against the board.

J CONCLUSION

Gary Kracke sought to establish that the orders by which he is being given involuntary medical treatment are invalid. He does not want to take the strong psychotropic drugs because he doesn't think he needs them and they have adverse side-effects.

He relied on the mandatory requirement in the Mental Health Act 1986 that the Mental Health Review Board review treatment orders within a specified time. Involuntary treatment orders must be reviewed within 12 months. Community treatment orders must be reviewed within eight weeks.

As in other cases, the board failed to conduct the reviews within the specified time. Indeed it did so very late. This is a summary:

the involuntary treatment order dated 1 April 2005 should have been periodically reviewed twice between 19 April 2006 and 19 April 2008, but was not reviewed until 3 June 2008

the second extended community treatment order dated 15 February 2007 should have been reviewed by 12 April 2007, but it was not reviewed at all before it was replaced by the third extended order on 17 January 2008, which should have been reviewed by 13 March 2008, but was not until 3 June 2008

When the board confirmed the orders, Mr Kracke appealed to the tribunal.

Mr Kracke submitted the treatment orders became invalid immediately the time for conducting the reviews expired. I have rejected that submission. The purpose of the Mental Health Act is to protect the health of mentally ill patients by giving them medical treatment which they need. A psychiatrist has certified that Mr Kracke needs the treatment he is being given. The board's failure to conduct the reviews does not change that fact. But it is very concerning that the review safeguard did not work as it should have in his case and in others.

Mr Kracke also submitted the board breached his human rights by compelling him to accept the involuntary medical treatment and failing to conduct the reviews within time. That gave rise to a test case on certain important aspects of the operation of the Charter of Human Rights and Responsibilities Act 2006. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission intervened. I gave leave to appear to the Human Rights Law Resource Centre. I was assisted with highly considered submissions from all parties and intervenors which were indispensable for my analysis of the issues in the case.

After examining the international jurisprudence, I set out the correct principles for applying the Charter. Then I applied those principles to Mr Kracke's case.

For all practical purposes, the Charter came into force on 1 January 2008. Mr Kracke relied on the Charter to say treatment orders not reviewed within time and made before that date breached his human rights. I have rejected that submission. The Charter does not apply retrospectively to change the legal character of past events. I did take the past delay into account in determining whether his human rights were breached after the Charter came into force.

Questions arose about the application of the Charter to courts and tribunals. Following an earlier decision of the Supreme Court of Victoria, I have decided courts and tribunals are bound to act compatibly with all of the human rights in the Charter when deciding cases that are administrative in nature in the public law sense. The administrative jurisdiction of the courts is relatively small. Their jurisdiction is mainly judicial. The administrative jurisdiction of tribunals is relatively large. They do some but not as much judicial work.

I have also decided courts and tribunals are bound to act compatibly with certain human rights whatever is the nature of the jurisdiction they are exercising. These are particular rights concerning the powers exercised by the court or tribunal specifically in respect of the proceeding before it. A good example is the human right to a fair hearing in s 24(1) of the Charter. That and the other rights in this category must be observed by courts and tribunals in both administrative and judicial cases.

The tribunal's cases fall into two broad categories, the civil and the administrative. That is reflected in its name as the Victorian Civil and Administrative Tribunal. In many civil cases, such as consumer and trader disputes, the tribunal exercises judicial powers. In those cases, the tribunal is bound (for example) to act compatibly with the human right in the Charter to a fair hearing.

When the tribunal reviews government decisions, such as the present decision of the board, it is exercising its review jurisdiction. The review jurisdiction of the tribunal is administrative in nature in the public law sense. Exercising the review jurisdiction, the tribunal is bound to act compatibly with all of the human rights in the Charter. There may be individual exceptions.

In the present case, the tribunal is conducting an administrative review of the decisions of the board. Therefore it is bound by all of the human rights in the Charter.

Under the same principles, so was the board. It was conducting an administrative review of the treatment orders. The board's functions are entirely administrative. It is wholly bound as a public authority under the Charter to act compatibly with all the human rights of mentally ill people.

I have also examined the principles by which, under the Charter, all Victorian legislation must be interpreted compatibly with human rights, so far as possibly consistently with their purpose.

Returning to Mr Kracke's case, I decided several of his human rights were being limited by his involuntary treatment. Some of those rights are engaged because, if a patient does not take their medication, they can be put in detention. Others are engaged by having to take the medication itself. This is a summary of the rights engaged:

making an involuntary treatment order engages the patient's rights to freedom from medical treatment without their full, free and informed consent (s 10(c)), to freedom of movement (s 12), to privacy (s 13(a)) and the various aspects of the right to liberty in (s 21(1), (2) and (3))

making a community treatment order engages a patient's rights to freedom from medical treatment without their full, free and informed consent (s 10(c)), to freedom of movement (s 12) and to privacy (s 13(a))

reviewing (or failing to review) an involuntary or community treatment order engages the same rights as making an involuntary treatment order and the right to a fair hearing (s 24(1))

These rights reflect the protection which the Charter gives to Mr Kracke's interest in his personal integrity and autonomy, both physical and mental, his private capacity for individual decision-making about matters affecting him, his development and relations as a person and member of society and, most importantly of all, his unique human dignity.

To decide whether Mr Kracke's human rights are being breached, it is necessary to take into account that, under the Charter, human rights are not absolute and can be limited. It is sometimes necessary to balance the interests of individuals and groups with those of society as a whole. But any limitations must be under law, reasonable and demonstrably justified. In particular, the limitations must not be arbitrary, must have safeguards where appropriate and must be proportionate to the legitimate purpose of meeting pressing and substantial social needs.

Applying these principles to this case, I decided the limitations on Mr Kracke's human rights imposed by giving him involuntary treatment were demonstrably justified because the treatment was only given on grounds of medical necessity and was subject to various safeguards.

Of the safeguards, review by the board of treatment orders is one of the more important. The function of reviews is to provide mandatory, independent oversight of the system for making involuntary and community treatment orders. Reviews deliberately do not depend on patient initiation.

In Mr Kracke's case, the board did not conduct the reviews within the specified time. But this represented the failure to that extent of one safeguard only. The system operated in Mr Kracke's interests overall. For example:

his treatment orders were made on strict criteria and according to principles requiring the least restrictive and intrusive treatment, and treatment in the community where possible

he had to be regularly monitored by his treating psychiatrist

he could have exercised an independent appeal right

his treatment orders expired within 12 months unless renewed

A system compatible with human rights because it contains many such safeguards is not necessarily made incompatible with human rights because of the failure of one. That applies to this case.

I therefore decided the failure of the board to conduct the reviews within time did not make the treatment orders a breach of Mr Kracke's human rights. Put another way, I decided unreviewed treatment orders did not have to be considered invalid to be compatible with human rights. The treatment orders are valid, despite having been reviewed outside the statutory time limits. I answer the preliminary questions accordingly.

It was then necessary to decide whether the right to a fair hearing in s 24(1) of the Charter applied only to judicial proceedings or also to administrative proceedings in courts and tribunals. I decided it applied to both. Therefore the board was bound to act compatibly with that right, as am I sitting in the tribunal.

That led to the issue whether the board had breached Mr Kracke's human right to a fair hearing by conducting the reviews so late. I decided that, as part of the human right to a fair hearing applying to courts and tribunals, hearings must be conducted within a reasonable time. What is reasonable depends on such factors as the complexity of the case, the importance of the case to the applicant, any delay caused by the applicant and the explanation for the delay.

After considering these factors, I decided the board had breached Mr Kracke's human right to a fair hearing. The case was not unusually complex and it was very important to the protection of Mr Kracke's human rights. While Mr Kracke's requests for adjournments did contribute to the delay, the board's explanation for not conducting the reviews earlier was administrative oversight. After adjourning the review hearing to a date to be fixed, it lost track of Mr Kracke's case. That was not excusable. The board later thought he was AWOL when he was not. That made matters worse. I did not accept administrative oversight as a reasonable explanation for failing to conduct the reviews for such a long period, especially because their purpose was to provide an important safeguard for the protection of the interests of vulnerable people.

I decided the board had breached Mr Kracke's human right to a fair hearing of the reviews by failing to conduct them within a reasonable time.

The circumstances revealed that failing to conduct reviews within the specified times was common, and had been for some time. To help in addressing that problem, I clarified the statutory obligations of the board in respect of reviews. In deciding the board had breached Mr Kracke's human right to a fair hearing, I held the time limits for conducting reviews were not optional. Must means must. Everybody who plays a part in the system for giving involuntary treatment to mentally ill patients has to work within the time limits. This includes treating practitioners and other helping professionals, for they give necessary reports to the board, those assisting patients, including their legal and other advisors, as well as the board, who has to arrange its administration and manage its cases accordingly.

On the question of remedies, a preliminary objection was put by the contradictor that Mr Kracke had to take his case to the Supreme Court of Victoria. It was submitted he could not raise in the tribunal arguments about the validity of the treatment orders, including those based on human rights.

It is very important for all courts and tribunals to consider human rights arguments as part of the case if that is at all possible. It is the responsibility of courts and tribunals to do so, for thereby they uphold the rule of law and carry out their functions under the Charter. People should be able to raise all issues in the one justice institution at the one time. Splitting cases costs time and money and puts justice beyond the reach of many people. The tribunal was established to provide easy access to justice for the community, and that means as cheaply and promptly as possible. Therefore the tribunal must, if it can, decide the case applying the whole of the relevant law, including human rights. As in most cases, in the present case the tribunal has full authority to make decisions on all issues of law, jurisdiction, fact and merit, including human rights. I therefore rejected the preliminary objection.

