



**- Strengthening the Charter -**  
**Submission to the**  
**Scrutiny of Acts and Regulations Committee**  
**on the**  
**Four year review of the Victorian Charter of Human Rights**

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## List of Acronyms

AMHS	Area Mental Health Service
APB	Adult Parole Board
Charter	Victorian Charter of Human Rights and Responsibilities
CRPD	United Nations Convention on the Rights of Person with Disabilities
CTO	Community Treatment Order
FCLC	Federation of Community Legal Centres
GAAct	<i>Guardianship and Administration Act 1986 (Vic)</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ITO	Involuntary Treatment Order
MAP	Melbourne Assessment Prison
MCC	Melbourne Custody Centre
MHA	<i>Mental Health Act 1986 (Vic)</i>
MHLC	Mental Health Legal Centre
MHRB	Mental Health Review Board
OCP	Office of the Chief Psychiatrist
PDRSS	Psychosocial Disability Rehabilitation and Support Service
SARC	Scrutiny of Acts and Regulations Committee
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLRC	Victorian Law Reform Commission
VMIAC	Victorian Mental Illness Awareness Council

**Background:**

The Mental Health Legal Centre Inc (MHLC) is a Victorian state-wide specialist community legal centre. It is a non-profit organisation and receives the majority of its funding from the Victorian Department of Health and Victoria Legal Aid. In addition project funding has been secured from philanthropic and other funding sources for a range of projects.

The MHLC provides telephone legal advice and referral to callers from around Victoria, direct legal advocacy and community education about mental health and the law for people in Victoria with, or labelled as having, a mental illness. The MHLC also undertakes substantial research, law reform and policy work in relation to mental health and the law, the aim of which is to further the rights of people with mental illness in Victoria.

As one of only two specialist community legal centres in Australia for mental health law, the MHLC has developed significant expertise in the area of human rights and mental health, which has informed our submission. In particular, our submission draws on expertise gleaned through the following casework, research and law reform work:

- Issuing legal proceedings at VCAT on behalf of our client Mr Kracke, which resulted in the inaugural declaration of breach of the Charter;<sup>1</sup>
- Consumer forum discussing the impacts of the Charter for people with mental illness (20 May 2008);
- Inside Access – auspiced by the MHLC, the project provides civil legal services to people in Victorian prisons who have a mental illness;
- Submissions to the Department of Health’s (formerly Department of Human Services) Review of the *Mental Health Act 1986* (Vic), including to the Consultation Paper (February 2009) and the Exposure Draft Mental Health Bill (February 2011).
- ‘Lacking Insight – report on the experiences of involuntary patients before the Victorian MHRB’, Ingvarson, M, Topp, V and Thomas, M, MHLC (October 2008)
- A multi-staged research project, with funding from the Reichstein Foundation and the Legal Services Board on advance directives for mental health involving consultation with consumers/users of mental health services and clinicians and other stakeholders to gauge their views on advance directives. The findings from the research are currently being written up with a view to making recommendations for reform in law and practice to ensure appropriate recognition and respect for advance directives for mental health.
- Submissions to the Victorian Law Reform Commission’s (VLRC) review of guardianship laws, including to the Information Paper (May 2010) and the Consultation Paper (June 2011).

**Introduction:**

Human rights provide a powerful point of reference for identifying and addressing many of the issues faced by people with mental health issues. The Charter has become a key advocacy tool for people with mental illness, many of whom are or have in the past been subject to orders or practices which restrict their liberty and autonomy, such as detention and/or forced psychiatric treatment on

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<sup>1</sup> *Kracke v Mental Health Review Board & Ors* (General) [2009]VCAT 646 (Kracke decision)

an order under the *Mental Health Act 1986* (Vic) (MHA), or an Administration Order, which severely curtail a person's right to maintain control over their finances affairs.

