

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

GENERAL LIST

VCAT Reference: 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
(Pursuant to leave to granted on 15 August 2008)

INTERVENOR: Secretary to the Department of Human Services
(Pursuant to leave granted on 22 August 2008)

**SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY
AND HUMAN RIGHTS COMMISSION**

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Filed on behalf of: Victorian Equal Opportunity and Human Rights Commission

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THE COMMISSION'S STATUTORY INTERVENER ROLE

1. The Victorian Equal Opportunity and Human Rights Commission ("Commission") was originally established under s. 6 of the former *Equal Opportunity Act 1984* (Vic) and continues by virtue of s. 160 of the current *Equal Opportunity Act 1995* (Vic) ("EOA"). Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("Charter") the Commission was given a range of new functions, including intervening in court or tribunal matters that raise Charter issues (s. 40).

2. Section 40 provides the Commission with the right to intervene in legal proceedings initiated by other parties. It is pursuant to this provision that the Commission intervenes in this matter.
3. The Commission's intervention aims to advance the principles and objectives that underpin the enactment of the Charter, which are reflected in its preamble. In particular that:
 - 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.
4. In this matter the Commission will be confined to intervening by way of written submissions, so these written submissions are lengthy. A legally qualified Commission staff member will be present at the hearing to answer any questions in relation to the Commission's written submissions.

OUTLINE OF QUESTIONS AND CONCLUSIONS

5. The Commission's submissions will address the following questions:
 - A. Whether the Mental Health Review Board ("the Board") is a public authority under s. 4 of the Charter when conducting hearings under the *Mental Health Act 1986* ("MHA") including:
 - (i) whether the President and Board members are public officials within the meaning of the *Public Administration Act 2004* and whether the Board is an entity established by a statutory provision that has functions of a public nature;
The Commission concludes that the President and Board members are public officials and that the Board is an entity established by a statutory provision that has functions of a public nature.
 - (ii) whether the Board is a tribunal acting in an administrative capacity when conducting hearings under the *MHA*.
The Commission concludes that the Board is acting in an administrative capacity when conducting hearings under the MHA.
 - B. Whether the Victorian Civil and Administrative Tribunal ("VCAT") is a public authority when reviewing the determination of the Board in the matter of 09-003 [2008] VMHRB 1.
The Commission concludes that VCAT is a public authority when reviewing the determination of the Board in 09-003.
 - C. What obligations the Charter imposes on the Board and VCAT, if they are considered public authorities, when conducting hearings under the *MHA* including:
 - (i) what obligations s. 38(1) of the Charter imposes on public authorities;

The Commission concludes that s. 38(1) of the Charter requires public authorities to only limit human rights in a manner allowable under s. 7(2) and to make human rights decisions in accordance with the framework provided by s. 7(2) of the Charter.

- (ii) whether, and to what extent, s. 7(2) of the Charter affects the obligations imposed by s. 38(1) of the Charter;

The Commission concludes that s. 7(2) of the Charter defines what it means to act compatibly with human rights and to give proper consideration to human rights in s. 38(1).

- (iii) whether the obligations in s. 38(1) of the Charter do not apply to the Board and VCAT when conducting hearings under the *MHA* by virtue of s. 38(2) of the Charter because of a conflicting statutory requirement.

The Commission concludes that there is no conflicting statutory requirement in the *MHA* that relieves the Board and VCAT of s. 38(1) obligations under s. 38(2) of the Charter.

- D. What obligations the Charter imposes on the Board and VCAT as courts or tribunals when conducting hearings under the *MHA* including:

- (i) which sections of the Charter apply to the Board and VCAT by virtue of s. 6(2)(b) of the Charter and the consequences of this application;

The Commission concludes that sections 21(5)(c), 21(6)-(8), 23(2)-(3), 24, 25, 26, 27, 32, 33 and 36 of the Charter apply to the Board and VCAT under s. 6(2)(b), which in this matter means that VCAT is bound to apply and comply with sections 24 and 32.

- (ii) how s. 32 of the Charter should be applied and the consequences of applying s. 32 to the legislative provisions in issue in this matter.

The Commission concludes that the manner in which s. 32 should be applied and the extent to which s. 7(2) should influence the process will depend on the nature of the legislative provision being interpreted and the extent to which a variety of interpretations are available.

- E. Whether, and to what extent, the Charter is operational in this matter in accordance with its commencement and transitional provisions and the presumptions of the common law.

The Commission concludes that all sections of the Charter apply in this matter.

A. WHETHER BOARD/VCAT IS A PUBLIC AUTHORITY WHEN CONDUCTING HEARINGS UNDER THE MENTAL HEALTH ACT

6. Section 4 of the Charter defines what is meant by ‘public authority’:

- (1) For the purposes of this Charter a public authority is-
- (a) a public official within the meaning of the **Public Administration Act 2004**; or
 - (b) an entity established by a statutory provision that has functions of a public nature; or ...
- but does not include- ...

- (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.

- (2) In determining if a function is of a public nature the factors that may be taken into account include-
 - (a) that the function is conferred on the entity by or under a statutory provision;
 - (b) that the function is connected to or generally identified with the functions of government;
 - (c) that the function is of a regulatory nature;
 - (d) that the entity is publicly funded to perform the functions ...
 - (3) To avoid doubt-
 - (a) the factors listed in sub-s. (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and
 - (b) the fact that one or more of the factors set out in sub-s. (2) are present in relation to a function does not necessarily result in the function being of a public nature ...
7. Section 3 of the Charter defines “court” as ‘the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court’. The Charter does not define “tribunal”.
8. Section 4 of the *Public Administration Act 2004* (Vic) provides that:
public official means-
...
(d) the holder of a statutory office or a prerogative office
...
But does not include-
...
(g) a judge, a magistrate, a coroner appointed under the **Coroners Act 1985** or a member of VCAT
...
statutory office means an office established by or under an Act to which the right to appoint is vested in the Governor in Council or a Minister.

The Mental Health Review Board

9. The *MHA* sets out the procedure for the appointment of the President and the ordinary members of the Board in Schedule 1. Sections 1 and 2 of that schedule provide that both the President and the ordinary members are appointed by the Governor in Council. As a result, the positions of President and ordinary members of the Board are all “statutory offices” under the *Public Administration Act 2004* (Vic) making them all “public officials” under that Act. The President and ordinary members of the Board are therefore all public authorities under s. 4(1)(a) of the Charter, to the extent that they are not excluded from that definition by s. 4(1)(j) of the Charter because they are sitting as a tribunal.

10. In addition, the Board is a public authority by virtue of s. 4(1)(b) to the extent that it is not excluded by s. 4(1)(j). The Board is established by the *MHA* and has ‘functions of a public nature’ (reviewing the involuntary treatment of psychiatric patients) which it is wholly publicly funded to perform, and which are generally identified with the functions of government.
11. Although the Board is a “tribunal” s. 4(1)(j) has the effect that it will only be excluded from the definition of “public authority” to the extent that it is not acting in an *administrative capacity*. The interpretation of this phrase should be guided by the note to s. 4(1)(j) (s. 36(3A) of the *Interpretation of Legislation Act 1986* (Vic) provides that a note in an Act forms part of the Act if the Act is passed after 1 January 2001). The note suggests that the term “administrative” is being used in the constitutional law sense when it refers to ‘committal proceedings and the issuing of warrants’ both of which have been held to be administrative in that context. The note suggests that functions within the ordinary meaning of the word “administrative” are also encompassed by the term, when it refers to ‘listing cases or adopting practices and procedures’. The Macquarie Dictionary defines administrative as ‘relating to administration’, and defines administration as ‘1. the management or direction of any office or employment. 2. the function of a political state in exercising its governmental duties...’. The Commission submits that the exclusion from the court and tribunal exemption encompasses both the constitutional and ordinary meanings of the word “administrative”.
12. The administrative/judicial distinction was clarified in three significant High Court cases in the context of the separation of powers doctrine that underpins the Commonwealth Constitution – *Grassby v R* (1989) 168 CLR 1; *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167 and *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382.
13. In *Grassby* the court decided that committal proceedings are administrative, not judicial, in nature. In a decision with which all other judges of the Court broadly agreed, Dawson J discussed the reasons for this traditional position:
- [T]he answer lies in the nature of committal proceedings and the function of the magistrate in hearing them.
- It has consistently been held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function... The explanation is largely to be found in history. A magistrate conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders... The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature...¹
14. In *Precision Data Holdings* the Court held that certain functions entrusted to the Corporations and Securities Panel were administrative. The Court’s unanimous judgment makes the following observations:

¹ *Grassby v R* (1989) 168 CLR 1 at 11

It follows that functions may be classified as either judicial or administrative according to the way in which they are to be exercised... So, if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power....²

Furthermore, if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.³

[W]here...the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power.⁴

15. This decision was recently followed by the Court in *Alinta*, which confirmed that the Takeovers Panel (the successor to the Corporations and Securities Panel) does not exercise judicial power. In this matter Gleeson CJ made the following observations:

There are two features of the statutory scheme which, in combination, strongly support a conclusion that the Takeovers Panel (“the Panel”) does not exercise judicial power. The first is that, in deciding whether to make a declaration of unacceptable circumstances, and remedial orders, the Panel is required to take account of considerations and interests to which the judicial process is ill-adapted. The second is that a decision of the Panel creates new rights and obligations, and provision is made for their enforcement by a court in the independent exercise of judicial power.⁵

... The constitution of the Panel, the way in which it is intended to go about its business, the way in which it informs itself about matters that arise for its consideration, and the nature of the considerations according to which it acts or declines to act, all point against the conclusion that this is a judicial process.⁶

16. Crennan and Kiefel JJ also discuss the way in which the extent of policy consideration required of a body may distinguish a function as either judicial or administrative:

Policy considerations are more often regarded as applying to a non-judicial process of decision-making. This is not to say that statutes do not sometimes require courts to have regard to the public interest. Whether it is possible for a court to do so, consistent with its function, may depend upon what guide is given by the statutory context and stated criteria. Where policy considerations relevant to the public interest are ill-defined and subjective, their application may be regarded as inappropriate to the judicial method and more consonant with a non-judicial process of decision-making. The policy considerations here

² *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167 at 189

³ *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167 at 189

⁴ *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167 at 191

⁵ *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at [2]

⁶ *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at [6]

reserved to the Panel are potentially of wide range, even with statements of statutory purpose. They may involve matters relevant to the market, corporate behaviour and the interests of stakeholders beyond those directly affected by the proposal. In this regard Panel members may be taken to be qualified to make an assessment by their knowledge and experience.⁷

17. Section 4(1)(j) has been referred to in at least three decisions since the Charter's enactment. In *R v Williams* (2007) 16 VR 168 the Court concluded that courts are not acting in an administrative capacity when hearing an application for an adjournment of a trial already fixed for hearing.⁸ In *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334 (unreported) VCAT observed:

I note that as this division of the Tribunal is reviewing the failure of the Council to make a decision in the statutory period, the Tribunal constitutes a tribunal "acting in an administration [sic] capacity" as per Section 4(1)(j) of the Charter Act. Hence the Charter Act applies here and must be complied with.⁹

Presumably the Member meant that the Charter applies to VCAT as a public authority, rather than merely as a court or tribunal.

18. In *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) Justice Hollingworth considered a similar issue in relation to the Charter status of the Medical Practitioners Board of Victoria. Justice Hollingworth concluded that the Medical Practitioners Board was a public authority within the meaning of s. 4(1)(b) because of the fact that it was established by statute, the nature of its functions and the way it is funded.¹⁰ Her Honour went on to consider whether the Medical Practitioners Board was covered by the exclusion in s. 4(1)(j), noting that while the term "tribunal" is not defined in the Charter there was no dispute that the Medical Practitioners Board was a tribunal for the purposes of the Charter.¹¹ Her Honour then went on to consider whether the exclusion in s. 4(1)(j) applies to the activities of the Medical Practitioners Board in this case:

The question which then arises is whether, in making the decision, the Board was acting in an administrative, or in a judicial or quasi-judicial capacity. If the former, then it is a public authority to which s 38 applies. If the latter, s 38 does not apply.

There is no definition of "administrative capacity" in the Charter. The explanatory memorandum says that the term was intended to exclude instances where courts and tribunals were acting in a "judicial or quasi-judicial" capacity. The common law has long recognised a distinction between administrative and judicial (or quasi-judicial) powers. The parties agree that it is appropriate for the court to read "administrative capacity" in s 4(1)(j) as if it equated to "administrative power" at common law.

The note to s 4(1)(j) gives the following examples of acting in an administrative capacity: committal proceedings, the issuing of warrants, the listing of cases and the adoption of practices and procedures.