Finally, I have decided it is important to exercise the tribunal's power to make a declaration of breach of human rights. Mr Kracke is entitled to vindication and the tribunal needs to express its disapproval of the breach. I also took into account the interest of the community in seeing that human rights are upheld, for this contributes to the maintenance of the rule of law in democratic society. The declaration will also bring attention to the need to address the general issue of delay in conducting reviews of the involuntary treatment of mentally ill people.

The order of the tribunal will be a declaration that the Mental Health Review Board breached Gary Kracke's human right to a fair hearing under s 24(1) of the Charter of Human Rights and Responsibilities Act 2006 by failing to conduct the reviews of his involuntary and community treatment orders under s 30(3) and (4) of the Mental Health Act 1986 within a reasonable time.

[1] International Covenant on Civil and Political Rights, opened for signature 16 December 1966,

999 UNTS 171 (entered into force 23 March 1976).

[2] Ronald Dworkin, Life's Dominion (1993) 239.

[3] [1991] 2 SCR 779, 812.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[5] See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised ed, 2005) XXVI [17]-[18].

[6] [1979] UKPC 21; [1980] AC 319, 328.

[7] Ibid.

[8] [1984] 2 SCR 145, [16].

[9] Edwards v Attorney-General for Canada [1930] AC 124, 136 per Lord Sankey, in reference to the Canadian Constitution.

[10] Judge v Canada, Communication no 829/1998, CCPR, 78th sess, UN Doc CCPR/C/78/D/829/1998 (2002) [10.3].

[11] [1978] ECHR 2; (1979) 2 EHRR 1.

[12] Ibid [31].

[13] [1989] ECHR 14; (1989) 11 EHRR 439.

[14] Ibid [103].

[15] See Hunter v Southam Inc [1984] 2 SCR 145, [16]-[19]; R v Oakes [1986] 1 SCR 103, [28]; and Canada (Attorney-General) v Hislop 1 [2007] 1 SCR 429, [94].

[16] Minister of Transport v Noort [1992] 3 NZLR 260, 268.

[17] Tranchemontagne v Ontario (Director, Disability Support Program) [2006] 1 SCR 513, [33].

[18] See eg Sepet v Secretary of State for the Home Department [2003] UKHL 15; [2003] 1 WLR 856, [15].

[19] The New Zealand Bill of Rights Act: A Commentary (2005) 76.

[20] The authorities are collected in Tomasevic v Travaglini [2007] VSC 337; (2007) 17 VR 100, [73] and described further below.

[21] Tomasevic v Travaglini [2007] VSC 337; (2007) 17 VR 100, [73]; Ragg v Magistrates' Court of Victoria [2008] VSC 1; (2008) 18 VR 300, [41]–[44].

[22] See generally Murray Gleeson, "The meaning of legislation: context, purpose and respect for fundamental rights" (speech delivered at the Victoria Law Foundation Oration, Melbourne, 31 July 2008).

[23] (1997) 187 CLR 384, 408.

[24] See generally Tomasevic v Travaglini [2007] VSC 337; (2007) 17 VR 100, [73].

[25] [2006] VSCA 85; (2006) 15 VR 22, [75].

[26] Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs [1992] HCA 64; (1992) 176 CLR 1, 38.

[27] Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273, 287.

[28] [2004] HCA 39; (2004) 220 CLR 1, 91-96; cf Gleeson CJ at 27-30.

[29] [1994] HCA 15; (1994) 179 CLR 427, 437.

[30] [1908] HCA 63; (1908) 7 CLR 277, 304 (footnote omitted).

[31] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [60] per Lord Millett.

[32] Solomen v CCE [1967] 2 QB 116; R v Secretary for the Home Department; Ex parte Brind [1991] 1 AC, Salomon v Commissioners of Customs & Excise 696.

[33] R v Secretary of State for the Home Department; Ex parte Brind [1991] UKHL 4; [1991] 1 AC 696; R v Lyons [2002] EWHC 409; [2003] 1 AC 976 [13]; R (Hurst) v London North District Coroner [2007] EWCA Civ 1262; [2007] 2 WLR 726, [17]-[18], [78]-[79].

[34] Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) 6ff.

[35] [1920] 1 KB 829.

[36] Ibid 836.

[37] Derbyshire County Council v Times Newspapers Ltd [1992] UKHL 6; [1993] AC 534, 551.

[38] Director of Public Prosecutions v Jones [1999] UKHL 5; [1999] 2 AC 240, 257, 259, 280, 287.

[39] [1997] UKHL 37; [1998] AC 539.

[40] Ibid 573, 587.

[41] Sir Peter Benson Maxwell, On the interpretation of statutes (4th ed, 1905).

[42] [1988] AC 529, 587.

[43] [1855] EngR 324; (1855) 20 Beav 269, 278.

[44] [1999] UKHL 33; [2000] 2 AC 115, 131.

[45] [2001] UKHL 26; [2001] 2 AC 532, [12] per Lord Bingham; Lords Steyn, Cooke, Hutton and Scott wrote concurring judgments or agreed.

[46] [2006] EWHC 3165; [2006] 2 AC 307.

[47] Ibid [15]. There is a question whether the principle requires express words or whether a necessary implication is sufficient: see Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) 11.

[48] [2001] UKHL 26; [2001] 2 AC 532.

[49] Ibid [30].

[50] [2001] UKHL 25; [2002] 1 AC 45, [39].

[51] [2004] UKHL 30; [2004] 2 AC 557.

[52] Ibid [60].

[53] [2009] HCA 4; (2009) 83 ALJR 327, [47].

[54] Ibid, referring to R v Secretary of State for the Home Department; Ex parte Simms [1999] UKHL 33; [2000] 2 AC 115, 131 and R v Secretary of State for the Home Department; Ex parte Pierson [1997] UKHL 37; [1998] AC 539, 587.

[55] Murray Gleeson, "The meaning of legislation: context, purpose and respect for fundamental rights" (speech delivered at the Victoria Law Foundation Oration, Melbourne, 31 July 2008) 23.

[56] Ibid 24.

[57] Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40; (2004) 221 CLR 309, [21].

[58] K-Generation Pty Ltd v Liquor Licensing Court [2009] HCA 4; (2009) 83 ALJR 327, [47].

[59] Court of Final Appeal of the Hong Kong Special Administrative Region, FACC No. 4 of 2005, 31 August 2006, (unreported), [65].

[60] [2007] NZSC 7; [2007] 3 NZLR 1, [6].

[61] Section 1(2).

[62] Section 28(1).

[63] Section 28(3).

[64] Section 31.

[65] [2007] NZSC 7; [2007] 3 NZLR 1.

[66] Ibid [88] (footnotes omitted).

[67] Ibid [88]-[92].

[68] Ibid [89].

[69] [1986] 1 SCR 103.

[70] [2007] NZSC 7; [2007] 3 NZLR 1, [22] (footnotes omitted).

[71] Section 39 provides: "(1) When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[72] Ibid [6].

[73] Ibid.

[74] Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167, [19] per Lord Bingham, referring to R v Oakes [1986] 1 SCR 103, 139 per Dickson CJ and R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 AC 368, [20] per Lord Bingham.

[75] [2001] EWCA Civ 595; [2002] QB 48, [75].

[76] [2008] VSCA 265, [116].

[77] [2001] EWCA Civ 595; [2002] QB 48, [67].

[78] [1995] ZACC 1; 1995 (2) SA 642.

[79] Chaskalson P, Ackermann JJ, Didcott, Kriegler, Langa , Madala, Mahomed, Mokgoro, O'Regan, Sachs JJ and Kentridge AJ.

[80] Ibid [21].

[81] [1995] ZACC 3; 1995 (3) SA 391.

[82] Ibid [100].

[83] 1999 (1) SA 6, [15], [33]-[35].

[84] 1996 (1) SA 984.

[85] [1995] ZACC 1; 1995 (2) SA 642.

[86] [1995] ZACC 3; 1995 (3) SA 391.

[87] 1996 (1) SA 984, [44].

[88] Ibid [45].

[89] [1985] 1 SCR 295.

[90] Ibid [116]-[117].

[91] See Sauve v Canada (Chief Electoral Officer) [2002] 3 SCR 519, [11].

[92] [1995] ZACC 7; 1995 (4) SA 631.

[93] Ibid [9].

[94] 2001 (4) SA 491.

[95] Ibid [7].

[96] See eg Nyathi v Member of the Executive Council for the Department of Health Gauteng 2008 (5) SA 94, [120] approving Coetzee v Government of the Republic of South Africa [1995] ZACC 7; 1995 (4) SA 631, [9].

[97] South African Constitutional Law: The Bill of Rights (2nd ed, 2005) [30.3.1].

[98] Ibid [30.3.2].

[99] [2002] 2 AC 545.

[100] Ibid [35] (including heading VII).

[101] Ibid [36].

[102] Ibid [37]-[41].

[103] Ibid [42].

[104] [2003] 1 AC 681, 704 per Lord Bingham and 720 per Lord Hope.

[105] [2002] 2 AC 545, [186]; see also [189]-[190].

[106] [2003] 1 AC 681.

[107] Ibid 704.

[108] Ibid 719.

[109] [2003] UKHL 40; [2004] 1 AC 816.

[110] Ibid [94].

[111] Ibid [103].

[112] [2006] Ch 79.

[113] Ibid [119].

[114] Ibid [120].

[115] [2004] UKHL 10; [2004] 2 AC 182.

[116] Ibid [6]-[20].

[117] Carolyn Evans and Simon Evans, Australian Bills of Rights (2008) 165.

[118] Ibid [5.18].