Involuntary psychiatric treatment by definition engages a range of human rights enshrined in Victoria's Charter of Human Rights (the Charter) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD), including:

- the right to autonomy on an equal basis with others (Art 12 CRPD) including the right to be free from medical treatment without consent (s10(c) Charter)
- Recognition and equality before the law (s8 Charter; Art 12 CRPD) the right to be free from torture and cruel, inhuman and degrading treatment (s10(a) and (b) Charter; Art 15 CRPD)
- the right to a fair trial, including the right to be heard without undue delay (s24 Charter)
- the right to liberty and security of person (s21 Charter and Art 14 CRPD)
- the right to humane treatment when deprived of liberty (s22 Charter)
- the right to privacy and bodily integrity (s 13 Charter and Art 17 CRPD) freedom of movement (s12 Charter)

The Preamble of the Charter recognises 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

People with psychiatric disability have been fighting for, and continue to fight for dignity and respect for their fundamental human rights on an equal basis with others in society. The Charter is a critical tool to spur political, departmental, service provider and community awareness of and accountability for protecting and promoting the rights of people with psychiatric disability. It forces a reframing of legislation and policies and actions of public authorities and, importantly, requires any limitation or restriction on rights to be articulated, explained and justified and limited to that which is necessary, reasonable and proportionate.<sup>2</sup> The Charter therefore gives added weight to the important principle that mental health care and treatment be provided in a manner least restrictive of a person's liberty and freedoms.<sup>3</sup>

The Charter provides an important means of holding the government to account in accordance with its international obligations under ratified treaties and in line with accepted international human rights standards. This is important in both the development of new legislation and the way in which public authorities perform their functions under existing legislation. The interpretive provision at s 32(2) of the Charter makes it clear that international law as well as specific decisions of other domestic, foreign and international courts and tribunals about the scope, application and interpretation of a particular human right can be considered. Justice Bell in the *Kracke* decision<sup>4</sup> for example, referred extensively to international and foreign domestic decisions when determining which of our client's rights were engaged by his involuntary treatment under the MHA and the failure on the part of the Mental Health Review Board (MHRB) to conduct a review of such treatment within the statutory time frames. Bell J drew widely on international jurisprudence in determining whether the limitations on our client's rights were lawful in accordance with section 7(2)

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<sup>2</sup> S 7(2) Charter

<sup>3</sup> See s 4(2) MHA.

<sup>4</sup> Above n 1.

of the Charter.<sup>5</sup> The *Kracke* decision itself was instrumental in developing Charter jurisprudence and clarifying the operation of the Charter in many key respects.

Whilst we believe the Charter can have a positive impact in vindicating an individual's rights, as well as on a systemic level, albeit incrementally, we firmly support the introduction of a range of mechanisms to enhance human rights-compliant decision-making, policy development and practice. We are pleased to provide these submissions on the basis of our extensive experience in working with people with psychiatric disability.

## **1. Inclusion of additional rights in the Charter**

### Full incorporation of the rights in the UN CRPD, including economic, social and cultural rights

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the most comprehensive articulation of the scope and nature of human rights for people with disability, including mental illness. The MHLC strongly supports fuller recognition in the Charter of the rights of people with disabilities in two key ways. First, through the introduction of discrete economic, social and cultural 'access' rights in the Charter and second, through recognition in the object of the Charter, of particular principles underlying the enjoyment of rights for people with disabilities.

The Charter enshrines only fundamental civil and political rights which, in our view, results in inadequate protection of the rights of people with disabilities. Although section 5 of the Charter reaffirms that other rights arising from other laws are neither abrogated nor limited, in our view this section alone gives insufficient protection to the above economic social and cultural (ESC) rights.

The CRPD, importantly, contains not only 'freedom' rights (civil and political rights) but also a range of other 'access' rights, such as:

- the highest possible standard of health, including health-related rehabilitation, of the range, quality and standard provided to other members of the community, including on the basis of free and informed consent (right to health) (Art 25);
- adequate living standards, including housing, clothing, food, and social protection such as public housing (Art 28);
- inclusive and accessible education at all levels (Art 24);
- the right to work, including the right to gain a living through freely chosen and accepted work with fair conditions, equal pay for equal work and equal advancement opportunity (Art 27);
- the right to live independently and be included in the community including to chose place of residence and have the personal assistance necessary to achieve this (Art 20);
- the right to found and raise a family and to receive appropriate parenting assistance where necessary (Art 23);
- the right to participation in arts, leisure, recreation, sport (Art 30).

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<sup>5</sup> Ibid.