⁷ *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at [168]

⁸ *R v Williams* (2007) 16 VR 168 at [50]

⁹ *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334 (unreported) at [221]

¹⁰ *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) at [118]

¹¹ *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) at [120]

It is well-established at common law that in conducting committal proceedings to determine whether there is sufficient evidence to stand an accused for trial, a magistrate is exercising an administrative, not a judicial, function.

In *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*, the High Court recently held that the decision of a disciplinary board to suspend the registration of two liquidators did not involve the exercise of judicial power. Although *Albarran* was a constitutional law case, the court's analysis is capable of broader application, reflecting as it does the well-established common law distinction between administrative and judicial functions.

The High Court noted that judicial power classically involves either the governance of a trial for the determination of criminal guilt and its punishment or, more broadly, the determination of a dispute inter partes regarding the existence of a legal right or obligation and the application of that law to the facts as determined. Although the effect of disciplinary action may have a detrimental impact on the individual concerned, the action is “corporate and self-respecting”, rather than personal and retributive. The proceedings are disciplinary, rather than criminal. The board had not determined whether the liquidators had committed any offence. The disciplinary board's only task was to assess whether duties had been performed “adequately and properly”, measured against standards familiar to the board's specialist composition, and whether a person was “otherwise not a fit and proper person” to be a registered liquidator.

Applying that same reasoning to the Board's role under s 40(1) of the HPRA, I am satisfied that in exercising its power to suspend Dr Sabet, the Board was acting in an administrative capacity. Therefore, although a tribunal, it is a public authority to which s 38 applies.¹² (footnotes omitted)

19. The Commission submits that when considered in light of the constitutional jurisprudence in relation to the distinction between administrative and judicial functions, the Board's hearings function is an administrative, not a judicial, one because:

- the Board is required to make decisions on the basis of broad policy considerations rather than an application of the law to the facts – s. 22(2) of the *MHA* provides that:

The Board must in determining any review or appeal have regard primarily to the patient's current mental condition and consider the patient's medical and psychiatric history and social circumstances.
- the Board does not make decisions about pre-existing rights and obligations but rather decides what new rights and obligations should be;
- the Board is composed of members with a variety of experience, often not legal, who are taken to be qualified to make an assessment based on their personal knowledge and experience – s. 2(2) of Schedule 2 of the *MHA* provides that:

¹² *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) at [121] – [127]

In nominating persons for appointment to the Board, the Minister must have regard to—

- (a) the matters which the Board has jurisdiction to hear and determine; and
 - (b) the need for the Board to be comprised of both males and females so qualified by knowledge and experience that the Board is capable of exercising the jurisdiction and performing the functions conferred on it.
- the Board conducts itself in an inquisitorial manner and forms a conclusion on the basis of its own exploration of the issues, rather than imposing a burden of proof on any of the parties;¹³
 - the Board’s decisions are the subject of administrative review by VCAT.¹⁴

The Victorian Civil and Administrative Tribunal

20. The question of whether VCAT exercises judicial or administrative power has been considered in a number of cases.¹⁵ Courts have reached different conclusions about the nature of the power exercised by VCAT, depending on the functions being undertaken by VCAT in each instance. In *Strait Settlements Restaurant Pty Ltd v Bell & Ors* [2005] VCAT 957 (unreported) Deputy President Macnamara observed that VCAT ‘is not a court for Commonwealth *Constitutional* purposes’.¹⁶ In *Re Maltall Pty Ltd and anor v Bevendale Pty Ltd* (1998) 14 VAR 368 Deputy President Macnamara considered the issue in some detail, concluding that VCAT is not a court for the purposes of s. 86 of the *Trade Practices Act 1974* (Cth):

One should also consider the total range of the Tribunal’s jurisdiction in deciding its overall character. Many lists in the Civil Division deal with disputes similar to those heard in courts albeit with less formality and untrammelled by a strict application of the rules of evidence. Much of the work of the Administrative Division is of a different character. In its review jurisdiction the Tribunal “stands in the shoes” of the administrative decision-maker and can make the decision anew performing the same functions as the administrative decision-maker: s 51 of the VCAT Act. In certain circumstances the Tribunal may be required to implement government policy: s 57. In freedom of information proceedings the Tribunal may be required to decide questions as potentially nebulous and political as what “the public interest requires”: s 50(4) of the *Freedom of Information Act 1982* (Vic). The majority of the proceedings in the Planning List involve not the ascertainment and enforcement of existing rights but rather the discretionary application of planning policy in deciding whether to direct the issue of a planning permit or not. All these functions are distant from the core functions of traditional courts of law.¹⁷

21. Section 51(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* provides that VCAT ‘has all the functions of the decision-maker’ when exercising its review jurisdiction. Within the definition of “function” is “duty”,¹⁸ which encompasses the duties imposed on public authorities under s. 38 of the Charter.

¹³ 09-003 [2008] VMHRB 1 (unreported) at [139]

¹⁴ Section 120 *MHA*

¹⁵ See Dr Cremean et al *Victorian Civil and Administrative Tribunal Laws and Procedure* at 1-1 – 1-8

¹⁶ *Strait Settlements Restaurant Pty Ltd v Bell & Ors* [2005] VCAT 957 (unreported) at [16]

¹⁷ *Re Maltall Pty Ltd and anor v Bevendale Pty Ltd* (1998) 14 VAR 368 at 383

¹⁸ Section 3 *Victorian Civil and Administrative Tribunal Act 1998*

When reviewing the Board's decisions VCAT will therefore have the same obligations under the Charter as the Board.

22. VCAT will also be bound by the obligations in s. 38 of the Charter in its own right. Although VCAT is not a "public official" under the *Public Administration Act 2004* (Vic), it is 'an entity established by a statutory provision that has functions of a public nature' within the meaning of s. 4(1)(b) of the Charter. In this matter VCAT is sitting in its review jurisdiction and makes its own decision under the *MHA*. As suggested by the discussion in *Re Maltall* VCAT is acting in an 'administrative capacity' within the meaning of s. 4(1)(j) in its review jurisdiction so the exception in that section does not apply. *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334 (unreported) confirms this position.

B. WHAT CHARTER REQUIRES IF BOARD/VCAT IS A PUBLIC AUTHORITY

23. The primary consequence of determining that the Board and VCAT are public authorities is that they are bound by the obligation in s. 38(1) of the Charter. Section 38 provides:

Conduct of public authorities

- (1) Subject to this section, 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.
 - (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.
 - (3) This section does not apply to an act or decision of a private nature...
24. In discussing subs. 38(1) of the Charter the Explanatory Memorandum states:
This provision is modelled on section 6 of the United Kingdom *Human Rights Act 1998* and is intended to ensure that public authorities make decisions and act compatibly with human rights. Note that in clause 3(1) "act" is defined to include a failure to act and a proposal to act.¹⁹
25. In his second reading speech the Minister stated:
Clause 38... is a key provision of the Charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts...²⁰

Interaction between section 38 and section 7(2)

26. The requirements of s. 38 have not yet been judicially considered in any detail. The Commission submits that the twin concepts of *incompatibility* (in relation to actions) and *proper consideration* (in relation to decision making processes) should be interpreted as requiring compliance with s. 7(2) of the Charter, which stipulates when the human rights in the Charter may be limited. In other words, an action will be unlawful if it limits any rights unreasonably (to paraphrase the s. 7(2) requirements)

¹⁹ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 27

²⁰ Victorian Parliamentary Hansard, 19 July 2006, Council at 2557

and a decision will be unlawful if it results in any rights being limited unreasonably. Simply giving consideration to human rights during the decision-making process but then making a decision that limits human rights in a manner that does not comply with s. 7(2) is not giving *proper* consideration to human rights. In short, s. 7(2) outlines how to give proper consideration to human rights.

27. Importantly, s. 7(2) stipulates that human rights may be subject to reasonable limitations “under law”, that is, not at the complete discretion of public authorities themselves. Limitations that a public authority places on rights through its actions or decisions will be unlawful if they are not “under law” – even if they would otherwise pass a reasonable limitations test. The Charter’s Explanatory Memorandum provides that “under law” includes both statute and the common law.²¹ Phrases similar to “under law” have been used in the human rights legislation of Canada and New Zealand.

28. Section 1 of the *Canadian Charter of Rights and Freedoms* provides:
The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Canadian jurisprudence on s. 1 requires that reasonable limits “prescribed by law” have legal force, whether they are found in statute, common law or regulations – for example the guidelines of an administrative authority were held not to have sufficient legal force to be considered “law”.²²

29. Further, the requirement that any reasonable limits must be “prescribed by law” in Canada’s Charter has been interpreted to require that any limits set out in the law must be ascertainable, understandable and articulated with precision.²³ In *Re Luscher and Deputy Minister, Revenue Canada, Customs & Excise* (1985) 17 D.L.R. (4th) 503 the court discussed these requirements:

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.²⁴

30. Section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) provides:
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.

²¹ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 8

²² *Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 147 D.L.R. (3d) 58

²³ *R v Zundel* (1987) 31 CCC (3d) 97 at 126

²⁴ *Re Luscher and Deputy Minister, Revenue Canada, Customs & Excise* (1985) 17 D.L.R. (4th) 503 at 506

In *R v Hansen* [2007] 3 NZLR 1 McGrath J discussed the meaning of the phrase ‘prescribed by law’:

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.²⁵

31. The Commission submits that under s. 7(2) a public authority’s decision or action (including a failure to act or a proposal to act)²⁶ will be unlawful if it:
- (a) limits human rights in a manner that is not “reasonable” using the s. 7(2) criteria; or
 - (b) limits human rights *at all* if those limits are not authorised by a law that is ascertainable, understandable *and* articulated with precision.

Limitation of rights

32. A number of rights are engaged in this matter, some of which cover similar impacts on the Applicant. The primary right engaged in any hearing under the *MHA* is the right not to be subjected to medical treatment without consent. Other rights engaged by non-consensual medical treatment are the rights to privacy and liberty and the broader right to protection from torture and cruel, inhuman or degrading treatment. In this matter the right to a fair hearing is also engaged, because of the specific circumstances of the failure to conduct the relevant hearings within the statutory timeframe.

33. The rights engaged in this matter are contained in the following sections of the Charter:

10. Protection from torture and cruel, inhuman or degrading treatment

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 treatment without his or her full, free and informed consent.

13. Privacy and reputation

A person has the right—

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...

21. Right to liberty and security of person

- (1) Every person has the right to liberty and security ...
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

²⁵ *R v Hansen* [2007] 3 NZLR 1 at [180]

²⁶ Charter s 3(1)

24. Fair hearing

(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 ...

34. The limit on the above rights relevant to the Board and VCAT's review is constituted by the continuation of the Applicant's Involuntary Treatment Order ("ITO") and Community Treatment Order ("CTO") (which limit the rights in sections 10, 13 and 21) in circumstances where safeguards designed to limit the detrimental impact of that primary limitation were not met (which involves both a limit on the right in s. 24 and an increase in the magnitude and significance of the primary rights limitation).

Engagement of section 10 of the Charter

35. The forced non-consensual administration of psychiatric drugs for the treatment of mental illness may in certain instances constitute a form of torture or ill-treatment,²⁷ thereby engaging sub-sections 10(a) and 10(b), in addition to squarely engaging the specific right to freedom from non-consensual medical treatment in s. 10(c) of the Charter.
36. The Charter provides that a person must not be subjected to medical treatment without full, free and informed consent. New Zealand²⁸ and the Australian Capital Territory²⁹ also have this right in their human rights legislation. In New Zealand the right has been interpreted so as to only apply to those who are "competent" to refuse treatment.³⁰ However the concepts of mental disorder and competency are not the same. In deciding whether a patient has competence to decline to consent to medical treatment the Court in *Re K* [2003] NZFLR 318 set out the following test:
1. Whether the patient is able to comprehend and retain information that is material to the decision, especially as to the likely consequences of having or not having the treatment in question; and
 2. Whether the patient is able to use the information and weigh it in the balance as part of the process of arriving at a decision.³¹
37. The *International Covenant on Civil and Political Rights* ("ICCPR") does not contain the specific right in s. 10(c), although article 7 contains the right not to be subjected to medical experimentation. The broader medical treatment right contained in the Charter has been dealt with in the context of the right not to be subjected to cruel or inhuman treatment in article 7. For example in *Brough v Australia* (Human Rights Committee 2006) the author complained that his right not to be subjected to torture and cruel, inhuman or degrading treatment under article 7 of the ICCPR had

²⁷ Manfred Novak, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2008) UN Doc A/63/175 at [63]

²⁸ Section 11 of the *New Zealand Bill of Rights Act 1990* provides that 'everyone has the right to refuse to undergo any medical treatment'.