[119] Ibid.

[120] Alistair Pound and Kylie Evans, An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities (2008) [830].

[121] Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

[122] Ibid.

[123] Ibid.

[124] Ibid.

[125] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2830.

[126] The Charter is Part I of the Constitution Act 1982 (Canada).

[127] S v Makwanyane [1995] ZACC 3; 1995 (3) SA 391, [102]; Moise v Greater Germiston Transitional Local Council 2001 (4) SA 481, [19]; R v Oakes [1986] 1 SCR 103, [66]; Minister of Transport v Noort [1992] 3 NZLR 260, 283; Marcic v Thames Water Utilities [2003] EWCA Civ 1559; [2004] 2 AC 42, [37]; R v Shayler [2002] UKHL 11; [2003] 1 AC 247, [45], [59].

[128] R v Oakes [1986] 1 SCR 103, [67].

[129] Ibid.

[130] See also s 8(4) in relation to limiting equality before the law.

[131] [1986] 1 SCR 103.

[132] Alistair Pound and Kylie Evans, An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities (2008) [960].

[133] [1986] 1 SCR 103, [69]-[71].

[134] Human Rights Consultation Committee, Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) 47.

[135] [1976] ECHR 5; (1979) 1 EHRR 737.

[136] [1979] ECHR 1; (1979) 2 EHRR 245.

[137] [1976] ECHR 5; (1979) 1 EHRR 737.

[138] Ibid [48] (footnotes omitted).

[139] Ibid (footnotes omitted).

[140] Ibid [49].

[141] [1979] ECHR 1; (1979) 2 EHRR 245.

[142] Ibid [62].

[143] See for example R v Shayler [2002] UKHL 11; [2003] 1 AC 247, [23] per Lord Bingham.

[144] [1998] UKPC 30; [1999] 1 AC 69.

[145] Ibid 80.

[146] [2007] UKHL 11; [2007] 2 AC 167.

[147] [2007] UKHL 11; [2007] 2 AC 167, [19].

[148] [1986] 1 SCR 103, [70].

[149] [2007] UKHL 11; [2007] 2 AC 167, [19].

[150] [2004] UKHL 27; [2004] 2 AC 368, [20].

[151] Ibid [20].

[152] [2005] UKHL 58; [2006] 2 AC 148.

[153] Ibid [32]; see also Lord Hope at [89].

[154] Ibid [32].

[155] Ibid [33].

[156] Ibid [90].

[157] [1986] 1 SCR 103.

[158] Ibid [69]-[71].

[159] Canada (Attorney-General) v Hislop [2007] 1 SCR 429 where at [44] the Supreme Court gave its current understanding of the Oakes test: "the Oakes test may be formulated as two main tests with subtests under the second branch, but it may be easier to think of it in terms of four independent tests. If the legislation fails under any one test, it cannot be justified. The four tests ask the following questions:

- Is the objective of the legislation pressing and substantial?

- Is there a rational connection between the government's legislation and its objective?

- Does the government's legislation minimally impair the Charter right or freedom at stake?

• Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?"

[160] [1995] ZACC 3; 1995 (3) SA 391, especially [104].

[161] [1986] 1 SCR 103.

[162] 2000 (3) SA 1, [32] (footnote omitted).

[163] Cf Sabet v Medical Practitioners Board of Victoria [2008] VSC 346, [185].

[164] H Cheadle, D Davis and N Haysom, South African Constitutional Law: the Bill of Rights (2nd ed, 2005) [30.4.3].

[165] [1986] 1 SCR 103, [69].

[166] Carolyn Evans and Simon Evans, Australian Bills of Rights (2008) 189-190.

[167] H Cheadle, D Davis and N Haysom, South African Constitutional Law: the Bill of Rights (2nd ed, 2005) [30.4.4].

[168] [2006] ZACC 8; 2006 (5) SA 250.

[169] Ibid [65].

[170] Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

[171] Alistair Pound and Kylie Evans, An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities (2008) [920].

[172] S v Meaker 1998 (8) BCLR 1038, [50].

[173] [1986] 1 SCR 103, [69], [70].

[174] [1995] ZACC 3; 1995 (3) SA 391.

[175] Ibid [184].

[176] [1986] 1 SCR 103.

[177] Ibid [70].

[178] R v Sharpe [2001] 1 SCR 45, [96]-[97]; Libman v Quebec (Attorney-General) [1997] 3 SCR 569, [59]-[62]; R v Chaulk [1990] 3 SCR 1303, [59]-[62].

[179] S v Manamela 2000 (3) SA 1, [34] per O'Regan J and Cameron AJ (the other judges concurred on this point: [94]-[95]).

[180] See eg R (Clays Lane Housing Co-operative Ltd) v The Housing Corporation [2005] 1 WLR 2229, [25]; Jack Beatson et al regard the law as unsettled: Human Rights: Judicial Protection in the United Kingdom (2008) [3-68].

[181] [1995] 3 SCR 199, [160].

[182] [2008] VSC 346, [188].

[183] Canadian Charter of Rights and Freedoms, s 1.

[184] New Zealand Bill of Rights Act 1990, s 5.

[185] Constitution of the Republic of South Africa Act 1996, s 36(1).

[186] Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

[187] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2829.

[188] [2006] EWHC 3165; [2006] 2 AC 307.

[189] Ibid [34].

[190] Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, [3].

[191] Ibid [4].

[192] Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2nd ed, 2004) chapter 16.

[193] Communication no 488/1992, CCPR, 50th sess, UN Doc CCPR/C/50/D/488/1992 (1994).

[194] Ibid [8.2].

[195] Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, [4].

[196] Communication no 488/1992, CCPR, 50th sess, UN Doc CCPR/C/50/D/488/1992 (1994), [8.3].

[197] [1979] ECHR 1; (1979) 2 EHRR 245.

[198] Ibid [47].

[199] Ibid.

[200] Ibid [49].

[201] [1979] ECHR 4; (1979) 2 EHRR 387.

[202] Ibid [39].

[203] Ibid [39].

[204] Ibid. In Loizidou v Turkey [1995] ECHR 10; (1995) 20 EHRR 99, [76] the court said the purpose of article 5 was "to protect individuals from arbitrariness".

[205] Ibid.

[206] Ibid [45].

[207] [1984] ECHR 10; (1985) 7 EHRR 14.

[208] Ibid [67]. As the court said in Amuur v France [1996] ECHR 25; (1996) 22 EHRR 533, [50] to satisfy article 5(1), "the quality of the law [requires] it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention."

[209] [1984] ECHR 10; (1985) 7 EHRR 14, [67].

[210] Ibid.

[211] Ibid [68]. See further Gillow v United Kingdom (1986) 11 EHRR 335, [52] and Amuur v France [1996] ECHR 25; (1996) 22 EHRR 533, in which it was held that the law "must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness."

[212] [1984] ECHR 10; (1985) 7 EHRR 14, [80].

[213] [1988] ECHR 2; (1989) 11 EHRR 259.

[214] Ibid [61].

[215] [1979] ECHR 4; (1979) 2 EHRR 387.

[216] (2005) 40 EHRR 32.

[217] Ibid [114]-[115].

[218] Ibid [119].

[219] Ibid [120].

[220] (2006) 43 EHRR 6.

[221] Ibid [117].

[222] Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) [3-21].

[223] Ibid [2-158].

[224] Hentrich v France [1994] ECHR 29; (1994) 18 EHRR 440, [42].

[225] Gillow v United Kingdom (1989) 11 EHRR 335, [51].

[226] Olsson v Sweden [1988] ECHR 2; (1989) 11 EHRR 259, [62].

[227] [2000] UKHL 48; [2001] 2 AC 19.

[228] Ibid 38; approved R v Offen [2000] EWCA Crim 96; [2001] 1 WLR 253, 276 per Lord Woolf.

[229] [2005] UKHL 58; [2006] 2 AC 148.

[230] Ibid [34].

[231] Ibid [92] per Lord Hope.

[232] [2006] EWHC 3165; [2006] 2 AC 307.

[233] Ibid [31] per Lord Bingham.

[234] Ibid [34].

[235] [1985] 17 DLR (4th) 503, 506.

[236] (1987) 31 CCC (3d) 97.

[237] Howland CJO, Brooke, Martin, Lacourciere and Houlden JJA.

[238] Ibid [126].

[239] [2007] NZSC 7; [2007] 3 NZLR 1.

[240] Ibid [180] (footnotes omitted). Applying the Strasbourg jurisprudence, Elias CJ applied the same principles in Brooker v Police [2007] NZSC 30; [2007] 3 NZLR 91, [39].

[241] [1992] 1 NZLR 29.

[242] Ibid 40-41.

[243] [1992] 1 NZLR 363.

[244] Ibid 374.

[245] (1989) 67 CR (3d) 252, 274.

[246] Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls).

[247] Ibid.

[248] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2844.

[249] Ibid.

[250] Ibid.

[251] See the definition of "statutory provision" in s 3(1).

[252] See "human rights" in s 3(1).

[253] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2844.

[254] Ibid 2844-2845.

[255] [2004] UKHL 30; [2004] 2 AC 557, [106].

[256] Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816, [95] per Lord Hope.

[257] [2004] UKHL 30; [2004] 2 AC 557.

[258] [2006] Ch 79.

[259] [2008] VSCA 265, [106].

[260] [1989] 1 SCR 1038; applied Societe des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada [2008] SCC 15, [20].

[261] Ibid 1078.

[262] See Hein v Director (CFCS) & Carrol [2006] BCSC 818, [32] where Chamberlent J held it was not the constitutionality of the provision conferring a "broad discretion" that had to be examined. Applying Slaight, the provision had to be interpreted as only authorising a decision consistently the Charter. Therefore the court was "dealing with the decision ... and not the statute itself": ibid [33].