The MHLC strongly supports the inclusion of the above ESC rights into the Charter. We endorse the recommendation of the VEOHRC that these rights be subject to the same range of obligations and mechanisms as existing Charter rights, with the added consideration of their progressive realisation.<sup>6</sup> We see these 'access' rights not as mutually exclusive of civil and political rights, but rather as interrelated. For example, the right to be free from cruel, inhuman or degrading treatment (s10(b) Charter) may be reinforced and given meaning by the right to health (Art 25, CRPD). For example, if mental health services were required to comply with a person's right to health, this could enable their preferred less restrictive medication alternatives to at least be trialled before other medication with more severe side effects were prescribed. We refer to and endorse the Federation of Community Legal Centre's (FCLC) submission which supports the justiciability and legal enforceability of ESC rights.<sup>7</sup> Inclusion of economic, social and cultural rights in the Charter could be a powerful step towards finally achieving adequate resourcing of genuine legal, social, cultural and economic equality for people with mental health issues.

### The right to health should be included

The MHLC supports the introduction of a right to health in the Charter. This is particularly important for people incarcerated in prison, where rates of major mental illnesses are between three and five times higher than in the general community<sup>8</sup> and where, according to Forensicare, the statewide forensic mental health service, "...the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made...".<sup>9</sup> In October 2010, the MHLC published a report, 'Experiences of the criminal justice system – the perspectives of people living with mental illness' (CJS report).<sup>10</sup> The report documented the experiences of people with mental illness at various stages in the criminal justice system in Victoria. Its findings also indicate a lack of appropriate provision of mental health services in prison as well as a lack of awareness of the issues surrounding mental illness of service providers such as corrections officers.<sup>11</sup>

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on the Right to Health), Mr Anand Grover, visited Australia in late 2009. One of the focuses of his report<sup>12</sup> was the right to health of people in detention. He too highlighted the significant overrepresentation of people with mental illness in prison and the "insufficient provision of replacement community-based treatment options" for people with mental illness since the de-institutionalisation of mental health care services.<sup>13</sup> He also noted that, although key treaties which Australia has ratified recognise the right to health, none

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<sup>6</sup> See VEOHRC submission 'Putting principle into practice: Overview and recommendations – Submission to the four year review of the Charter of Human Rights and Responsibilities Act 2006', Recommendation 1. Available at: [http://www.humanrightscommission.vic.gov.au/index.php?option=com\\_k2&view=item&task=download&id=685&Itemid=147](http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&task=download&id=685&Itemid=147)

<sup>7</sup> 'Strengthening Victoria's Human Rights Charter: Submission to the four year review' FCLC, June 2011 at p 10-11, (available at [www.communitylaw.org.au](http://www.communitylaw.org.au)).

<sup>8</sup> J P R Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice* (No 334, Australian Institute of Criminology, 2007) 1.

<sup>9</sup> See Submission to Senate Select Committee on Mental Health, Parliament of Australia, May 2005, 4-5, 20 (Forensicare) available at [http://www.aph.gov.au/senate/committee/mentalhealth\\_ctte/submissions/sub306.pdf](http://www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf).

<sup>10</sup> Available at:

[http://www.communitylaw.org.au/mentalhealth/cb\\_pages/images/Experiences%20of%20the%20Criminal%20Justice%20System%20Report.pdf](http://www.communitylaw.org.au/mentalhealth/cb_pages/images/Experiences%20of%20the%20Criminal%20Justice%20System%20Report.pdf) (accessed 30 June 2011)

<sup>11</sup> Ibid at page 48.

<sup>12</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his mission to Australia (23 November to 4 December 2009) UN Doc A/HRC/14/20/Add.4 (3 June 2010), citing Whiteford, H. and Buckingham W., 'Ten years of mental health service reform in Australia: are we getting it right?' *Medical Journal of Australia* vol. 182(8) pp. 396-397 (2005).

<sup>13</sup> Ibid at paragraphs 70-71.

has been fully incorporated into Australian law and he “regrets that there is no such formal recognition of the right to health in Australia”.<sup>14</sup>

The following case study, from the Inside Access program (legal service to people with a mental illness) illustrates the significant difference it would make to the lives of people with mental illness in prison, were right to health enshrined in the Charter.