²⁹ Section 10 of the *Human Rights Act 2004* (ACT) provides that 'no-one may be subjected to medical or scientific experimentation or treatment without his or her free consent'.

³⁰ *Re S* [1992] 1 NZLR 363; *Re M* [1992] 1 NZLR 29; *Re K* [2003] NZFLR 318

³¹ *Re K* [2003] NZFLR 318 at [24]

been violated by giving him an anti-psychotic drug without his consent.³² The Human Rights Committee noted that inhuman treatment must attain a minimum level of severity to come within the scope of article 7. It concluded that no violation of article 7 occurred because the treatment was intended to control the author's self-destructive behaviour, it was administered upon medical advice and there was no evidence that the medication was administered for purposes contrary to article 7.³³

38. A recent report by the United Nations Special Rapporteur on Torture suggests that the treatment of persons with psychiatric disabilities warrants greater scrutiny in the context of torture than it has previously been given. Of relevance to the regime established by the *MHA*, the Special Rapporteur notes that:

Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognised as a form of torture. In *Viana Acosta v Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquilizers against his will, constituted inhuman treatment. The Special Rapporteur notes that forced non-consensual administration of psychiatric drugs, and in particular neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment.³⁴

39. The Australian common law generally places a high value on the freedom of individuals to decide what medical treatment they undertake. The High Court in *Rogers v Whitaker* (1992) 175 CLR 479 quoted with approval 'the paramount consideration that a person is entitled to make his own decisions about his life'.³⁵ In particular, non-consensual medical treatment has been considered a trespass on the person: *Department of Health and Community Services v JWB and SMA* ("Marion's Case") (1992) 175 CLR 218.³⁶

Engagement of section 13 of the Charter

40. The Charter provides that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with. Article 8 of the *European Charter of Human Rights* ("ECHR") (the right to respect for private and family life, home and correspondence) has been interpreted to include bodily privacy.³⁷

³² *Brough v Australia* (Human Rights Committee 2006) UN Doc CCPR/C/86/D/1184/2003 at [9.2]

³³ *Brough v Australia* (Human Rights Committee 2006) UN Doc CCPR/C/86/D/1184/2003 at [9.5]

³⁴ *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc A/63/175 at [63]

³⁵ *Rogers v Whitaker* (1992) 175 CLR 479 at 487

³⁶ *Department of Health and Community Services v JWB and SMA* ("Marion's Case") (1992) 175 CLR 218

³⁷ *Pretty v The United Kingdom* (2002) 35 EHRR 1 at [61]

41. The privacy right in the Charter is internally limited – it is bounded by the concepts of unlawfulness and arbitrariness. An interference with privacy will be lawful if the interference is authorised by law. In this case, some interference with the right is authorised by the *MHA*. However, under the *MHA* the authority for interference with the right is provided in the context of the legislative safeguard of the periodic review by the Board, so the failure to fulfil that safeguard may render the interference unlawful from that point onwards. To avoid being considered arbitrary, the interference must be governed by clear pre-existing rules and the circumstances and procedures adopted for interfering with the right must be predictable and foreseeable by those to whom they are applied.³⁸ The *MHA* appears to provide clear rules that are predictable and foreseeable however the interference in this case may be considered arbitrary as it was not done in accordance with those clear rules and therefore lacks predictability.

Engagement of section 21 of the Charter

42. In Canada the Consent and Capacity Board has characterised non-consensual medical treatment as a restriction on liberty. In *Re W.S.* (2007) CanLII 50504 (Ontario Consent and Capacity Board) (unreported) the Consent and Capacity Board held:

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 principals of fundamental justice.” Any restriction on the liberty of a person in Canada is a deprivation of that liberty. The physician’s opinion which seeks to have the applicant be the subject of a Community Treatment Order, with all that entails is such a restriction and therefore can only occur, in law, in accordance with the principles of fundamental justice.³⁹

Although the patient in this case was not physically detained or confined, it was recognised that his liberty was restricted by a CTO requiring him to take medication. Because the procedural requirements of the mental health legislation were not strictly complied with the order was lifted. The liberty right is similarly engaged in this case and the requirements of the *MHA* have not been strictly complied with.

Engagement of section 24 of the Charter

43. The Charter’s fair hearing right was considered by VCAT in *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334 (unreported). VCAT acknowledged that the right to a fair hearing applied in the context of the administrative review of a decision regarding subdivision and construction permit applications. The content of the right was determined in the context of the nature of the hearing being conducted. In that case the Members determined that VCAT’s processes had been fair and consistent with the principles of natural justice, and therefore complied with the Charter’s right to a fair hearing.⁴⁰

44. The right to a fair hearing is a fundamental right under the common law, although the common law right may differ from that set out in the Charter. The importance of the right at common law was discussed by Justice Bell in *Tomasevic v Travaglini & Anor* (2007) 17 VR 100:

³⁸ *Regina v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex Parte Munjaz* (FC) [2005] UKHL 58 (unreported) at [34], [94] and [122]

³⁹ *Re W.S.* (2007) CanLII 50504 (Ontario Consent and Capacity Board) (unreported) at 7

⁴⁰ *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334 (unreported) at [238]

The right of every person to a fair criminal or civil trial, and the duty of every judge to ensure it, is deeply ingrained in the law. Expressed in traditional terms, the right is inherent in the rule of law – indeed, ‘in every system of law that makes any pretension of civilisation’ – and in the judicial process. Expressed in modern human rights terms, the right to a fair trial is important for promoting and respecting equality before the law and access to justice.⁴¹

45. At common law the right to a fair trial within a court is effectively absolute, to the extent that a fair trial is the only sort of trial that a judge can judicially conduct.⁴² A review of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* indicates that the right to a fair trial is not considered to be non-derogable in international law.⁴³ However, in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 the European Court of Human Rights held that any limitations should not impair the essence of the right to a fair hearing.⁴⁴
46. The right to a fair hearing will be limited if a determination to continue the Applicant’s CTO is presumed to have been made without a hearing having actually occurred. A finding that scheduling and then adjourning a hearing under s. 30 constitutes substantial compliance with the requirement to conduct a hearing, limits the right to a fair hearing because a hearing where the matter is not actually heard is not fair. Further, while the review of the Applicant’s CTO extension was eventually heard significantly outside the statutory time-frame, a hearing of this nature, which the legislature saw fit to impose an 8 week timeframe on, can not be delayed by over a year and still be considered “fair”.
47. In *NAIS v Minister for Immigration and Multicultural Indigenous Affairs* (2005) 223 ALR 171 the High Court held that delay by an administrative tribunal affected the procedural fairness of the hearing in question. Justice Kirby’s judgment provides a useful discussion of the considerations that will be relevant in asylum cases, which are equally relevant in *MHA* cases where significant human rights are similarly at risk:
Delay in asylum cases: Of special relevance to the present case is the fact that the delay complained of occurred in a tribunal which, quite apart from the statutory injunctions contained in s 420 of the Act, of its very nature needs to decide applications promptly in order to fulfil its statutory purposes. In the past this Court has referred to the vulnerability of many of the persons who are applicants before the Tribunal... In *SB (Sufficiency of Protection – Mafia) Albania*, that tribunal was concerned with a case involving a five month delay from the completion of the hearing to the issue of its determination. In the event, the appeal was dismissed. However, the tribunal identified the standard which, it considered, should apply to such decisions, by virtue of their very character and purpose:
“[I]n asylum appeals a delay of three months between the hearing and preparation of the determination is unacceptable. The nature of the issues raised particularly in an asylum appeal are such that undue delay causes unnecessary worry and prejudice to a deserving party and equally it is not in

⁴¹ *Tomasevic v Travaglini & Anor* (2007) 17 VR 100 at [68]

⁴² *Tomasevic v Travaglini & Anor* (2007) 17 VR 100 at [129]

⁴³ United Nations Economic and Social Council (1985) UN Doc E/CN.4/1985/4

⁴⁴ *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at [57]

the public interest where the claimant is undeserving. Asylum, immigration and human rights appeals should be determined with as little delay as possible ideally on the day or at least within days of the hearing. It should only be in exceptional cases that any further delay is justifiable.”⁴⁵

48. Delays by mental health tribunals have been considered in the United Kingdom in the context of the right in article 5(4) of the ECHR to a speedy trial when deprived of liberty by arrest or detention. In *R (C) v Mental Health Review Tribunal London South and South West Region* [2002] 1 WLR 176 the court considered the policy of listing all applications for review in mental health detention cases for a hearing 8 weeks after the application. The court concluded that:

[T]he practice of fixing hearing dates eight weeks after the date of application is bred of administrative convenience, not of administrative necessity... I do not consider lawful a practice which makes no effort to see that the individual application is heard as soon as reasonably practicable, having regard to the relevant circumstances of the case.⁴⁶

49. In *R (KB and others) v Mental Health Review Tribunal London South and South West Region* [2002] EWHC 639 (Admin) Justice Burton considered delays in seven cases where psychiatric patients had requested a review of their detention. In doing so he noted that:

The issues before the Mental Health Tribunals are probably the most important issues decided by any tribunals. The Tribunals make decisions as to the compulsory detention and treatment, and thus the liberty, of the individual... Their importance is reflected in the different wording of Articles 5.4 and 6 of the Convention. Article 5.4 requires that the lawfulness of the detention of a patient “shall be decided speedily”, whereas Article 6 requires a hearing of a trial in a civil or criminal case only “within a reasonable time”. This difference should be borne in mind when considering the authorities on delay in the context of Article 6.⁴⁷

50. The decision of the Board limited various Charter rights of the Applicant, so it will be unlawful if:

- (a) the limit on the relevant rights is not
 - (i) authorised by law *and*
 - (ii) that law is ascertainable, understandable and articulated with precision;
- or*
- (b) it limits those rights in a manner that is not “reasonable” in accordance with section 7(2).

The first test is the more stringent, precluding even reasonable limitations if they are not authorised by laws with the required characteristics. If this test is satisfied, the second test should be applied to ascertain whether the decision is nevertheless unlawful because not reasonable in accordance with s. 7(2).

⁴⁵ *NAIS v Minister for Immigration and Multicultural Indigenous Affairs* (2005) 223 ALR 171 at [99] – [100]

⁴⁶ *R (C) v Mental Health Review Tribunal London South and South West Region* [2002] 1 WLR 176 at [63] – [65]

⁴⁷ *R (KB and others) v Mental Health Review Tribunal London South and South West Region* [2002] EWHC 639 (Admin) at [32]

Is the limit on the rights authorised by law?

51. Part 3, Division 2 of the *MHA* implicitly authorises limitations on the rights in sections 10, 13 and 21 of the Charter in the form of involuntary mental health treatment where patients satisfy the criteria in s. 8 of the *MHA*. In particular s. 12AD provides that an involuntary patient is to be given treatment for their mental illness, regardless of whether they personally consent or not. However the Act only authorises limits on these rights in the context of the safeguard provided by prompt Board review. Section 4 of the *MHA* makes it clear that the Act's safeguards are an integral part of the authorisation to limit rights:

Objects of the Act

- (1) The objects of this Act 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
 - (b) to establish a Mental Health Review Board; and
 - (c) to establish a Psychosurgery Review Board; and
 - (d) to provide for the appointment and functions of community visitors; and
 - (da) to establish a Victorian Institute of Forensic and Mental Health; and
 - (e) to ensure that people with a mental disorder are informed of and make use of the provisions of this Act.
- (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.
52. The Act's dual mandate of non-consensual treatment and rights protection can only be achieved if the rights protection measures provided for in the Act are strictly complied with. Interpreted in accordance with its purpose and as a whole, the Act only authorises limitation of these rights where proscribed Board reviews are conducted when required and the Act's other safeguard provisions are complied with. The Commission submits that this is the interpretation of the *MHA* that VCAT should adopt, for reasons explained more fully below at [128] and [129]. In the current circumstances, where the Board has failed to conduct one or more required reviews within the required time, the Act does not authorise the limitation of the rights, so that limitation is unlawful.
53. The *MHA* does not implicitly authorise any limitation of the right to a fair hearing, to the contrary s. 29 of the *MHA* specifically provides for appeals to be made to the

Board at any time against all forms of non-consensual treatment and s. 30 of the *MHA* provides for hearings by the Board at specific intervals of time to review involuntary treatment orders. The limitation on the right to a fair hearing was not authorised by the *MHA*, in fact it occurred in breach of the requirements of that Act. The limitation is therefore unlawful.