[263] [2004] UKHL 30; [2004] 2 AC 557.

[264] Human Rights Consultation Committee, Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) 82-83.

[265] [2008] ACT AAT 19, [78] per Peedom P.

[266] Sheldrake v Director of Public Prosecutions [2004] EWCA Civ 6; [2005] 1 AC 264, [28] per Lord Bingham.

[267] In re S [2002] UKHL 10; [2002] 2 AC 291, [39]-[40].

[268] Sheldrake v Director of Public Prosecutions [2004] EWCA Civ 6; [2005] 1 AC 264, [28] per Lord Bingham.

[269] [2000] 2 NZLR 9.

[270] Ibid [17].

[271] [2002] 2 NZLR 754.

[272] Ibid [13].

[273] [2002] UKHL 10; [2002] 2 AC 291.

[274] [2004] UKHL 30; [2004] 2 AC 557.

[275] [2002] UKHL 10; [2002] 2 AC 291, [39]-[40].

[276] [2004] UKHL 30; [2004] 2 AC 557.

[277] [2001] 1 AC 27.

[278] Ibid [33].

[279] Ibid .

[280] Ibid [41].

[281] Ibid [35].

[282] R v Lambert [2002] 2 AC 545, 585 per Lord Hope; In re S [2002] UKHL 10; [2002] 2 AC 291, [39] per Lord Nicholls.

[283] [2002] 2 AC 545, 585.

[284] [2001] EWCA Civ 595; [2002] QB 48, 72.

[285] R v Lambert [2002] 2 AC 545, 585 per Lord Hope; Bellinger v Bellinger [2003] UKHL 21; [2003] 2 AC 467, 486 per Lord Hope; In re S [2002] UKHL 10; [2002] 2 AC 291, 313 per Lord Nicholls.

[286] Poplar Housing Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48, 72 per Lord Woolf CJ; In re S [2002] UKHL 10; [2002] 2 AC 291, [37] per Lord Nicholls.

[287] [2002] UKHL 10; [2002] 2 AC 291, [37].

[288] [2004] UKHL 30; [2004] 2 AC 557, [50].

[289] [2002] 2 AC 545, 585.

[290] R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45, 67 per Lord Steyn and 87 per Lord Hope; In re S [2002] UKHL 10; [2002] 2 AC 291, [37] per Lord Nicholls; Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [29] per Lord Nicholls, [44] per Lord Steyn and [67] per Lord Millett.

[291] [2002] UKHL 10; [2002] 2 AC 291, [37].

[292] [2004] UKHL 30; [2004] 2 AC 557, 571.

[293] R v Lambert [2002] 2 AC 545, 585 per Lord Hope.

[294] [2004] UKHL 30; [2004] 2 AC 557.

[295] [2008] VSCA 265, [106].

[296] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, 571 per Lord Nicholls.

[297] [2001] UKHL 25; [2002] 1 AC 45, [45].

[298] [2004] UKHL 30; [2004] 2 AC 557, [123].

[299] [2004] UKHL 30; [2004] 2 AC 557.

[300] [2002] EWCA Crim 747; [2003] 1 AC 837, [30].

[301] [2002] 2 AC 545, 585.

[302] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [33] per Lord Nicholls.

[303] Ibid [121] per Lord Rodger.

[304] Ibid [116] per Lord Rodger.

[305] Sheldrake v Director of Public Prosecutions [2004] EWCA Civ 6; [2005] 1 AC 264, [28] per Lord Bingham.

[306] [2004] UKHL 30; [2004] 2 AC 557, [35].

[307] [2003] UKHL 40; [2004] 1 AC 816, [61]. See generally Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557.

[308] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [67] per Lord Millett.

[309] Ibid.

[310] R v Offen [2000] EWCA Crim 96; [2001] 1 WLR 253.

[311] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [122] per Lord Rodger.

[312] Poplar Housing Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48, 72 per Lord Woolf CJ.

[313] R v Lambert [2002] 2 AC 545, 585 per Lord Hope.

[314] Poplar Housing Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48, 73 per Lord Woolf CJ.

[315] R v Lambert [2002] 2 AC 545, 585 per Lord Hope.

[316] International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2003] QB 728, 758 per Simon Brown LJ.

[317] Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557, [49] per Lord Steyn.

[318] In re S [2002] UKHL 10; [2002] 2 AC 291.

[319] See s 31(3)-(9).

[320] Sheldrake v Director of Public Prosecutions [2004] EWCA Civ 6; [2005] 1 AC 264, [28] per Lord Bingham.

[321] R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45, [44] per Lord Steyn.

[322] Section 10(c).

[323] Section 13(a).

[324] Section 12.

[325] Section 21(1) and (3).

[326] Section 7(1).

[327] Carolyn Evans and Simon Evans, Australian Bills of Rights (2008) 12-13.

[328] See s 35(a) of the Interpretation of Legislation Act 1984.

[329] Human Rights Act 1998 (UK), s 6(1) and (3).

[330] New Zealand Bill of Rights Act 1990 (NZ), s 3(a).

[331] Constitution of the Republic of South Africa 1996 (SA), s 8(1).

[332] Section 4(1)(j).

[333] Dubois v R [1985] 2 SCR 350, [43].

[334] [2007] VSC 2; (2007) 16 VR 168, 177.

[335] [2007] VSC 337; (2007) 17 VR 100, [139].

[336] Unreported, Supreme Court of Victoria, Court of Appeal, Neave JA and Williams AJA, 3 April 2009, [53].

[337] Section 9.

[338] Section 15.

[339] Section 4(l) of the Public Administration Act defines "public official" to include "the holder of a statutory office" but not including "a judge, a magistrate, a coroner appointed under the Coroners Act 1985 or a member of VCAT".

[340] Ibid; members of the board are not included in the exclusions.

[341] YL v Birmingham City Council [2007] UKHL 27; [2008] 1 AC 95, [167] per Lord Neuberger.

[342] [2008] VSC 346, [119]–[127]; applied Seachange Management Pty Ltd v Bevnol Constructions and Developments Pty Ltd [2008] VCAT 2629, [50] per Judge Ross, Vice President.

[343] Grassby v R [1989] HCA 45; (1989) 168 CLR 1, 11-12; Lamb v Moss [1983] FCA 254; (1983) 76 FLR 296, 321.

[344] Ibid; Sankey v Whitlam [1978] HCA 43; (1978) 142 CLR 1, 83.

[345] Hilton v Wells [1985] HCA 16; (1985) 157 CLR 57, 78.

[346] See R v Williams [2007] VSC 2; (2007) 16 VR 168, [50] per King J.

[347] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2825.

[348] See In the Review of P [2009] VMHRB 1, [51] in which, after the decision in the present case, the legal member decided Sabet v Medical Practitioner's Board of Victoria [2008] VSC 346 was distinguishable because the board acts not administratively but quasi-judicially.

[349] R v Perkins [2002] VSCA 132, [16] per Vincent JA (Phillips CJ and Chernov JA agreeing); Simjanoski v La Trobe University [2004] VSCA 125; (2004) 21 VAR 299, [4] per Callaway JA (Buchanan JA agreeing), applying Energy Brix Australia Corporation Pty Ltd v National Logistics Co-ordinators (Morwell) Pty Ltd [2002] VSCA 113; (2002) 5 VR 353, [37]; Collection House Ltd v Taylor [2004] VSC 49; (2004) 21 VAR 333, [26] per Nettle J; Pong Property Development Pty Ltd v Strangio (2005) VAR 128, [57] per Ashley J.

[350] Strait Settlements Restaurant Pty Ltd v Bell [2005] VCAT 957, [16] per Macnamara DP; see also Innis Ltd v Demos [1997] VDBT 91; (1997) 12 VAR 228, 234 per Member Cremean.

[351] Guss v Aldy Corp Pty Ltd [2008] VCAT 912, [29] per Vassie SM.

[352] Re Maltall Pty Ltd and Bevendale Pty Ltd (1998) 14 VAR 368, 383 per Macnamara DP.

[353] Herald and Weekly Times Ltd v Victorian Civil and Administrative Tribunal [2006] VSCA 7; (2006) 24 VAR 174, [27] per Maxwell P (Eames and Nettle JJA concurring); R v Perkins [2002] VSCA 132, [16] per Vincent JA (Phillips CJ and Chernov JA concurring).

[354] Herald and Weekly Times Pty Ltd v State of Victoria [2006] VSCA 146, [19].

[355] Australian Postal Commission v Dao (No 2) (1986) 6 NSWLR 497, 516 per McHugh JA.

[356] For example, for the purposes of the provisions of the Corporations Act 2001 (Cth) which prevent a person from beginning or pursuing a proceeding in a "court" against a company in external administration without leave: Moorabool Shire Council v Taitapanui [2002] VSC 418. See also Volpe v Greenhill Homes Pty Ltd (1997) 12 VAR 437, 444 per Judge Davey (the former Domestic Building Tribunal under the Domestic Building Contracts and Tribunal Act 1995 was a "court" for the purposes of the Fair Trading Act 1985.

[357] This general principle is subject to the federal constitutional constraint that a court of a state cannot be given jurisdiction which is incompatible with its integrity, independence and impartiality as a court invested with federal jurisdiction under Chapter III of the Constitution: Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51, 102-103.

[358] [1994] FCA 1294; (1994) 52 FCR 454, 463.

[359] [1983] FCA 254; (1983) 76 FLR 296, 321.

[360] Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson [1892] 1 QB 431, 452.