54. The second aspect of this test is whether the law authorising the limit is ascertainable, understandable and articulated with precision. To the extent that the *MHA* authorises some limitation of the rights in s. 10, 13 and 21, it appears to satisfy the requirement to be ascertainable, understandable and articulated with precision. However the limitation did not occur in conformity with that law.

Is the limitation on the rights reasonable?

55. For those limits that pass the first test, it is necessary to ascertain whether they pass the second test – that of reasonableness under s. 7(2). Section 7 of the Charter provides:

Human rights – what they are and when they may be limited

- (1) ...
- (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 ...

56. In recommending a general limitation provision in the Charter the Human Rights Consultation Committee discussed various limitations provisions enacted in other jurisdictions:

Section 28 of the ACT *Human Rights Act 2004* provides one form of limitation clause:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

This is consistent with provisions in the human rights instruments in New Zealand and Canada. The provision embodies what is known as the ‘proportionality test’. The Canadian Supreme Court has stated that in order for a limitation on a right to be reasonable and demonstrably justified, two key conditions must be met:

- The objective that the rights-limiting law is trying to fulfil must be of ‘sufficient importance to warrant overriding a constitutionally protected right or freedom’. The objective must ‘relate to concerns which are pressing and substantial’.
- The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are ‘designed to meet the objective in question’, whether they impair rights or freedoms as little as possible and whether there is proportionality between the effects of the measures and the objective

which the rights-limiting law is seeking to achieve. [*R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ]

In considering what is most appropriate for Victoria, the Committee found useful the comments of New Zealand practitioners at the academic round-table, who said that the unstructured New Zealand provision (and by implication the ACT and Canadian provisions) can be difficult to interpret and apply on a day-to-day basis.

The Committee wants to make sure that the Charter, which will more often be interpreted within governments than by the courts, is as easy as possible to apply. As such, a more certain form of guidance about the limitations on rights is needed. The South African Bill of Rights 1996 specifically sets out the matters to be taken into account in deciding if a limitation is reasonable and justifiable.

The Committee has drawn on this example and recommends that the limitation clause be drafted as follows:

Human rights may be subject only to such reasonable limits set by Victorian laws that can be demonstrably justified in a free and democratic society taking into account all relevant factors, including:

- *the nature of the right;*
- *the importance of the purpose of the limitation;*
- *the nature and extent of the limitation;*
- *the relation between the limitation and its purpose; and*
- *less restrictive means to achieve the purpose.*

57. The Charter's Explanatory Memorandum provides:

The general limitation clause, including the list of relevant factors, is modelled on section 5 of the New Zealand *Bill of Rights Act 1990* and, more particularly, on section 36 of the Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

Laws which are necessary to protect security, public order or public safety which limit human rights, are examples of laws which may be demonstrably justified in a free and democratic society.⁴⁸

58. The Charter's second reading speech provides:

This approach is adopted in many modern human rights instruments, such as those in the ACT, New Zealand, Canada and South Africa. The general limitations clause embodies what is known as the 'proportionality test'. The weight to be attached to each of the factors listed in clause 7 will vary depending on the particular rights and the circumstances that are being considered.

...the reasonable limitations provision will apply in well recognised situations where full, free and informed consent to medical treatment might not be possible because of emergency or because the person is incapable of giving consent.⁴⁹

⁴⁸ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 9

⁴⁹ Victorian Parliamentary Hansard, 19 July 2006, Council at 2555

59. Justice Hollingworth briefly considered this section of the Charter in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported):

It should be noted that although many of the international cases to which I was taken apply general notions of proportionality at this stage of their analysis, the Charter requires a Victorian court to have regard to the specific factors mentioned in s 7(2), not to any such general concepts.

As far as s 7(2)(e) is concerned, it is common ground that, in considering whether there is any “less restrictive means available”, there is no obligation on a public authority to choose the least intrusive means possible. Rather, the court is required to consider whether the chosen measure falls within a range of reasonable alternatives (see, for example: *RJR McDonald Inc v Attorney-General (Canada)* [1995] 3 SCR 199 at [160]).

Dr Sabet focussed on s 7(2)(e). He argues that a restraining agreement under s 40(5) of the HPRA was a less restrictive means reasonably available, and therefore the decision should not have been made to suspend him.

This submission misunderstands the meaning of s 7(2)(e). It must be remembered that it is the limitation on the human right which is relevant in section 7(2). A restraining agreement under s 40(5) of the HPRA may be a “less restrictive means” of limiting Dr Sabet’s capacity to practice medicine, but it is not a “less restrictive means reasonably available to achieve the purpose that the limitation [on the presumption of innocence] seeks to achieve.”⁵⁰

60. In considering the meaning of the concepts of ‘reasonable limits’, ‘demonstrably justified’ and ‘free and democratic society’ contained in s. 7(2), case law from those jurisdictions referred to in the Charter’s preparatory material should be considered. These concepts provide broad guidance about the manner in which the specific factors listed in s. 7(2) should be used to form conclusions about Charter compatibility under that section.

61. The decision of the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103 has been influential in Canada,⁵¹ New Zealand,⁵² South Africa⁵³ and the United Kingdom⁵⁴. It relevantly provides:

A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched into the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and

⁵⁰ *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) at [187] – [190]

⁵¹ *Canada (Attorney General) v Hislop* [2007] 1 SCR 429

⁵² *R v Hansen* [2007] 3 NZLR 1

⁵³ *Makwanyane* 1995 (3) SA 391 (CC)

⁵⁴ *Huang v Secretary of State for the Home Department* [2007] 2 WLR 581

political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.⁵⁵

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation...⁵⁶

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as “reasonableness”, “justifiability” and “free and democratic society” are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase “demonstrably justified” in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case...⁵⁷

Having regard to the fact that s. 1 is being invoked for the purpose of justifying the violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, “commensurate with the occasion”. Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit...⁵⁸

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”... It is necessary, at a minimum, that an objective relate to concerns that are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.⁵⁹

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”... 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 this first sense, should impair “as little as possible” the right or freedom in question... Third, there must be proportionality between the effects of the measures which are responsible for limiting the

⁵⁵ *R v Oakes* [1986] 1 SCR 103 at [64]

⁵⁶ *R v Oakes* [1986] 1 SCR 103 at [66]

⁵⁷ *R v Oakes* [1986] 1 SCR 103 at [67]

⁵⁸ *R v Oakes* [1986] 1 SCR 103 at [68]

⁵⁹ *R v Oakes* [1986] 1 SCR 103 at [69]

Charter right or freedom, and the objective which has been identified as of “sufficient importance”.⁶⁰

... 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.⁶¹

62. From the excerpts set out above it is clear that in *R v Oakes* “proportionality” is used as a shorthand for “reasonable” and “demonstrably justified” (two phrases that appear in s. 7(2)), so contrary to what was said in *Sabet*,⁶² the Commission submits that general concepts of proportionality will be relevant under s. 7(2).

63. Similar considerations also arise in the United Kingdom, even though the *Human Rights Act 1998* (UK) does not contain a reasonable limits provision. The United Kingdom case law relies on the principle of proportionality to determine when limits are lawful. The principle is stated in *R (Daly) v Home Secretary* [2001] 2 AC 532:

The contours of the principle of proportionality are familiar... In determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

“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.”⁶³

64. In *Huang v Secretary of State for the Home Department* [2007] 2 WLR 581 the House of Lords Appellate Committee considered this statement of the proportionality principle, noting that:

This formulation has been widely cited and applied. But counsel for the applicants... suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted...⁶⁴

65. In discussing New Zealand’s reasonable limits provision Anderson J notes in his judgment in *Hansen* that although the *New Zealand Bill of Rights Act 1990* contains a general limitations provision, some rights may not be able to be limited under that provision:

⁶⁰ *R v Oakes* [1986] 1 SCR 103 at [70]

⁶¹ *R v Oakes* [1986] 1 SCR 103 at [71]

⁶² *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (unreported) at [187]

⁶³ *R (Daly) v Home Secretary* [2001] 2 AC 532 at [27]

⁶⁴ *Huang v Secretary of State for the Home Department* [2007] 2 WLR 581 at [19]

There are some rights and freedoms in respect of which no limitation could be justified in a free and democratic society. Take, for example, the rights affirmed by s 9. What free and democratic society could contemplate as reasonable the infliction of torture or cruel, degrading or disproportionately severe punishment? The right to a fair trial is another example. Whether in a particular case errors of law, or procedural deficiencies or other aberrations, do or do not render the trial unfair is a matter of degree and judgment. But should a trial be properly stigmatised as unfair, s 5 could not be invoked to redeem it. It is also fairly arguable that the burden of persuasion carried by the prosecution in criminal cases is so integral to a fair trial that no relaxation or reversal of it can be justified.⁶⁵

66. Although s. 7(2) of the Charter sets out how rights may permissibly be limited, the Commission submits that Anderson J's comments are equally applicable under the Charter – there are some rights which may not be limited in any circumstances. These rights are known at international law as ‘non-derogable rights’. The *Siracusa Principles* sets out those rights that are ‘non-derogable’ under customary international law – even if the purpose of the limitation is to preserve the life of the nation.⁶⁶ These rights are:

- the right to life;
- freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation;
- freedom from slavery or involuntary servitude;
- the right not to be imprisoned for a contractual debt;
- the right not to be subjected to retroactive criminal penalties;
- the right to recognition as a person before the law; and
- freedom of thought, conscience and religion.⁶⁷

67. Notably, freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation is a non-derogable right. Freedom from medical *treatment* is not a free standing right under the Covenant, however medical treatment without consent may be considered to be ‘torture or cruel, inhuman or degrading treatment’ in certain circumstances.⁶⁸ Where the treatment falls within this category, no purpose would be important enough to justify it at international law. This should also be the position under the Charter. The fact that non-consensual medical treatment may, at one end of the spectrum, fall into the category of a non-derogable right, indicates that caution needs to be exercised when this right is engaged.

68. In addition to the introductory concepts set out in s. 7(2) of the Charter, the section clearly sets out a number of factors, drawn from these broader concepts, that will be relevant when considering whether a limit is ‘demonstrably justified’. The circumstances of the limitation on the Applicant’s rights will be canvassed briefly within a discussion of these factors.

⁶⁵ *R v Hansen* [2007] 3 NZLR 1 at [264]

⁶⁶ United Nations Economic and Social Council, UN Doc E/CN.4/1985/4 (1985)

⁶⁷ Article 58

⁶⁸ Manfred Novak, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2008) UN Doc A/63/175 at [163]

Nature of the right

69. The nature of the rights engaged in this matter has been canvassed above in the discussion of whether these rights are limited at [35] – [49].

The importance of the purpose of the limitation

70. The limitation of the rights of the mentally ill that is involved in non-consensual treatment is considered necessary to ensure that they get appropriate treatment, protection and care, and so that the public are protected from any anti-social manifestations or consequences of mental illness.

71. The limitation of the Applicant's right to a fair hearing was in part caused for the purpose of allowing the Applicant to seek a second psychiatric opinion and in part caused by administrative oversight.

The nature and extent of the limitation

72. The interference involved in non-consensual treatment involves the Applicant being required to submit to fortnightly injections of risperidone consta. This treatment has resulted in unwanted physical side effects to the Applicant – he states that it causes him to sleep 12 hours a day and that he suffers from lack of motivation as a result of taking it.

73. Although the limitation in this case does not involve physical confinement, this does not detract from the seriousness of the impact of the limitation. Anti-psychotic medications have a significant impact on brain function, affecting the way a person views themselves and the world around them. With the ability to affect the very “reality” in which a person lives, the imposition of such medication without consent should not be viewed lightly.

74. The extent of the limitation on the right to a fair hearing went far beyond what was necessary to allow a reasonable time for the Applicant to seek a second psychiatric opinion and was to a significant extent the result of administrative error rather than a desire to allow the Applicant a prolonged period in which to seek the opinion.

The relationship between the limitation and its purpose

75. The limitation involved in non-consensual treatment appears to be directly related to its purpose.

76. The limitation of the Applicant's fair hearing rights was partially related to the stated purpose of allowing the Applicant to have a fair hearing by giving him further time to seek a second psychiatric opinion and partially due to administrative oversight.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

77. It appears that there are other treatments available to the Applicant, however the Applicant's treating team have stated a concern that the Applicant will not comply with an oral treatment regime. The Applicant claims that the treating team has failed to discuss alternative medications with him and that he may be willing to consent to

alternatives. It is possible that there are alternative treatment regimes available to achieve the purpose of effectively treating the Applicant's mental illness, which would not involve a limitation on rights if the Applicant consented to being treated with them.

78. The purpose of the limitation on the Applicant's right to a fair hearing could have been achieved in a manner less restrictive of the right, for example by partially hearing the matter and considering whether the Board was satisfied of the need for the extension of the CTO on the basis of the available psychiatric report and if so, adjourning the matter to allow additional time for a second psychiatric opinion to be provided, but if not, removing the CTO. This would have ensured that a substantive review of the matter was undertaken promptly and that if a CTO was not warranted on the basis of the available psychiatric opinion, the Applicant would not have been unnecessarily treated against his will.

79. Taking into account the factors discussed above, none of the limits on human rights arising in this matter can be justified in accordance with s. 7(2) of the Charter.

Conflicting statutory mandate

80. Section 38(2) provides that the s. 38(1) obligation 'does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision'. The Explanatory Memorandum to the Charter provides that the exception provided for in s. 38(2) was included to 'exonerate public authorities who act to give effect to a statutory provision that is incompatible with a human right in the circumstances where they could not reasonably have acted differently or made a different decision'.⁶⁹

81. The Explanatory Memorandum suggests that the exception is limited to cases where the action or decision is required to give effect to the relevant legislation:

This sub-clause is intended to exonerate public authorities who act to give effect to a statutory provision that is incompatible with a human right in circumstances where they could not reasonably have acted differently or made a different decision.⁷⁰

The exemption should be limited to those cases where the law in fact requires the decision or action, such that there is no discretion in the exercise of the relevant powers. This is the only circumstance in which it can be said that the public authority could not reasonably have acted differently or made a different decision, which is the prerequisite for reliance on s. 38(2). The section clearly does not provide an exemption where the law that the public authority is acting or deciding under simply allows for an incompatible decision or action.

82. The Commission submits that s. 38(2) does not apply to the decision being made by the Board or VCAT under s. 30 of the *MHA*, because the Act does not *require* the confirmation of the CTO in the current circumstances, particularly when the *MHA* is interpreted in accordance with s. 32 of the Charter, as it must be.

⁶⁹ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 26

⁷⁰ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 27

83. In its decision in this matter there was a suggestion by the Board that s. 36C(2) of the *MHA* prevented it from discharging involuntary patients from CTOs:

[T]he inherent difficulty faced by the Board in considering any interpretation, Charter-consistent or otherwise, of the current statutory provisions is the lack of any express consideration in the Act of the consequences of a failure by the Board to conduct a periodic review and review of the extension of a CTO in accordance with its obligations under ss 30(3) and (4). This position is exacerbated by the fact that the Board, as a statutory decision-making body under the Act, is given specific and strictly limited powers under s36C(2) to discharge an involuntary patient from a CTO, namely “(I)f the Board considers that the criteria in section 8(1) do not apply to the patient...”.⁷¹

84. Section 36C provides that on the review or appeal of a CTO the CTO may be discharged, confirmed, varied or revoked:

36C Power of Board on appeal or review for patients on community treatment orders

...

- (3) This section applies on an appeal or review for a patient who is subject to a community treatment order.
- (4) If the Board considers that the criteria in section 8(1) do not apply to the patient, the Board **must** order that the patient be **discharged** from the community treatment order.
- (5) If the Board is satisfied that the criteria in section 8(1) apply to the patient – the Board **may**–
 - (a) **confirm** or **vary** the community treatment order;
 - (b) **revoke** the community treatment order if satisfied on reasonable grounds that the treatment required for the patient cannot be obtained under the order.
- (6) The Board **may** also **revoke** a community treatment order if–
 - (a) the Board is satisfied on reasonable grounds that the patient has not complied with the order or the patient’s treatment plan; and
 - (b) reasonable steps have been taken, without success, to obtain compliance with the order or plan; and
 - (c) the Board is satisfied on reasonable grounds that there is a significant risk of deterioration in the patient’s mental or physical condition because of the non-compliance ... (emphasis added)

85. It is notable that the sub-section dealing with discharge is expressed in mandatory language, whilst the balance of the provisions relating to revocation, confirmation and variation are expressed in discretionary language. A patient must be discharged if the Board considers that the criteria in s. 8(1) do not apply. In this case the Board failed to consider whether the criteria in s. 8(1) applied within the required time frame. The failure arguably requires the patient to be discharged, because a failure to find that the criteria are satisfied may be considered analogous to a finding that the criteria are not satisfied. It certainly does not *require* a decision to confirm the CTO. The *MHA* provision governing the Board’s review of CTO’s therefore does not provide the basis of a s. 38(2) exemption from the obligations imposed by s. 38(1).

⁷¹ 09-003 [2008] VMHRB 1 (unreported) at [174]

C. WHAT CHARTER REQUIRES OF BOARD/VCAT AS A TRIBUNAL

Application of the Charter to courts and tribunals

86. Regardless of whether the Board or VCAT is considered to be a public authority when undertaking hearings under the *MHA* s. 6(2)(b) provides for the Charter to apply to courts and tribunals ‘to the extent that they have functions under Part 2 and Division 3 of Part 3’. This section applies as the sole source of Charter obligations when the Board or VCAT is acting in a judicial capacity.
87. Section 6(2)(b) applies the Charter to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3. Section 3(2)(a) of the Charter defines a ‘function’ as including powers, authorities and duties. Part 2 of the Charter sets out all the human rights that are protected by the Charter and Division 3 of Part 3 relates to the interpretation of laws (s. 32) and the making of declarations of inconsistent interpretation (s. 36).
88. Courts and tribunals may be given functions (that is – powers, authority or duties) under various sections in Part 2 and Division 3 of Part 3 in various circumstances. It is not possible or desirable to predetermine the circumstances in which courts and tribunals will have powers, authority or duties under the relevant parts and divisions of the Charter – each situation must be examined on its facts. However it is clear that some sections clearly give functions to courts and tribunals. These sections are:
- s. 21(5)(c): rights when arrested and detained on a criminal charge;
 - s. 21(6)-(8): rights when awaiting trial;
 - s. 23(2)-(3): rights of children in the criminal process;
 - s. 24: right to a fair hearing;
 - s. 25: rights in criminal proceedings;
 - s. 26: right not to be tried or punished more than once;
 - s. 27: prohibition on retrospective criminal laws;
 - s. 32: interpretation;
 - s. 33: referral to Supreme Court;
 - s. 36: declaration of inconsistent interpretation by Supreme Court.
89. Section 6(2)(b) has been the subject of judicial consideration in a small number of cases. In *R v Williams* (2007) 16 VR 168 Justice King considered the Charter, although she held that the Charter did not apply to the case before her. King J commented that:
- When a court is determining what would constitute a fair hearing in respect of a criminal trial it would be difficult to imagine that the rights referred to as minimum guarantees in criminal proceedings, would not form, in addition to any common law and other statutory requirements, the basis of what constitutes a fair hearing.⁷²
90. This is the approach that has been taken in the Australian Capital Territory, where courts are similarly not public authorities. Although there is no specific application provision akin to s. 6 in the ACT, ACT courts have proceeded on the basis that they are required to apply and respect the right to a fair hearing. For example in *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008] ACTSC 76

⁷² *R v Williams* (2007) 16 VR 168 at [54]

(unreported) Justice Refushage considered whether the right to a fair trial contained in the *Human Rights Act 2004* (ACT) required him to vacate a trial date as requested by the Applicants. His Honour noted that in deciding the application he ‘must have regard to the paramount duty to see that the Applicants are not denied a fair trial nor access to the court as protected by the *Human Rights Act 2004* (ACT)’.⁷³ In *R v Griffin* [2007] ACTCA 6 (unreported) the Court of Appeal stated that:

It should be noted that s 21 *Human Rights Act 2004* (ACT) (*HR Act*) now is the source, under Territory law, of the right to a fair trial. The difference may be one of emphasis rather than of substance. It does, however, mean that there is now a positive right to a fair trial rather than the right not to be tried unfairly as the common law provides. It may be that would make a difference in some cases, though in this case it seems to us to lead to the same result.

There is a duty cast on the trial judge to relieve the unfairness referred to by Wilson J (*supra*).

That duty is reinforced by the provisions of the *HR Act* (for example, s 21).⁷⁴

91. Finally, the issue was considered by the Board in the case that is the subject of this application. In 09-003 [2008] VMHRB 1 (unreported) the Legal Member of the Board made the following comments on the Board’s functions under Part 2 of the Charter:

There is, however, less clarity in relation to a function (which term is defined in s3(2) to include “a reference to a power, authority and duty”) if any, that the Board has under part 2, the provisions of which contain the protected Charter rights. In *Evans and Evans* paragraphs 1.40-1.44 on pp12-14, three possible alternatives are suggested and discussed, namely that:

- the Board has power to enforce directly any and all of the rights set out in Part 2;
- the Board has power to enforce directly any of the rights set out in Part 2 that **relate to its proceedings**;
- the Board has power to enforce directly any of the rights set out in Part 2 that are explicitly and exclusively addressed to courts and tribunals.

In order to distinguish in a meaningful way between its functions as a public authority, when acting in an administrative capacity, and as a tribunal, in undertaking its decision-making function, until determined otherwise the Board adopts the narrow interpretation of s6(2) articulated above by *Evans and Evans*.

Under this interpretation... the Board in its decision-making function as a tribunal is limited to the application of those Charter rights that **directly relate to the conduct of its hearings**. In effect this means that the Board is bound to consider the s24 fair hearing right. If that were not correct, as Ms Davidson submitted, in the Board’s view, there would be no Charter rights that the Board would be required to consider and apply, a result which would be entirely inconsistent with the spirit and intention of the Charter. (emphasis added)

⁷³ *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008] ACTSC 76 (unreported) at [51]

⁷⁴ *R v Griffin* [2007] ACTCA 6 (unreported) at [4] – [6]

92. Notably, although the Board purported to be adopting the narrow approach, the Board's decision that it was limited to the application of 'those Charter rights that directly relate to the conduct of its hearings' appears to be the second approach suggested by Evans and Evans.

93. When conducting hearings under the *MHA*, the Board and VCAT have functions under sections 24, 32 and 33 of the Charter. This means that these sections apply to the Board and VCAT by virtue of s. 6(2)(b) and they are bound to comply with them. In this matter only sections 24 and 32 are relevant.

Section 24

94. Section 24 requires that determinations under the *MHA* are 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. In determining whether the hearing received by the Applicant in the Board hearing was unfair, or whether the hearing being conducted by VCAT could be unfair, the issues raised in the Commission's earlier submissions at [43] – [49] should be considered.

95. For the reasons discussed in the Commission's earlier submissions at [53] above, the limit on the Applicant's right to a fair hearing that occurred as a result of the Board's decision did not occur "under law" as required by s. 7(2) and was therefore unlawful.

96. For the reasons discussed in the Commission's earlier submissions at [71], [74], [76], [78] and [79] above, the limit on the Applicant's right to a fair hearing that occurred as a result of the Board's decision was not "reasonable" as required by s. 7(2) and was therefore unlawful.

97. Because the Applicant's right to a fair hearing has already been limited in an unlawful manner, VCAT should refrain from conducting a review of the extension of the Applicant's CTO under s. 30 of the *MHA* and should instead treat the Applicant's CTO as having expired, with the result that the Applicant ceases to be an involuntary patient as provided in s. 14(5) of the *MHA*.

Section 32

98. The Charter's interpretation provision provides:

Section 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.

99. Section 32 of the Charter requires that the Board and VCAT interpret the *MHA* compatibly with human rights, so far as it is possible to do so consistently with that Act's purpose. The meaning and scope of this obligation is considered in further detail below.

Interpreting section 32

100. In recommending an interpretive provision the Human Rights Consultation Committee referred to the interpretation provisions in the United Kingdom and the Australian Capital Territory legislation with approval:

By making this plain, the courts would be provided 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. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation is favoured. In the United Kingdom House of Lords decision *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 Lord Nicholls of Birkenhead said:

The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must... 'go with the grain of the legislation'.⁷⁵

Or as Lord Roger of Earlsferry stated:

It does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.⁷⁶

101. In discussing subs. 32(1) the Explanatory Memorandum states:
The object of this sub clause is to ensure that courts and tribunals interpret legislation to 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 or interpret legislation in a manner which avoids achieving the object of the legislation.⁷⁷
102. In his second reading speech the Minister stated that:
The bill is based on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand.⁷⁸

Nature of the interpretive obligation

103. Although there is not yet any Victorian case law that examines the s. 32 interpretive process in any detail other jurisdictions, in particular the United Kingdom and New Zealand, have significant experience with equivalent provisions. The Human Rights Consultation Committee specifically referred to the equivalent provisions of the United Kingdom and the Australian Capital Territory when recommending an interpretation provision.