[361] Lamb v Moss [1983] FCA 254; (1983) 76 FLR 296, 321 per Bowen CJ, Sheppard and Fitzgerald JJ.

[362] Commonwealth of Australia v Hospital Contribution Fund of Australia [1982] HCA 13; (1982) 150 CLR 49; see also Aston v Irvine [1955] HCA 53; (1955) 92 CLR 353, 365 and Trust Company of Australia Ltd v Skiwing Pty Ltd [2006] NSWCA 185; (2006) 66 NSWLR 77, 85 per Spigelman CJ.

[363] [1981] FCA 85; (1981) 53 FLR 229.

[364] Ibid 235-236.

[365] Per Lord Simonds, speaking for the Privy Council in Labour Relations Board of Sasdatchewan v John East Iron Works Ltd. [1949] AC 134, 148.

[366] Minister for Industry and Commerce v Tooheys Ltd [1982] FCA 128; (1982) 60 FLR 325, 331 per Bowen CJ, Northrop and Lockart JJ.

[367] [1943] HCA 47; (1943) 67 CLR 58, 82.

[368] Attorney-General (Commonwealth) v Breckler [1999] HCA 28; (1999) 197 CLR 83, 109 following Federal Commissioner of Taxation v Monroe [1926] HCA 58; (1926) 38 CLR 153, 175.

[369] Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; (1995) 183 CLR 245, 258.

[370] Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd [1987] HCA 29; (1987) 163 CLR 140, 148.

[371] Huddart Parker and Co Pty Ltd v Moorehead [1909] HCA 36; (1908) 8 CLR 330, 357; Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd [1987] HCA 29; (1987) 163 CLR 140, 148-149.

[372] Mason CJ, Brennan and Toohey JJ.

[373] [1995] HCA 10; (1995) 183 CLR 245,258.

[374] Prentis v Atlantic Coast Line [1908] USSC 160; (1908) 211 US 210, 226 per Homes J cited in Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; (1995) 183 CLR 245, 259.

[375] Shell Company of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530, 544.

[376] The Queen v Kirby; ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, 278.

[377] Precision Data Holdings Ltd v Wills [1991] HCA 58; (1991) 173 CLR 167, 191.

[378] Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers' Union of Australia [1987] HCA 63; (1987) 163 CLR 656, 665-666.

[379] Pancontinental Mining Ltd v Burns [1994] FCA 1294; (1994) 52 FCR 454, 462-463 per von Doussa J.

[380] Otter Gold Mines Ltd v McDonald (1997) 95 FCR 467, 471 per Sundberg J.

[381] [1995] HCA 10; (1995) 183 CLR 245, 269-271.

[382] Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51, 109 per McHugh J.

[383] Attorney-General (NSW) v 2UE Sydney Pty Ltd [2006] NSWCA 349; (2006) 236 ALR 385, [74] and [79]-[80].

[384] Commonwealth v Anti-Discrimination Tribunal (Tasmania) [2008] FCAFC 104; (2008) 169 FCR 85, [205].

[385] Trust Company of Australia Ltd v Skiwing Pty Ltd [2006] NSWCA 185; (2006) 66 NSWLR 77, 89 per Spigelman CJ, following an extensive analysis of the authorities.

[386] Innis Ltd v Demos (1997) 12 VAR 229, 231 per Member Cremean.

[387] Re Maltall Pty Ltd v Bevendale Pty Ltd (1998) 14 VAR 368, 383 per Macnamara DP.

[388] [1982] FCA 59; (1982) 61 FLR 76.

[389] Ibid 83.

[390] Ibid 84.

[391] Section 3(1).

[392] There is a question about whether the definition of "court" was intended to apply to s 21(5)(a).

[393] Section 36(1).

[394] Section 8(1) of the Victorian Civil and Administrative Tribunal Act 1998.

[395] See Part 2.

[396] See s 59(1).

[397] See s 98(1)(d).

[398] See Part 4.

[399] Established under s 21(1) of the Mental Health Act.

[400] See s 21(1)-(3) and Schedule 1.

[401] See s 22.

[402] See s 24(7).

[403] See s 24(1)(c).

[404] See s 24 and Schedule 2.

[405] Section 4(1)(j) of the Charter.

[406] Section 41.

[407] Section 42.

[408] Section 42(1).

[409] Section 41.

[410] Section 35A.

[411] Section 36(2).

[412] Section 36(3).

[413] Section 36C(2).

[414] Section 36C(3).

[415] Section 36C(4).

[416] Section 35A(1)-(2).

[417] Section 35A(1).

[418] Section 35A(2).

[419] Section 118(1).

[420] Section 130.

[421] Section 130A(1).

[422] Section 131(1).

[423] See s 51(1) of the Victorian Civil and Administrative Tribunal Act.

[424] Section 51(2)(a)-(d).

[425] Section 51(3)(a).

[426] Section 51(1)(c).

[427] Section 10 and 11.

[428] Section 121.

[429] Section 122.

[430] Section 122(1)(c).

[431] Section 121(3) and 122(3).

[432] [1995] HCA 10; (1995) 183 CLR 245, 269-271.

[433] Section 133(1).

[434] Section 134(1).

[435] Section 135.

[436] Section 136.

[437] See the definition in s 3(1).

[438] Section 137(1).

[439] Section 137(5).

[440] Section 143.

[441] Sections 150 and 151.

[442] “Statutory provision” is defined in s 3(1) to mean primary and subordinate legislation, including the Charter.

[443] [1957] HCA 7; (1957) 96 CLR 261.

[444] (1876) 3 Ch D 62.

[445] [1957] HCA 7; (1957) 96 CLR 261, 267.

[446] [1960] HCA 80; (1960) 105 CLR 188.

[447] Ibid 194.

[448] George Hudson Ltd v Australian Timber Workers’ Union [1923] HCA 38; (1923) 32 CLR 413, 434 per Isaacs J; Nicholas v Commissioner for Corporate Affairs [1988] VR 289, 300-301 per Fullagar J.

[449] [1923] HCA 38; (1923) 32 CLR 413, 434.

[450] Sir Peter Benson Maxwell, On the interpretation of statutes (6th ed, 1920) 381.

[451] [1923] HCA 38; (1923) 32 CLR 413, 434.

[452] Ibid.

[453] See Security of State for Social Security v Tunnicliffe [1992] 2 All ER 712, 724 per Staughton LJ, approved Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816, 831, 882.

[454] Doro v Victorian Railways Commissioners [1960] VR 84, 86 per Adam J.

[455] [1960] VR 84.

[456] Ibid 86.

[457] [1957] HCA 7; (1957) 96 CLR 261, 267.

[458] Coleman v Shell Co of Australia Ltd (1943) 45 SR (NSW) 27, 31; Robertson v City of Nunawading [1973] VR 819, 824; Maxwell v Murphy [1957] HCA 7; (1957) 96 CLR 261, 267.

[459] Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816, 879 per Lord Roger of Earlsferry.

[460] [1957] 3 All ER 617.

[461] Ibid 619.

[462] (1986) 72 ALR 23.

[463] [2003] 1 WLR 882.

[464] [2002] 2 AC 545.

[465] [2001] UKHL 62; [2002] 2 AC 69.

[466] [2001] EWCA Civ 2081; [2002] QB 1334.

[467] Lord Woolf CJ, Mummery and Buxton LJJ.

[468] [2002] 2 AC 545.

[469] [2001] UKHL 62; [2002] 2 AC 69.

[470] [2001] EWCA Civ 2081; [2002] QB 1334, 1345.

[471] [2003] UKHL 40; [2004] 1 AC 816.

[472] Ibid 831.

[473] [1992] 2 All ER 712, 724.

[474] [2003] UKHL 40; [2004] 1 AC 816, 831.

[475] Ibid 851.

[476] Ibid.

[477] Ibid.

[478] [2004] UKHL 12; [2004] 2 All ER 409.

[479] Ibid 416.

[480] Ibid 417.

[481] [2007] EWCA Civ 1262; [2007] 2 AC 189.

[482] See Baroness Hale at ibid 205 and Lord Brown at 213, 214.

[483] [2009] EWCA Civ 1357; [2009] 1 All ER 957.

[484] [2004] UKHL 12; [2004] 2 All ER 409.

[485] [2007] EWCA Civ 1262; [2007] 2 AC 189.

[486] [2009] EWCA Civ 1357; [2009] 1 All ER 957, 974.

[487] But see s 39(1), which enables a person seeking relief against a public authority on grounds of unlawfulness to rely on a ground of unlawfulness arising because of the Charter.

[488] Section 4(1)(j) of the Charter.

[489] There is a slight difference in language between the two – s 32 (l) contains a reference to "purpose". This will require attention later but is irrelevant here.

[490] That includes the Charter itself: see the definition "statutory provisions" in s 3(1).

[491] Section 2(2).

[492] Section 2(1).

[493] Section 2(2).

[494] Section 2(2).

[495] Section 6(1).

[496] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2839.

[497] The Human Rights Committee of the United Nations is established under article 28(1) of the ICCPR. Under article 40(4), it is responsible for making general comments on the operation of the Convention. Under article 2 of the first Optional Protocol to the International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, to which Australia is a party), the committee may also determine complaints (called communications) from individuals concerning alleged violation of the rights in the ICCPR.

[498] Human Rights Committee of the United Nations, General Comment 32, 23 August 2007.

[499] Ibid [2].

[500] Ibid [13].

[501] [2008] VSC 1; (2008) 18 VR 300.

[502] Ibid [65].

[503] Human Rights Committee of the United Nations, General Comment 32, 23 August 2007, [16].

[504] Ibid.