⁷⁵ *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 at [33]

⁷⁶ *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 at [110]

⁷⁷ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 23

⁷⁸ Victorian Parliamentary Hansard, 19 July 2006, Council at 2554

The purpose requirement

104. The main difference between the provisions in other jurisdictions and s. 32 is that s. 32 contains an express requirement that the *purpose* of the legislation must be taken into account when interpreting legislation. However in a number of cases courts in the United Kingdom and in New Zealand have determined the boundaries of their own interpretive provisions with an overriding purpose proviso – the courts have drawn a distinction between interpretation and amendment using legislative purpose as the dividing line.⁷⁹ For example, the House of Lords has drawn a distinction between interpretation and amendment in the following terms:

[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. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation.⁸⁰

105. The Australian Capital Territory has recently amended its interpretive provision so that it mirrors s. 32. The ACT Supreme Court has previously adopted the House of Lords authority on the use of the UK interpretive provisions – *Ghaidan v Godin-Mendoza* – without reservation.⁸¹ However a recent ACT Administrative Appeals Tribunal decision on the ACT interpretive provision examined the application of this authority on the use of the UK interpretive provisions more critically:

While the Explanatory Statement informs that the jurisprudence in *Ghaidan v Godin Mendoza* is drawn upon in the drafting of s. 30, the fact that it has not adopted the same language as section 3 of the UK HRA cannot be ignored. In particular, section 3 is not subject to the qualification contained in section 30 that any interpretation of the legislation is to be “consistently with its purpose”. That is, it seems to me, a matter of some significance having regard to the fact that section 3 of the UK HRA was clearly under active consideration in the drafting of section 30 and the Legislative Assembly chose to adopt a formula that contained a qualification not included in the equivalent United Kingdom provision.

The consequences of the difference in formulation is that, whereas section 3 of the UK HRA enables a court to modify the meaning of the legislation to which it is being applied bounded “only by what is possible” (to use the language of Lord Nicholls), there is an additional requirement imposed in the interpretation of legislation to which section 30 of the ACT HRA is being applied, ie, the interpretation must be consistent with the purpose of the legislation... The absence of the purposive qualification in section 3 of the UK HRA, in my view, has more readily enabled the far-reaching consequence that the intention of the

⁷⁹ *In Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at 313; *Quilter v Attorney-General* [1998] 1 NZLR 523 at 581

⁸⁰ *In Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at 313

⁸¹ *Kingsleys Chicken Pty Ltd v Queensland Investment Corporation and Canberra Centre Investments Pty Ltd* [2006] ACTCA 9 (unreported) at [52]; *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* (2006) 206 FLR 328 at [22]

Parliament which enacted the legislation in question could be departed from so as to achieve a human rights compliant outcome.⁸²

106. Outside of the Charter context the purpose of legislation has been read in various ways. The “purposive approach” identifies the purpose of the legislation at a higher level of abstraction than the ordinary meaning of the words in the section alone – with the purpose being to address some problem or mischief.⁸³ This approach has been cited with approval by Charter commentators⁸⁴ and is the one that should apply when approaching the interpretive process under s. 32 because it allows more scope for the operation of s. 32.

Interaction between section 32 and section 7(2)

107. A central issue in determining the meaning and operation of s. 32 is whether s. 7(2) considerations form a part of the interpretive process. The question is whether s. 32 requires an interpretation that is consistent with Charter rights in their unfettered form (where possible, consistent with the purpose of the legislation) or rather requires an interpretation that is consistent with Charter rights as reasonably limited in accordance with s. 7(2) (where possible, consistent with the purpose of the legislation).
108. The question of the relationship between human rights interpretation provisions and general limitations has been the subject of judicial examination in the New Zealand context. The New Zealand position has evolved in recent years in a trio of cases – *GA Moonen v Film and Literature Board of Review* [1999] NZCA 329 (“*Moonen (1)*”), *GA Moonen v Film and Literature Board of Review* [2002] NZCA 69 (“*Moonen (2)*”) and *R v Hansen* [2007] 3 NZLR 1 (“*Hansen*”), discussed below. Section 6 is New Zealand’s Bill of Rights interpretation provision, s. 5 is its limitations provision and s. 4 deals with the consequences of a finding rights incompatibility. The central debate in these cases was the order in which sections 4, 5 and 6 should be considered. That is, whether s. 5 limitations should form a first step in any interpretive exercise undertaken in accordance with s. 6 or should be left to a later stage in the process when determining whether s. 4 applies.
109. In the *Moonen 1* decision the Court unanimously stated:
The present point is that relevant provisions of the Bill of Rights must be given full weight in the construction of the Act, and in any classification made thereunder. Indeed s6 of the Bill of Rights requires that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. Thus if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted. Section 5 when read with s6 fulfils a similar role. An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation. Where an unjustified and unreasonable limitation

⁸² *Raytheon Australia Pty Ltd & Ors v ACT Human Rights Commission* [2008] ACTAAT 19 (unreported) at [77] – [78]

⁸³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408

⁸⁴ Evans, C and Evans, S *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (2008) 96

nevertheless results, because no other meaning or application is tenable, such limitation, while constituting a breach of s5, nevertheless prevails by dint of s4.

Although other approaches will probably lead to the same result, those concerned with the necessary analysis and application of ss 4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights...⁸⁵

110. The Court then set out the following approach, which is paraphrased in the following steps:

- (1) Identify the different interpretations properly open.
- (2) If only one meaning is properly open, adopt that meaning. If more than one meaning is open, adopt the meaning that least limits the right in question.
- (3) Identify the extent to which, if any, that meaning limits the right.
- (4) Is the extent of this limitation justified under s5?
- (5) If not, the section still applies even though there is an inconsistency with the Bill of Rights. If yes, there is no inconsistency with the Bill of Rights, although there is a limit on the right.⁸⁶

111. In the *Moonen 2* decision the Court unanimously stated:

That, in turn, led to substantial discussion in the High Court about the five-step approach and no doubt influenced the Solicitor-General in seeking on the argument of the appeal to this court to have the court revisit and modify what we had said in *Moonen 1*. Mr Arnold's concern was that in discussing the application of the Bill of Rights in this field, and having stated that, if there were two tenable meanings, the one most in harmony with the Bill of Rights must be adopted, the court added, referring also to s5 as well as s6, that "An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constituted the least possible limitation". His submission was that to be Bill of Rights consistent the obligation is to adopt a meaning consistent with the placing of "reasonable limits" (s5) on the relevant Bill of Rights right or freedom, even if it not the least restrictive meaning possible. In essence, a Bill of Rights consistent interpretation is one which involves the least possible reasonable limitation on a Bills of Rights right or freedom, rather than the least possible limitation.

We resisted the Solicitor-General's invitation. It was too late at this second appeal in the *Moonen* proceeding, where the second Board hearing and High Court appeal had been directed to *Moonen 1* as it stood, to allow that argument. Further, it is a complex question. Arguably the answer is context dependent and would require extensive consideration of the application of s5 in relation to various provisions of the Bill of Rights as well as of s14, which was the immediate subject of the discussion in *Moonen 1*...

We emphasise, too, that the five-step discussion in *Moonen 1* was immediately prefaced by the statement:

⁸⁵ *GA Moonen v Film and Literature Board of Review* [1999] NZCA 329 (unreported) at [16] – [17]

⁸⁶ *GA Moonen v Film and Literature Board of Review* [1999] NZCA 329 (unreported) at [17] – [19]

Although other approaches would probably lead to the same result, those concerned with the necessary analysis and application of ss4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights.

Clearly, it was not intended to be prescriptive. “May” means may. The five-step approach may be helpful. Other approaches are open.⁸⁷

112. In the *Hansen* decision each of the five judges handed down separate judgments. Three of those judgments – those of Blanchard, Tipping and McGrath JJ – took the following approach to the application of section 4, 5 and 6 to the legislation in question:

- (1) Ascertain Parliament’s intended meaning.
- (2) Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
- (3) If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of section 5.
- (4) If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning prevails.
- (5) If Parliament’s intended meaning represents an unjustified limit under section 5, the court must examine the words in question again under section 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
- (6) If it is not reasonably possible to find a consistent or less inconsistent meaning, section 4 mandates that Parliament’s intended meaning be adopted.⁸⁸

113. The other two judges in *Hansen* each disagreed with incorporating a consideration of limitations into the interpretation process in this way. Chief Justice Elias states that: I am however unable to accept the methodology adopted by other members of the Court in application of s 6 of the New Zealand Bill of Rights Act. I do not agree that s 5 applies to the s 6 preference for a meaning consistent with the enacted rights and freedoms in Part 2. The sequence suggested, by which consideration of justification under s 5 is a necessary step in determining whether an enactment is consistent with a right under Part 2, would set up a soft form of judicial review of legislation which seems inconsistent with s 4 of the Act. More importantly, it distorts the interpretive obligation under s 6 from preference for a meaning consistent with the rights and freedoms in part 2 to one of preference for consistency with the rights as limited by a s 5 justification. I do not think that approach conforms to the purpose, structure and meaning of the New Zealand Bill of Rights Act as a whole. It risks erosion of fundamental rights through judicial modification of enacted rights according to highly contestable distinctions and values...⁸⁹

⁸⁷ *GA Moonen v Film and Literature Board of Review* [2002] NZCA 69 (unreported) at [12] – [15]

⁸⁸ *R v Hansen* [2007] 3 NZLR 1 at [92]

⁸⁹ *R v Hansen* [2007] 3 NZLR 1 at [6]

I do not accept that s 6 gives preference to a meaning consistent with limitations justified under s 5, if a meaning consistent with the unlimited right is tenable.⁹⁰

114. Justice Anderson states that:

In my view s 5 does not have an interpretive purpose or effect. That function is served by s 6. There may, however, be situations where, in order to give effect to s 6, consideration needs to be given to s 5. Suppose that on one interpretation an enactment would abrogate a right or freedom, and on another interpretation it would have a limiting but not abrogating effect. If, on the second possibility, the limitation were reasonable, and could demonstrably be justified in a free and democratic society, s 6 would mandate that interpretation.⁹¹

115. Importantly Blanchard, Tipping and McGrath JJ all accept that other approaches may be appropriate in certain circumstances. Blanchard J notes that:

[In *Moonen* a different approach was appropriate because] in that case there was no meaning that, from the language and history of the Act and the circumstances at the time of its enactment, was obviously the one intended by the legislature... The Bill of Rights does not mandate any one method or sequence of application for applying and reconciling ss 4 – 6 in a given case. Those sections are broadly complementary but not necessarily always harmonious. When new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall Parliamentary intention... In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected.⁹²

116. Tipping J also supports the use of the *Moonen* approach in appropriate circumstances:

There is a difference between a case in which there are two conceptually distinct meanings and a case in which the issue concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. In the continuum type of case, there may be good reason to adopt the approach set out in *Moonen* if only because it will usually be difficult to determine where Parliament intended the meaning to fall on the continuum.⁹³

117. McGrath J also notes that the approach set out in *Moonen* was not intended to be prescriptive and left other approaches open.⁹⁴ McGrath J does not suggest that *Moonen* was wrongly decided or that the *Moonen* test should not be used. The majority position in *Hansen* therefore accommodates the use of approaches other than the 6-step approach they applied in that case, where appropriate.

118. In examining the two approaches that have been taken in New Zealand a distinction can be made between the legislative provisions being examined in *Moonen* and *Hansen*. In *Moonen* the provision was enacted before the Bill of Rights Act was in operation and did not have a clear ordinary meaning. In *Hansen*, the provision had

⁹⁰ *R v Hansen* [2007] 3 NZLR 1 at [15]

⁹¹ *R v Hansen* [2007] 3 NZLR 1 at [266]

⁹² *R v Hansen* [2007] 3 NZLR 1 at [61]

⁹³ *R v Hansen* [2007] 3 NZLR 1 at [94]

⁹⁴ *R v Hansen* [2007] 3 NZLR 1 at [192]

a clear ordinary meaning and was enacted after the Bill of Rights Act was in operation. In fact Parliament had specifically incorporated reasonable limitations on the right in question when enacting the *Hansen* legislative provision. Neither case sets down a single test for applying the provisions, although *Hansen* does suggest that its six-step approach would be the approach adopted in a majority of cases. Importantly, the New Zealand Supreme Court has since approached a Bill of Rights case without adopting a formulaic approach to interpretation in *Brooker v Police*.⁹⁵

119. The jurisprudence in the UK has not focussed on the interaction between interpretation and reasonable limitations to the same extent as in New Zealand because the *Human Rights Act 1998* (UK) does not contain a specific reasonable limitations provision but rather relies on limitations acceptable under the ECHR. The leading UK authority on the application of the interpretive requirement *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 does not stipulate a formulaic method of incorporating reasonable limitations into the interpretive process.