[505] Ibid (footnotes omitted).

[506] Ibid [17].

[507] See generally Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd revised ed, 2005) 315.

[508] The course of the evolution is tracked in Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) chapter 6 and Pieter van Dijk et al, Theory and Practice of the European Convention on Human Rights (4th ed, 2006). It is thoroughly analysed by the House of Lords in R (Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 and Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5; [2003] 2 AC 430.

[509] Golder v United Kingdom (1979-80) 1 EHRR 524, [34] and [35].

[510] König v Federal Republic of Germany [1978] ECHR 6; (1979-80) 2 EHRR 170, [88]; Kaplan v United Kingdom (1982) 4 EHRR 64, [134].

[511] Ringeisen v Austria (No 1) (1971) 1 EHRR 455, [94]; applied Deumeland v Germany [1986] ECHR 3; (1986) 8 EHRR 448, 474.

[512] Ibid.

[513] König v Federal Republic of Germany [1978] ECHR 6; (1979-80) 2 EHRR 170, [89]; see also Kaplan v United Kingdom (1982) 4 EHRR 64, [133].

[514] [1986] ECHR 4; (1986) 8 EHRR 425.

[515] Ibid [28].

[516] Ibid [26]-[40].

[517] Ibid [37].

[518] [1986] ECHR 3; (1986) 8 EHRR 448.

[519] (1993) 26 EHRR 187.

[520] [1986] ECHR 4; (1986) 8 EHRR 425.

[521] (1993) 26 EHRR 187, [31]-[36].

[522] Pieter van Dijk et al, Theory and Practice of the European Convention on Human Rights (4th ed, 2006) 525ff.

[523] Ibid 522.

[524] Ibid.

[525] Ibid 535ff.

[526] (1982) 4 EHRR 64, [161].

[527] [1993] ECHR 41; (1994) 17 EHRR 116, [64].

[528] [1995] ECHR 50; (1996) 21 EHRR 342, [45].

[529] Zumtobel v Austria [1993] ECHR 41; (1994) 17 EHRR 116, [32]; Bryan v United Kingdom [1995] ECHR 50; (1996) 21 EHRR 342, [47]; ISKCON v United Kingdom (1994) 18 EHRR CD 133, (4).

[530] [2003] 2 AC 295.

[531] [2003] UKHL 5; [2003] 2 AC 430.

[532] [2009] UKHL 3.

[533] [2003] 2 AC 295, [150].

[534] Ibid [152].

[535] Ibid [54] per Lord Slynn, [58] per Lord Nolan, [122], [135] and [136] per Lord Hoffmann, [160] per Lord Clyde and [197] per Lord Hutton.

[536] Ibid [87].

[537] [2003] UKHL 5; [2003] 2 AC 430.

[538] Ibid [33].

[539] [2009] UKHL 3.

[540] Ibid [19].

[541] Ibid [23] (footnotes omitted).

[542] Ibid [29].

[543] Ibid [38]-[39].

[544] Section 24(1) does not use the expression "criminal proceedings" but "person charged with a criminal offence". That latter expression itself needs to be interpreted broadly and purposively. This may feed back into the interpretation of "civil proceeding".

[545] Chief Executive Office of Customs v Labrador Liquor Wholesale Pty Ltd ([2003] HCA 49; 2003) 216 CLR 161, [30], [67] and [114]; Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129, [95]-[96]; D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1, [76]-[77].

[546] Commissioner for Motor Transport v Train [1972] HCA 62; (1972) 127 CLR 396, 413 per Walsh J.

[547] Evans v Button (1988) 13 NSWLR 57, 74-75; Sardon Pty Ltd v Registrar of Titles [2004] WASC 56, [67], citing Bradlaugh v Clarke (1883) 8 LR App Cas 354.

[548] See Butterworth's Concise Australian Legal Dictionary (2nd ed, 1998); Neil Andrews, Principles of Civil Procedure (1994) 4; Butterworths, Halsbury's Laws of England, vol 37 (at 7 February 2009) Practice and Procedure, '1 Introduction' [1]-[2].

[549] Neil Andrews, Principles of Civil Procedure (1994) 4.

[550] Butterworths, Halsbury's Laws of England, vol 37 (at 7 February 2009) Practice and Procedure, '1 Introduction' [1].

[551] (1997) 43 NSWLR 42.

[552] Mason P, Handley and Powell JJA.

[553] Ibid 59.

[554] Ibid.

[555] Evans v Button (1988) 13 NSWLR 57, 74-75.

[556] Ibid; Chief Executive Office of Customs v Labrador Liquor Wholesale Pty Ltd ([2003] HCA 49; 2003) 216 CLR 161, [29]-[30], [67] and [114].

[557] Blake v Norris (1990) 20 NSWLR 300, 306 per Smart J; approved Reynolds v Panten (1999) 23 WAR 215, [54]-[56] per Steytler J.

[558] Clause 1.

[559] Clause 3.

[560] Clause 5A.

[561] Clause 5A(c).

[562] Clause 6.

[563] Clause 7.

[564] [2002] UKHL 10; [2002] 2 AC 291.

[565] Ibid [71].

[566] General comment 32, [18].

[567] Sramek v Austria [1984] ECHR 12; (1985) 7 EHRR 351, [36].

[568] Benthem v The Netherlands [1985] ECHR 11; (1986) 8 EHRR 1, [40].

[569] Pieter van Dijk et al, Theory and Practice of the European Convention on Human Rights (4th ed, 2006) 614.

[570] Le Compte v Belgium [1981] ECHR 3; (1982) 4 EHRR 1, [55].

[571] Campbell and Fell v United Kingdom [1984] ECHR 8; (1985) 7 EHRR 165.

[572] Ibid [79]-[81].

[573] [2001] EWCA Civ 415; [2002] QB 1.

[574] But see the definition of "court" in s 3(1) of the Charter. A question arises whether that definition was intended to apply to s 21(5)(a).

[575] See generally NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470.

[576] Ibid [27].

[577] Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (2004) chapter 14.

[578] Ibid [14.58].

[579] Communication no 203/86, CCPR, 34th sess, UN Doc, CCPR/C/34/D/203/1986 (1988).

[580] Communication no 514/92, CCPR, 53th sess, UN Doc, CCPR/C/53/D/514/1992 (1995).

[581] Communication no 203/86, CCPR, 34th sess, UN Doc, CCPR/C/34/D/203/1986 (1988), [11.3].

[582] Ibid.

[583] Communication no 514/92, CCPR, 53th sess, UN Doc, CCPR/C/53/D/514/1992 (1995), [8.4].

[584] Ibid.

[585] (1979-80) 1 EHRR 524.

[586] Ibid [28].

[587] [2003] EWHC 2743; [2004] 2 AC 72, [10] [12].

[588] Dyer v Watson [2004] 1 AC 379, [73] per Lord Hope.

[589] [1978] ECHR 6; (1979-80) 2 EHRR 170.

[590] Ibid [99] (footnotes omitted).

[591] [1981] ECHR 2; (1981) 3 EHRR 597.

[592] Ibid [49] (footnotes omitted).

[593] Approved in (for example) Zimmermann and Steiner v Switzerland [1983] ECHR 9; (1984) 6 EHRR 17 [24] and Deumeland v Germany [1986] ECHR 3; (1986) 8 EHRR 448 [78].

[594] [1994] ECHR 12; (1994) 18 EHRR 156.

[595] Ibid [39].

[596] Salabiaku v France (1988) 13 EHRR 379 [28].

[597] See the Preamble.

[598] Hornsby v Greece [1997] ECHR 15; (1997) 24 EHRR 250, [55].

[599] Ibid.

[600] [2001] EWCA Civ 329; [2002] 1 WLR 176, [42].

[601] [2004] 1 AC 379.

[602] Ibid [52]-[55] per Lord Bingham, [75ff] per Lord Hope and [150] per Lord Rodger.

[603] Ibid [52].

[604] Ibid.

[605] [2001] EWCA Civ 329; [2002] 1 WLR 176 [51] per Lord Phillips.

[606] Ibid [57].

[607] Ibid [65].

[608] [2002] EWHC 1553 (Admin).

[609] Ibid [39].

[610] Ibid [53].

[611] Ibid.

[612] Ibid [61].

[613] [2003] EWHC 193 (Admin).

[614] Ibid [84], [97].

[615] Ibid [129].

[616] Ibid [81], [107], [127] and [131].

[617] Ibid [122].

[618] [1990] 2 SCR 1199.

[619] [1992] 1 SCR 771.

[620] [1989] 2 SCR 1120.

[621] Ibid [1131] per Sopinka J.

[622] [1990] 2 SCR 1199, 1240 per Cory J.

[623] [1992] 1 SCR 771, 779.

[624] Ibid.

[625] Ibid 787-788.

[626] Ibid 788.

[627] Ibid.

[628] Ibid.

[629] [1989] 2 SCR 1120, 1132-33.

[630] [1992] 1 SCR 771, 788.

[631] Ibid.

[632] [1995] 2 NZLR 419.

[633] Ibid 423.

[634] (1993) 19 EHRR 477, [25].

[635] [2003] EWHC 2743; [2004] 2 AC 72.

[636] Ibid [24] per Lord Bingham, [31] per Lord Nicholls, [43] per Lord Steyn, [44] per Lord Hoffmann, [111] per Lord Hobhouse, [129] per Lord Millett and [140] per Lord Scott.

[637] Ibid [88].

[638] See ibid [21] per Lord Bingham.

[639] [1999] NZFLR 711.

[640] Section 24(1)(b) of the Mental Health Act.

[641] Section 24(1) and Schedule 2.

[642] Clause 5A of Schedule 2.