Applying section 32

120. Before engaging in any interpretive process under the Charter, the common law presumptions of compatibility with civil rights and international obligations discussed in *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 should be given their full application. To avoid doubt, s. 5 of the Charter specifies that rights or freedoms arising under international law, the common law, Constitutional law or a Commonwealth law must not be taken to be abrogated or limited only because the right is not included in the Charter.
121. The two common law presumptions referred to above will apply in Charter matters just as they do in other cases. These presumptions operate to influence the ordinary meaning of legislation before the s. 32 interpretive process has been engaged. These are the presumptions that:
- (1) Courts should not impute to the legislature an intention to infringe upon a civil right unless the words of the legislature are expressed with irresistible clarity or necessary intendment.⁹⁶
 - (2) Statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international agreements or the established rules of international law.⁹⁷

Because the Charter enshrines many of the civil and political rights contained in the ICCPR (an international agreement to which Australia is a party), which have also become part of customary law through the *Universal Declaration of Human Rights* (containing established rules of international law), these two presumptions may interact with s. 32 to further protect human rights.

122. The Commission submits that two distinct approaches to the practical application of s. 32 should be adopted, depending on how clear the legislative purpose is. The

⁹⁵ *Brooker v Police* [2007] 3 NZLR 91 at [114] – [117]

⁹⁶ *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22; *Coco v The Queen* (1993) 179 CLR 427 at 437

⁹⁷ *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22; *Chu Cheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38

first approach should be used where the ordinary meaning of the provision is identified without any ambiguity and the second approach should be used where there is a range of possible meanings available.

123. The approach that should be taken where there is a single unambiguous meaning is:

- Step 1: Undertake ordinary interpretive process applying common law interpretive principles and *Interpretation of Legislation Act 1984* (Vic) (which includes “purpose”).
- Step 2: Does the single unambiguous meaning impact on any Charter rights? NB: determining the scope of a right is itself an exercise in statutory interpretation and needs to be informed by the s. 32 interpretive obligation.
- Step 3: If not, adopt step 1 meaning. If so, is the impact on the right “reasonable” under s. 7(2) (ie. does it comply with that section)?
- Step 4: If reasonable, adopt step 1 meaning. If not reasonable, consider if the section can be interpreted compatibly (either with no limit or with a limit that is reasonable under s. 7(2)) but still in accordance with purpose, preferring the least possible limit on Charter rights.
- Step 5: If reinterpretation is possible consistent with purpose, adopt step 4 meaning. If no other interpretations are consistent with purpose, adopt step 1 meaning (and if in Supreme Court, consider whether to make a declaration of inconsistent interpretation).

124. The approach that should be adopted where there is more than one possible meaning is:

- Step 1: Undertake ordinary interpretive process applying common law interpretive principles and *Interpretation of Legislation Act 1984* (Vic) (which includes “purpose”).
- Step 2: Of the possible meanings ascertained at step 1, choose the one that is most compatible with human rights. First preference should be for meanings that do not limit rights, then for meanings that reasonably limit rights (in accordance with s. 7(2)) and last preference should be for meanings that limit rights unreasonably (in breach of s. 7(2)). Within each of those categories preference should be for those meanings that least limit rights. NB: determining the scope of a right is itself an exercise in statutory interpretation and needs to be informed by the s. 32 interpretive obligation.

125. **Step 1:** Section 30 of the *MHA* provides that:

...

(3) The Board must conduct a periodic review of–

(a) an involuntary treatment order...

at intervals not exceeding 12 months following the initial review.

(4) The Board must conduct a review of the extension of a community treatment order within 8 weeks after the order is extended ...

126. The MHA does not explicitly set out the consequences of a failure to conduct a review within the timeframe required by s. 30(4). These consequences depend on how the section is interpreted.

127. The common law interpretive principles that:

- courts should not impute to the legislature an intention to infringe upon a civil right unless the words of the legislature are expressed with irresistible clarity or necessary intendment;⁹⁸ and
- statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international agreements or the established rules of international law;⁹⁹

suggest that the section should be interpreted as requiring strict compliance so as not to infringe upon the right to a fair hearing, which exists in both the common law and an international agreement to which Australia is a party (the ICCPR).

128. Further, the purpose of the legislation, and a reading of the provision in the context of the legislation as a whole, also suggest that strict compliance is required. Section 4 of the *MHA* outlines the objects of the Act and is set out above at [51]. The Act prioritises *both* necessary non-consensual treatment and the maximisation of rights protection. So the *MHA*'s "purpose" is best characterised as providing for treatment without consent in a carefully controlled manner so that rights are infringed to the minimum extent necessary to provide the required treatment. In this context, the purpose of s. 30 is to provide a safeguard against unnecessary treatment and other possible rights violations. This purpose, and the importance of this role, is supported by the Act's Explanatory Memorandum which notes that:

Perhaps the most important innovation proposed in the Bill is the establishment of a Mental Health Review Tribunal.

The Tribunal will have a number of functions under the Act.

These include reviewing all patients, and the hearing of appeals against the detention of involuntary and security patients.¹⁰⁰

This purpose, and its importance, suggests that strict compliance with the provision's 8 week requirement should be required. Any other reading undermines the rights infringement/treatment balance struck by the legislation.

129. A reading of the *MHA* as a whole also suggests the above interpretation. Section 36C of the *MHA* has been discussed earlier at [83] – [85]. Other sections of the Act that suggest strict compliance is required with the 8 week requirement in s. 30(4) are:

⁹⁸ *Coco v The Queen* (1993) 179 CLR 427 at 437

⁹⁹ *Chu Cheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38

¹⁰⁰ Explanatory Memorandum *Mental Health Bill* at 2

- s. 4(2): the Act is to be interpreted and duties are to be performed so as to minimise restrictions on rights;
- s. 14(5): a person is no longer an involuntary patient upon expiry of a CTO;
- s. 32(3): allows the board to reduce a specific time limit;
- s. 121: allows for amendment of defective documents;
- s. 133: a hearing is not invalidated by failure to give notice;
- s. 140: any contravention of the Act is an offence with penalties;
- schedule 2 s. 2(2): the decision of a division is not invalidated because of a defect in appointment of a member;
- schedule 2 s. 7: correction of clerical mistakes;
- schedule 2 s. 6(5): the decision of the Psychosurgery Review Board is not invalidated because of a defect in the appointment of a member.

The detailed provision in the legislation for errors, and sections providing that the failure to comply with certain requirements does not cause invalidity of the relevant proceeding, suggest that in the case of s. 30, where no such provision has been made, one should not be read in.

130. **Step 2:** Although the Commission submits that an ordinary reading of s. 30(4) would require the discharge of a CTO where a review is not undertaken within 8 weeks, the Board interpreted the section differently in its decision. Because there is more than one tenable meaning of s. 30 of the *MHA* the Commission's second approach to applying s. 32 of the Charter should be adopted. Of the two competing meanings, s. 32 of the Charter requires that the one that is most compatible with human rights be adopted. The meaning of the section most compatible with human rights is that strict compliance with the section is required, so that a failure to conduct the review within the required timeframe results in the discharge of the unreviewed CTO, and consequently of the underlying ITO.

D. COMMENCEMENT AND TRANSITIONAL PROVISIONS

Commencement of the Charter's various parts

131. Section 2 of the Charter provides for the Charter to have a two-stage commencement:

2. Commencement

- (1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007;
- (2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

As a result, s. 32 and s. 38 of the Charter did not commence until 1 January 2008, while the provisions outlining the rights, setting out whom the Charter applies to and requiring statements of compatibility and associated processes, came into force on 1 January 2007.

132. The one-year delay in imposing obligations under ss. 32 and 38 was intended to provide public authorities time to introduce Charter compliance measures. The Charter's Explanatory Memorandum provides that:

The staggered commencement will allow for a period of approximately 18 months for government departments to review existing laws, policies and procedures to ensure compliance with the Charter.¹⁰¹

133. The second reading speech states that there will be an '18-month period leading up to full implementation of the charter'.¹⁰² This material suggests that the Charter was to be of full force and effect from 1 January 2008. This is further suggested in the *Report of the Human Rights Consultation Committee*, which undertook the initial draft of the Charter:

The implementation of the Charter should occur in stages, with most of the Charter commencing on 1 January 2007 and those areas that impose new obligations on public authorities commencing on 1 January 2008. This would allow the Charter to be introduced over a reasonable period of time and enable appropriate training and education to commence... [P]ublic authorities would have adequate time to review their current laws, policies and practices in light of the Charter prior to 1 January 2008.¹⁰³

The Committee believes that the Charter should begin soon after it is enacted, but that a staggered start is appropriate. We are mindful that the Charter will impose new obligations, a new way of working in government and the courts and changes to the roles of bodies... Time will be needed for human rights training and education for these and other bodies. Some laws, policies and practices may need to be changed to comply with the Charter.¹⁰⁴

Retrospectivity

134. The Commission submits that in context the delayed commencement of the Charter gives rise to a presumption of retrospectivity. This is supported by the judgment of Justice Gibbs in *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228. Gibbs J states:

¹⁰¹ Explanatory Memorandum to the *Charter of Human Rights and Responsibilities Bill* at 2

¹⁰² *Victorian Parliamentary Hansard* 19 July 2006 Council, page 2557

¹⁰³ *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee* (2005) at 132

¹⁰⁴ *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee* (2005) at 133

Where the commencement of amending legislation, which shortens the time within which proceedings may be brought or continued, is postponed to a future date, no injustice is likely to result from giving retrospective effect to the amendment, since proceedings may be instituted, or a further step taken, before the commencement comes into operation. A provision postponing the commencement of a statute or rule in these circumstances may be regarded as revealing an intention that the enactment when it does come into effect should operate retrospectively.¹⁰⁵

(Walsh and Windeyer JJ specifically refrained from deciding upon this issue, while Barwick CJ and Menzies J did not consider the issue in their judgments).

135. In *Maxwell v Murphy* (1957) 96 CLR 261 Williams J refers to early cases dealing with the common law interpretive presumptions regarding retrospective application, particularly noting the reliance placed on the provision of delayed start dates for the commencement of the new legislation:

In *Towler v Chatterton* (1829) 6 Bing 258 (130 ER 1280) Lord Tenterden's Act was construed by Park J as having retrospective effect but only because the operation of the Act was postponed for about eight months so that creditors who were affected by it would have an opportunity of enforcing their claims in the interval under the law as it stood before the passing of the Act. In *Doe d. Evans v Page* (1844) 5 QB 767 (114 All ER 1439) it was held that s 7 of the Limitation Act 3 & 4 Wm. IV c. 27, was not retrospective and did not apply to tenancies at will which had determined before the passing of the Act. Lord Denman said: "A different construction, even if the words permitted it, would cause the greatest of hardship: for a person, who, as the law stood before the passing of the Act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights" ...¹⁰⁶

136. Section 49 of the Charter is its transitional provision, which stipulates that the Charter applies to legislation whenever it was enacted, but that it does not affect any proceedings commenced or concluded before 1 January 2007 or apply to any act or decision of a public authority before 1 January 2008:

¹⁰⁵ *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 246

¹⁰⁶ *Maxwell v Murphy* (1957) 96 CLR 261 at 280

49. Transitional provisions

(1) This Charter extends and applies to all Acts, whether passed before or after commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.

(2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

(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.

137. Transitional issues were clearly not overlooked in the Charter, they have been explicitly dealt with in some detail and do not need to be implied by reference to any common law presumption. In particular, s. 49(1) expressly applies the interpretive requirements of s. 32 to all legislation, whenever enacted, whereas s. 49(2) excludes the Charter's application to proceedings commenced before 1 January 2007. To read in additional exclusions when the Charter provides a clear rule of universality with a single clear exception, would be contrary to the clear words and intent of the legislature expressed both on the face of the Charter and in its preparatory material.

138. The case of *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 provides an example of legislation where express transitional provisions were regarded as exhaustive and by implication excluded the operation of the common law presumption:

Moreover, the transitional provisions in Sched 5 themselves suggest that the presumption erected by s 8 of the Interpretation Act has been displaced...¹⁰⁷

Item 55 is the only provision in Pt 2 of Sched 5 that expressly provides for the continued operation of a provision repealed by that Schedule. The Item provides that:

“The repeal of subsection 111(1A) of the Principal Act does not apply to any proceedings before the Commission that commenced before the commencement of the repeal.”

This express transitional provision is properly to be regarded as exhaustive in respect of the transitional application of Sched 5 to existing proceedings. An exhaustive express transitional provision of this nature leaves no room for s 8 of the Interpretation Act to operate. Indeed, Item 55 reflects a legislative assumption that the other provisions of Sched 5, including s 111AAA, will apply to proceedings commenced before 1 January 1997...¹⁰⁸

Indeed, to hold that s 111AAA is inapplicable to proceedings commenced before 1 January 1997 produces practical difficulties. It is improbable that Parliament contemplated that protracted disputes would continue to be dealt with in accordance with provisions long since repealed.¹⁰⁹

¹⁰⁷ *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 505

¹⁰⁸ *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 509

¹⁰⁹ *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 510

139. Similarly in *Heublein v Continental Liquers Pty Ltd* (1962) 109 CLR 153 the High Court concluded that an express savings provision left no room for the presumption:

Close consideration of the special provisions of s. 5 induces us to think that the express provision which it makes with respect to applications pending under the earlier Act must be read as exhaustive and that there is, therefore, no room for the application of s. 8 of the Acts Interpretation Act, even if it were otherwise possible to bring the case within its terms.¹¹⁰

140. Common law presumptions of statutory construction are only prima facie rules and must yield to indications of contrary intention.¹¹¹ The case of *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 provides an example of legislation where the presumption against retrospectivity was rebutted. In that case the court undertook a detailed analysis of the words of the relevant section, with Gaudron, McHugh, Gummow and Hayne JJ concluding that:

The language of s 111AAA is clearly broad enough to encompass all proceedings before the Commission, whenever commenced. The respondent unions sought to introduce into the provision an unexpressed temporal limitation on its operation. That submission should be rejected.¹¹²

141. The Commission submits that the common law presumption against retrospectivity does not apply to the operation of s. 32 in this case, because this application of the interpretive provision does not affect vested rights or liabilities. The common law presumption only applies where vested rights or liabilities are affected. Dixon CJ's judgment in *Maxwell v Murphy* (1957) 96 CLR 261 contains a much-cited statement of the presumption:

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 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.¹¹³

142. The Full Court of the Supreme Court of Victoria reiterated the limitations of this presumption in *Robertson v City of Nunawading* [1973] VR 819:

It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribed for the future, and it does no more than that... The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way "as to

¹¹⁰ *Heublein v Continental Liquers Pty Ltd* (1962) 109 CLR 153 at 161

¹¹¹ *Maxwell v Murphy* (1957) 96 CLR 261 at 291

¹¹² *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 506

¹¹³ *Maxwell v Murphy* (1957) 96 CLR 261 at 267

impair an existing right or obligation” or “as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events”.¹¹⁴

143. The common law presumption is generally the same as the presumption set out in the various interpretation acts in relation to the retrospective effect of the amendment or repeal of legislation, which are viewed as codifying that presumption.¹¹⁵ Pearce and Geddes note that:

[T]he common law presumption against the retrospective operation of legislation has been supplemented and largely codified by the inclusion of appropriate provisions in the Interpretation Acts of the states and Commonwealth... It does not appear that the courts regard the statutory test as leading to any result different to the common law presumption...¹¹⁶

144. The Full Court of the Supreme Court of Victoria considered the common law and statutory rules in *Robertson v City of Nunawading* [1973] VR 819:

There may be some areas in which the limits of the common law principle and those of this statutory provision are not the same. The case where an amending statute imposes an entirely new obligation may be one covered by the common law principle and not by the statutory provision. But, for present purposes, the quality of the “right” required for the purpose of the statutory provision can be tested in the same way as a right for the purpose of applying the common law principle...¹¹⁷

145. Section 14(2) of the *Interpretation of Legislation Act 1984* (Vic) provides that:

Where an Act or a provision of an Act–

(a) is repealed or amended; or

(b) expires, lapses or otherwise ceases to have effect–

the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears –

...

(e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision...

As with the common law, that section only precludes the retrospective application of amending or repealing legislation to affect rights, privileges, obligations or liabilities that have already accrued under the earlier legislation.

146. In considering how s. 32 should be applied it is instructive to look at how retrospectivity has been dealt with in relation to other interpretation provisions. In *J & P Lemming Holdings v O’Keefe* [1984] VR 1005 Brooking J had occasion to consider

¹¹⁴ *Robertson v City of Nunawading* [1973] VR 819 at 824

¹¹⁵ *Perpetual Trustees (Australia) Limited v Valuer-General* [1999] NSWLEC 93 (unreported) at [29]

¹¹⁶ Pearce and Geddes, *Statutory Interpretation in Australia 5th edn* (2001) at 270

¹¹⁷ *Robertson v City of Nunawading* [1973] VR 819 at 827

the above section a little over a month after it came into force on 1 July 1984. The predecessor to s. 14(2) in the *Acts Interpretation Act 1958* (Vic) was s. 7(2), which did not contain the word “expressly” quoted above. Although the section in the new legislation differed in a material respect from its predecessor there was no suggestion that the new interpretation provision should not be applied to the events of that matter, which took place before 1 July 1984.¹¹⁸ Brooking J notes that the section ‘applies to Acts both old and new’, referring to that Act’s express application to ‘all Acts, whether passed before or after the commencement of this Act’ in s. 4(1).¹¹⁹ This provision is expressed in identical terms to s. 49(1) of the Charter. Although issues of retrospectivity were foremost in Brooking J’s mind when considering this section, there was no suggestion that an interpretation provision should not be applied retrospectively. Brooking J implicitly accepts that the express application of the provision to all legislation, whenever enacted, should be read without limitation. A similar approach should be adopted in relation to s. 32, which is also an interpretation provision.

147. The presumption against the retrospective impairment of rights ‘reflects the care of the common law for vested rights and its concern to avoid injustice’.¹²⁰ Where the consequence of applying legislation retrospectively is to provide or protect rights, as opposed to removing or impairing them, any presumption against retrospective application should not apply.

148. The foundation of the common law interpretive principle on notions of justice and fairness is confirmed by authority from the United Kingdom in relation to the retrospective application of the interpretive principle in s. 3 of the *Human Rights Act* (UK). In *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 the House of Lords decided that the interpretive section of the *Human Rights Act 1998* (UK) should not be applied retrospectively in a case that involved a lending arrangement between two private parties. In this case the application of the interpretive principle would have had the effect of reversing the law that applied to the arrangement at the time it was entered into. In this decision most of the Lords emphasise notions of fairness and justice as the foundation of the common law interpretive principle.

149. Lord Nicholls of Birkenhead notes that:

Considerable difficulties, however, might arise if the new interpretation of legislation, consequent upon an application of section 3, were always to apply to pre-Act events. It would mean that parties’ rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other...¹²¹

The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in *L’Office*

¹¹⁸ *J & P Lemming Holdings v O’Keefe* [1984] VR 1005 at 1011

¹¹⁹ *J & P Lemming Holdings v O’Keefe* [1984] VR 1005 at 1013

¹²⁰ *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139 at 150

¹²¹ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [18]

Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724:

‘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.’

Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.¹²²

Applying this approach to the Human Rights Act, I agree with Mummery LJ in *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334, 1352, para 61, that in general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it to such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect.¹²³

I emphasise that this conclusion does not mean that section 3 never applies to pre-Act events. Whether section 3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.¹²⁴

Similarly, in the matter before VCAT, none of the public authorities involved can be said to have a vested right in any relevant sense.

150. Lord Hope of Craighead notes that:

Account may also be taken of the purpose of the 1998 Act. Its long title states that it was intended to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. The rights to which the Act gives effect are rights guaranteed by the Convention which the United Kingdom has already signed and ratified. In *R v Field* [2003] 1 WLR 882, 896E-F, para 61 the Court of Appeal accepted a submission by the Secretary of State for the Home Department that the court should take a more relaxed approach to a potentially retroactive element in legislation where its intended purpose was... to protect children. I would apply the same reasoning to section 3 of the 1998 Act. Its purpose is to ensure that legislation is read and given effect in a way that

¹²² *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [19]

¹²³ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [20]

¹²⁴ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [21]

is compatible with convention rights, so far as it is possible to do so, whenever the legislation was enacted. To restrict the application of the interpretive obligation, without exception, to “events” that happened or “transactions” entered into on or after 2 October 2000 would be to introduce a restriction which is not stated expressly anywhere in the 1998 Act. A restriction in such absolute and all-embracing terms would seem to be contrary to the intention of the legislation and incapable of being read into it by necessary implication.¹²⁵

Similarly in relation to the Charter, the rights it enshrines are those that Australia has bound itself to protect and respect since it ratified the ICCPR on 13 August 1980.

151. Lord Scott of Foscote notes that:

It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect...¹²⁶

152. Lord Roger of Earlsferry states succinctly that:

[T]he basis of any presumption in this area of the law “is no more than simple fairness, which ought to be the basis of every general rule.”¹²⁷

153. In the matter before VCAT, no unfairness will result from applying the interpretive provision to events occurring before the section’s commencement because:

- the legislation being interpreted does not involve vested rights or liabilities;
- the legislation already contains an interpretive provision mandating a rights consistent interpretation where possible (s. 4(2) *MHA*);
- the legislation being interpreted is therapeutic legislation that aims to provide care and treatment for the mentally ill in a manner that impinges on their rights as little as possible, so it is appropriate to give the protections of the Charter their broadest application;
- the other parties involved in this matter are all public authorities under the Charter, having direct corporate and often personal obligations to respect human rights (s. 38 of the Charter and s. 7(1)(g) of the *Public Administration*

¹²⁵ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [99]

¹²⁶ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [153]

¹²⁷ *Wilson v First County Trust (no 2)* [2003] 3 WLR 568 at [196]

Act 2004) so they will not be disadvantaged by having human rights taken into account in interpreting the legislation they operate under;

- public authorities have had 18-months since the enactment of the Charter to prepare for the full operation of the Charter;
- the Department of Human Services (in whose portfolio the Board sits) is one of only three agencies that were allocated specific resources for targeted Charter preparation and compliance strategies in recognition of the onerous human rights obligations it has;¹²⁸
- the Commission is aware that the Board undertook significant preparation for the full operation of the Charter prior to 1 January 2008, including reviews of internal policies and processes and consideration of legislative compatibility with the Charter.

154. Further, two common law presumptions regarding human rights exist at common law so it is incorrect to suggest that an entirely new set of interpretive presumptions became operational under the Charter on 1 January 2008. These common law presumptions are that:

- Courts should not impute to the legislature an intention to infringe upon a civil right unless the words of the legislature are expressed with irresistible clarity or necessary intendment.¹²⁹
- Statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international agreements or the established rules of international law.¹³⁰

Because the Charter enshrines many of the civil and political rights contained in the ICCPR (an international agreement), which have also become part of customary law through the *Universal Declaration of Human Rights* (containing established rules of international law), these two presumptions may generally have a similar effect to s. 32. For this reason also the common law presumption against the retrospective operation of legislation should not be applied in the case of s. 32.

155. Finally, courts in the Australian Capital Territory have been applying the *Human Rights Act 2004* (ACT) since its commencement on 1 July 2004, without limiting the scope of the application of that Act's interpretation provision. For example in October 2004, in the matter of *R v YL* [2004] ACTSC 115 (unreported), the Supreme Court of the ACT applied the interpretive provision in a case involving events that took place some years before the interpretive provision commenced.¹³¹ That court has been applying the interpretive provision without regard to issues of retrospectivity ever since.

¹²⁸ Victorian Equal Opportunity and Human Rights Commission, *First Steps Forward: the 2007 report on the Operation of the Charter of Human Rights and Responsibilities*, 2008

¹²⁹ *Royal Women's Hospital v Medical Practitioner's Board of Victoria* (2006) 15 VR 22; *Coco v The Queen* (1993) 179 CLR 427 at 437

¹³⁰ *Royal Women's Hospital v Medical Practitioner's Board of Victoria* (2006) 15 VR 22; *Chu Cheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38

¹³¹ *R v YL* [2004] ACTSC 115 (unreported) at [31]

156. The Commission submits that in this matter s. 38 of the Charter applied to the decision of the Board at its hearing on 3 June 2008 (and will apply to the decision of VCAT) because it occurred after 1 January 2008.
157. The Commission submits that in this matter s. 32 of the Charter applied to the Board at its hearing on 3 June 2008 (and will apply to the decision of VCAT) because the interpretation of legislation was undertaken after 1 January 2008.

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