[643] Section 26(1).

[644] Section 26(2).

[645] Section 26(6).

[646] Section 26(7) and (8).

[647] Section 32(1).

[648] See eg s 4(1)(ac).

[649] Section 4(2)(a) and (b).

[650] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2831.

[651] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[652] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2832.

[653] Ibid.

[654] [2009] VSC 14.

[655] Ibid [5].

[656] Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) [1992] HCA 15; (1991-1992) 175 CLR 218, 266 per Brennan J.

[657] Ibid 253 per Mason CJ, Dawson, Toohey and Gaudron JJ; see also Collins v Wilcock [1984] 1 WLR 1172, 1177 per Goff LJ: "The fundamental principle, plain and incontestable, is that every person's body is inviolate".

[658] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[659] Article 9.

[660] See, eg, the right not to be treated in a degrading way (s 10(b)), the right not to be subjected to medical treatment without full, free and informed consent (s 19(c)), the right not to have your privacy unlawfully or arbitrarily interfered with (s 13(a)) and the right of every person to security (s 21(1)).

[661] Office of the High Commissioner for Human Rights, General Comment 20, 10 March 1992.

[662] Ibid [2].

[663] Ibid [4].

[664] Ibid [5].

[665] Ibid [11].

[666] Article 1(1).

[667] Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2nd ed, 2004) chapter 9.

[668] Torture and other cruel, inhuman or degrading treatment of punishment: note by the Secretary General, UN GA, 63rd sess, UN Doc A/63/175 (2008).

[669] [1978] ECHR 1; (1978) 2 EHRR 25.

[670] Ibid [167].

[671] Selmaine v France [1999] ECHR 66; (2000) 29 EHRR 403, [101].

[672] [2005] UKHL 71; [2006] 2 AC 221, [53].

[673] 2001 (3) SA 382.

[674] Ibid [35].

[675] Ibid.

[676] Ibid.

[677] R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66; [2006] 1 AC 396, [6].

[678] Brough v Australia, Communication no 1184/2003, CCPR, 86th session, UN Doc CCPR/C/86/D/1184/2003 (2006).

[679] Section 7(2).

[680] Ireland v United Kingdom [1978] ECHR 1; (1978) 2 EHRR 25; Ciorap v Moldova [2007] ECHR 502.

[681] [1978] ECHR 1; (1978) 2 EHRR 25.

[682] Ibid [167].

[683] Ibid [162].

[684] Ibid [167].

[685] (2001) 33 EHRR 38.

[686] Ibid [109].

[687] Ibid [109]; see also Pretty v United Kingdom [2002] ECHR 427; (2002) 35 EHRR 1, [52].

[688] [1992] ECHR 83; (1993) 15 EHRR 437.

[689] Ibid [242].

[690] Ibid [251].

[691] [2007] ECHR 502.

[692] Ibid [74].

[693] Ibid [73] and [77].

[694] Ibid [77].

[695] [2005] UKHL 66; [2006] 1 AC 396.

[696] [2002] ECHR 427; (2002) 35 EHRR 1, [52].

[697] [2005] UKHL 66; [2006] 1 AC 396. [7].

[698] Ibid [54].

[699] Ibid [46].

[700] [2005] UKHL 58; [2006] 2 AC 148.

[701] Ibid [78]-[79] per Lord Hope.

[702] Stuart v Kirkland-Veenstra [2009] HCA 15, [88] per Gummow, Hayne and Haydon JJ.

[703] F v R (1983) 33 SASR 189, 193; applied Rogers v Whitaker [1992] HCA 58; (1992) 175 CLR 479, 487.

[704] Starson v Swayze [2003] 1 SCR 722, 760 per Major J.

[705] Section 1.

[706] Section 4(1).

[707] Section 9(1).

[708] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2833.

[709] Human Rights Committee of the United Nations, General Comment 27, 2 November 1999, [1].

[710] Ibid [14].

[711] [2001] ECHR 340; (2002) 34 EHRR 44, [61] (footnote omitted); see also Napijalo v Croatia (2005) 40 EHRR 30, [68].

[712] See Secretary of State for the Home Department v JJ [2007] UKHL 45; [2008] 1 AC 385, [36]; Austin v Commissioner of Police of the Metropolis [2009] UKHL 5; [2009] 2 WLR 372, [14]-[16].

[713] Consent and Capacity Board of Ontario, 12 July 2003, TO 030814, unreported.

[714] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2834.

[715] Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, [2].

[716] Bensaid v United Kingdom [2001] ECHR 82; (2001) 33 EHRR 10, [47]; Pretty v United Kingdom [2002] ECHR 427; (2002) 35 EHRR 1, [61].

[717] Pretty v United Kingdom [2002] ECHR 427; (2002) 35 EHRR 1, [61].

[718] Communication no 488/1992, CCPR, 50th sess, UN Doc CCPR/C/50/D/488/1992 (1994).

[719] Communication no 1482/2006, CCPR, 93rd sess, UN Doc CCPR/C/93/D/1482/2006 (2008).

[720] Ibid [10.1].

[721] Ibid [10.2].

[722] [2001] ECHR 82; (2001) 33 EHRR 10.

[723] Ibid [48]-[49].

[724] Ibid [47] (footnote omitted).

[725] [2002] ECHR 427; (2002) 35 EHRR 1, [61].

[726] Ibid [78].

[727] Ibid [61] (footnotes omitted).

[728] [1992] ECHR 83; (1993) 15 EHRR 437.

[729] Ibid [86], by reference to [83].

[730] [1985] ECHR 8978/80; (1986) 8 EHRR 235.

[731] Ibid [23].

[732] Ibid (footnotes omitted).

[733] Ibid [27].

[734] (2007) 44 EHRR 40.

[735] Ibid [41].

[736] Ibid [43].

[737] Ibid.

[738] Ibid [48]-[49].

[739] [2003] ECHR 391; (2004) 39 EHRR 34.

[740] Ibid [33] (footnotes omitted).

[741] Ibid [43].

[742] [1996] ECHR 44; (1997) 23 EHRR 213.

[743] (1998) 26 EHRR 241.

[744] [1996] ECHR 44; (1997) 23 EHRR 213, [64].

[745] (1998) 26 EHRR 241, [31] (footnotes omitted).

[746] Ibid [33].

[747] Ibid [34].

[748] Ibid [33].

[749] Ibid [35].

[750] Ibid.

[751] [2003] UKHL 43; [2004] 1 AC 983.

[752] [2003] EWCA Civ 1406; [2004] QB 1124.

[753] Ibid [10].

[754] Ibid [43].

[755] Ibid [45].

[756] Ibid.

[757] [2004] UKHL 27; [2004] 2 AC 368, see also R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323.

[758] Ibid [9].

[759] Ibid.

[760] [2002] ECHR 427; (2002) 35 EHRR 1, [61].

[761] [2004] UKHL 27; [2004] 2 AC 368, [9].

[762] Ibid [9].

[763] Ibid; the comment was made in "The Developing Scope of Article 8 of the European Convention of Human Rights" [1997] EHRLR 265, 270.

[764] [2001] EWCA Civ 1545; [2002] 1 WLR 419.

[765] Simon Brown, Brooke and Hale LJJ.

[766] Ibid [30].

[767] [1992] ECHR 83; (1993) 15 EHRR 437.

[768] [2001] EWCA Civ 1545; [2002] 1 WLR 419, [30].

[769] Section 3(1) defines “court” to mean the Supreme, County, Magistrates’ or Children’s Court.

[770] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic) 2837.

[771] Ibid.

[772] Ibid. Section 7 of the Canadian Charter of Rights and Freedoms provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” That right has been interpreted such that “Any restriction on the liberty of a person in Canada is a deprivation of that liberty”: In the matter of Mr WS, Consent and Capacity Board of Ontario, HA-07-1657 and 1658 (unreported) 31 August 2007. The imposition of a community treatment order on a mentally ill person, which brings about involuntary treatment, has been held to engage that right: Ibid.

[773] Office of the High Commissioner for Human Rights, General Comment 8, 30 June 1982.

[774] Ibid [1].

[775] Ibid.

[776] [1979] ECHR 4; (1979-80) 2 EHRR 387.

[777] Ibid [39].

[778] Ibid [43].

[779] Ibid [50].

[780] Ibid [61].

[781] Ibid.

[782] [1976] ECHR 3; (1979) 1 EHRR 647, [58].

[783] Ibid [59].

[784] Ibid [60]-[66].

[785] [1980] ECHR 5; (1981) 3 EHRR 333.

[786] Ibid [92]-[93] (footnotes omitted).

[787] Ibid [95].

[788] Ibid (footnotes omitted).

[789] [1985] ECHR 8225/78; (1985) 7 EHRR 528.

[790] Ibid [37] following Winterwerp v The Netherlands [1979] ECHR 4; (1979-80) 2 EHRR 387.

[791] Ibid [38].

[792] Ibid [41].

[793] Ibid (footnotes omitted) following Engel v The Netherlands (No 1) [1976] ECHR 3; (1979) 1 EHRR 647 and Guzzardi v Italy [1980] ECHR 5; (1981) 3 EHRR 333.

[794] [2003] ECHR 196; (2004) 38 EHRR 17.

[795] [1985] ECHR 8225/78; (1985) 7 EHRR 528.

[796] [1988] ECHR 23; (1989) 11 EHRR 175, [70].

[797] [2003] ECHR 196; (2004) 38 EHRR 17, [48].

[798] [1992] ECHR 49; (1993) 15 EHRR 584.

[799] Ibid [22].

[800] Ibid [27].

[801] [2003] ECHR 558.

[802] [1979] ECHR 4; (1979-80) 2 EHRR 387.

[803] Ibid [30].

[804] Ibid [31].

[805] Ibid [44].

[806] Ibid.

[807] Ibid.

[808] [2001] EWCA Civ 415; [2002] QB 1.

[809] Lord Phillips, Kennedy and Dyson LJJ.

[810] [2001] EWCA Civ 415; [2002] QB 1, [19]. Under earlier legislation the Tribunal lacked that capacity. In X v United Kingdom [1981] ECHR 6; (1981) 4 EHRR 188 it was held not to be in conformity with article 5 (4), and was subsequently amended.

[811] [1979] ECHR 4; (1979-80) 2 EHRR 387.

[812] (1997) 27 EHRR 296.

[813] [2001] EWCA Civ 415; [2002] QB 1, [31].

[814] [2002] EWCA Civ 1868.

[815] [2002] EWHC 1128 (Admin).

[816] Kay and Keene LJJ, Sir Anthony Evans.

[817] [2002] EWCA Civ 1868, [14]-[17].

[818] [1980] ECHR 5; (1981) 3 EHRR 333.

[819] [1985] ECHR 8225/78; (1985) 7 EHRR 528.

[820] [2003] ECHR 196; (2004) 38 EHRR 17.

[821] [1988] ECHR 23; (1989) 11 EHRR 175.

[822] [2002] EWCA Civ 1868, [14].

[823] Ibid [19].

[824] Ibid [24].

[825] [2004] 2 AC 253.

[826] (1999) 27 EHRR 296.

[827] Ibid [67], [71].

[828] [2004] 2 AC 253, [26].

[829] Ibid [28].

[830] [2006] EWHC 3165; [2006] 2 AC 307.

[831] [1980] ECHR 5; (1981) 3 EHRR 333.

[832] (2004) 40 EHRR 32.

[833] See Lord Bingham at [28], Lord Hope at [38], Lord Scott at [58], Lord Walker at [70] and Lord Brown at [71].

[834] [2007] UKHL 45; [2008] 1 AC 385.

[835] (1981) 3 EHRR 383 [95].

[836] [2007] UKHL 45; [2008] 1 AC 385, [15].

[837] Ibid [17] per Lord Bingham.

[838] The orders obliged each controlled person at all times to wear an electronic tagging device, to remain within his specified residence, a one-bedroom flat, except between 10.00am and 4.00pm, and permit police searches of the premises at any time. Visitors were permitted only where prior permission had been given. During the six hours when the persons were permitted to leave their residences, they were confined to restricted urban areas, which did not extend, except in one case, to any area where they had previously lived. Each area contained a mosque, healthcare facility, shops and entertainment and sporting facilities. Each controlled person was prohibited from meeting anyone by pre-arrangement without prior approval.

[839] [2007] UKHL 45; [2008] 1 AC 385, [27].

[840] [2009] UKHL 5; [2009] 2 WLR 372.

[841] Ibid [34] per Lord Hope.

[842] [1985] 1 SCR 613.

[843] Ibid [54]-[57].

[844] (1993) 104 DLR (4th) 391.

[845] Ibid [38]-[40], following R v Nova Scotia Pharmaceutical Society [1992] 2 SCR 606, 643.

[846] Ibid [50].

[847] [1998] HCA 28; (1998) 194 CLR 355.

[848] Ibid [91].

[849] Ibid [93].

[850] Victoria, Parliamentary Debates, Legislative Assembly, 30 May 1985, 925-938 (Thomas Roper).

[851] Ibid 930.

[852] Ibid 936.

[853] Explanatory Memorandum, Mental Health Bill 1985 (Vic).

[854] Ibid 2.

[855] Ibid 6.

[856] See s 35A of the Mental Health Act.

[857] [2000] VSC 404; (2000) 17 VAR 42.

[858] Section 14(5).

[859] See article 1 (purpose), article 14 (right to liberty), article 17 (right to physical and mental integrity), article 18 (right to freedom of movement), article 22 (right to privacy). But also, they have the right to health (article 25).

[860] [2000] VSC 404; (2000) 17 VAR 42, [32].

[861] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by General Assembly resolution 46/119 of 17 December 1991.

[862] Section 12.

[863] Section 12AC(1).

[864] Section 12AD(1).

[865] Section 12A-D.

[866] Section 13.

[867] Section 14(2).

[868] Section 14(1).

[869] Section 14(3)(a) and (b).

[870] Section 14B(4).

[871] Section 14B(1)(a) and (b).

[872] Section 19A(1) and the definition of “patient” and “involuntary patient” in s 3(1).

[873] Section 19A(2).

[874] Section 19A(3) and (4).

[875] Section 19A(4).

[876] Section 14D(1).

[877] Section 14D(2).

[878] Section 14(5).

[879] Section 4(2) and 6A(b).

[880] Sections 30(1)(a) and 30(3)(a).

[881] Section 30(4).

[882] Section 29(1)(a).

[883] Section 36(2).

[884] Section 36C(2).

[885] Section 36(2) and 36C(2).

[886] Section 36C(3).

[887] Section 36C(4).

[888] Section 35A(1).

[889] Section 35A(2).

[890] Section 22(2).

[891] As to initial reviews, see s 30(1).

[892] Section 29(4) requires the board to "commence the hearing of an appeal without delay."

[893] Section 29(4).

[894] Section 4(1)(a).

[895] [2000] VSC 404; (2000) 17 VAR 42.

[896] [2007] 1 NZLR 767.

[897] Section 9(2)(d) of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[898] Ibid s 9(1).

[899] William Young P, Robertson and Arnold JJ.

[900] [2007] 1 NZLR 767, [44].

[901] Ibid [45].

[902] Ibid [52].

[903] Ibid [53].

[904] Ibid [88].

[905] Ibid [90].

[906] [2008] EWCA Civ 1354.

[907] Ibid [9]; see s 40(4) of the Mental Health Act 1983 (UK).

[908] Ibid, Stanley Burnton LJ at [16] and [22], Longmore LJ at [32], and Laws LJ at [37].

[909] [1999] NZFLR 711.

[910] Ibid 719-720.

[911] Section 14D(1) and (2).

[912] Section 14(3).

[913] Section 36C(2).

[914] Section 14D(2).

[915] Section 19A(4)(e) and (f).

[916] Opened for signature 16 December 1996, 999 UNTS 3 (entered into force 3 January 1976).

[917] Principle 1(1).

[918] Section 12AC(1)(b).

[919] Section 14(1) and the objects and principles in ss 14(1) and (2) and 6A.

[920] Section 30.

[921] Section 29.

[922] Section 36C(2).

[923] Section 14(5).

[924] Unreported, Supreme Court of Victoria, Appeal Division, Fullagar, Brooking and Marks JJ, 6 March 1992.

[925] Ibid 502.

[926] Ibid 503.

[927] [2007] VSC 225, [76]-[77].

[928] [2008] VSCA 43.

[929] Ibid [96] per Dodds-Streeton JA, Buchanan and Nettle JJA concurring.

[930] Section 38(1).

[931] Section 32(1).

[932] [2006] 1 SCR 513.

[933] McLachlin CJ, Bastarache, Binnie and Fish JJ (LeBel, Deschamps and Abella JJ dissenting).

[934] Ibid [40].

[935] [1992] 2 SCR 321, 339.

[936] [2006] 1 SCR 513, [49].

[937] Ibid [50].

[938] Section 36.

[939] Section 39(1).

[940] Section 39(2).

[941] Herald and Weekly Times Pty Ltd v State of Victoria [2006] VSCA 146; [2006] 25 VAR 124, 134 (regarding s 123(1), but the position is analogous).

[942] ITQ Pty Ltd v Hyde Park Management Ltd [2008] WASAT 66, [37] (Chaney P was then Judge J Chaney (Deputy President)).

[943] Ibid [35]-[36].

[944] See generally Targaville Pty Ltd v Mornington Peninsula Shire Council [2000] VCAT 1483, [54]-[58]; Director of Consumer Affairs v AAPT Ltd [2006] VCAT 1493, [60ff].

[945] Huggins v Fasham Johnson Pty Ltd [2004] VCAT 2274, [52] per Macnamara DP.

[946] Section 51(2)(a)-(d) Victorian Civil and Administrative Act.

[947] [1992] HCA 10; (1992) 175 CLR 564.

[948] Ibid 597.

[949] Ibid 596.

[950] [1964] 1 WLR 219, 225.

[951] [1992] HCA 10; (1992) 175 CLR 564, 596 (footnote omitted).

[952] [1921] 2 AC 438, 448.

[953] [1982] UKHL 10; [1982] 1 WLR 1155, 1172.

[954] [1992] HCA 10; (1992) 175 CLR 564, 597.

[955] Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) 644.

[956] R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14; [2005] 2 All ER 240, [8].

[957] [2005] UKHL 14; [2005] 2 All ER 240.

[958] Ibid [9].

[959] [2002] EWHC 639 (Admin) and [2003] EWHC 193 (Admin).

[960] [2002] EWHC 639 (Admin), [115].

[961] [2003] EWHC 193 (Admin), [84].

[962] [1997] ZACC 6; 1997 (3) SA 786, [82]

[963] Taunoa v Attorney-General [2007] NZSC 70; [2008] 1 NZLR 429, [300].

[964] [2007] NZSC 70; [2008] 1 NZLR 429; see [253]-[255] per Blanchard J, [299]-[300] per Tipping J, [366ff] per McGrath J.

[965] Ibid [366].

[966] Ibid [367].

[967] Ibid [368].

[968] Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667.

[969] Section 39(3).