#### **Case study – denial of access to adequate mental health care in prison**

Our client, Brendan, was on remand in the Melbourne Custody Centre. Brendan has been diagnosed as having a major depressive disorder with psychotic symptoms, and requires ongoing psychiatric treatment including antidepressant, antipsychotic and mood stabilising medications. He also requires additional psychological support. Whilst on remand, Brendon requested psychiatric medication but was told to wait until morning. The following morning Brendon went to the doctor who told him client he did not have the appropriate medication and so he went without any psychiatric medication. Brendon’s file notes indicated he had been prescribed Diazepam approximately a week prior to his detention on remand, yet he remained in MCC without being provided with any psychiatric medication, despite it being recorded he was agitated, threatening self-harm, being in a depressed state and threatening to commit suicide.

A post-custody assessment by a registered psychologist concluded that as a result of Brendan’s treatment at MCC, he suffered a high level of distress and significant psychological weakness. An assessment by a consultant psychiatric further confirmed that the lack of psychological assessment and provision of psychiatric medications was definitely a cause of the relapse of our client’s depression.

The facts of the case indicate that Brendan would be unlikely to succeed in a medical negligence claim due to the threshold injury assessment requirements. Were there a distinct right to health in the Charter however, our client’s right to an adequate standard of mental health including the provision of necessary psychiatric medication, could be vindicated. Arguably, timely access to necessary treatment would have prevented a relapse and been less costly for the health system overall.

#### Principles underlying enjoyment of rights for people with disabilities

As to other fundamental principles articulated in the CRPD, we endorse the view of the VEOHRC that these be included in the objects of the Charter, rather than in specific articles, so as to inform the interpretation of all Charter rights.<sup>15</sup> In particular, we support articulation of the following key principles relevant to people with disabilities, in the objects of the Charter:

- respect for the inherent dignity and individual autonomy of people with disabilities, including the freedom to make one’s own choices, and independence of persons, on an equal basis with others
- non-discrimination

<sup>14</sup> Ibid at paragraph 7.

<sup>15</sup> VEOHRC submission, Recommendation 5, above n 6, at p13.

- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women, and
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

### Specific rights of women should be recognised

We support recognition of the specific rights of women in the Charter. This is particularly important for women using psychiatric services, of whom an estimated 50-80% have a history of sexual abuse and/or assault.<sup>16</sup> Inpatient mental health treatment for women who have suffered sexual abuse and/or assault frequently triggers feelings of powerlessness and can re-traumatise them.<sup>17</sup>

Most women receiving mental health treatment have no choice about whether, upon admission to a psychiatric ward, they are treated in a women-only space. Maroondah Hospital is currently the only Victorian public mental health inpatient service that is designed with an area specifically for women. This unit only opened in September 2009.<sup>18</sup>

Specific articulation of the rights of women and girls would be a catalyst for government to provide a choice for women about whether they are treated in a single-sex psychiatric ward or not. This could go a significant way to improving the safety of women and minimising the anxiety and distress for women who have a history of abuse or trauma.

## **2. Further provisions regarding public authorities' compliance with the Charter, including regular auditing**

The MHLC wholeheartedly supports the introduction of mandatory regular auditing of public authorities' compliance with the Charter. It is an important means of promoting transparency and accountability by government and agencies of a public nature or carrying out public functions. It is also a critical gauge of any gaps in the service system and can identify where further education and training resources can be directed to ensure front-line staff are aware of their responsibilities under relevant legislation and the impact of the Charter in the discharge of these functions.

In this respect, we note the comments made by the Special Rapporteur on the Right to Health in his report on Australia that, although ethics is a core component of training for health professionals,

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<sup>16</sup> Cox, M 1994, *Good practices in women's mental health*, Health Sharing Women's Resource Service, Melbourne. Discussed in Department of Human Services, (2006) 'Building partnerships between mental health, family violence and sexual assault services: Project report' <<http://www.health.vic.gov.au/mentalhealth/family-violence/partnerships0706.pdf>>

<sup>17</sup> See <<http://www.theage.com.au/news/national/women-in-mental-wards-face-grave-risk-of-abuse/2008/05/11/1210444243808.html>>

<sup>18</sup> The newly-designed inpatient unit has eight designated female-only beds in a female-only area. See Department of Human Services media release: <<http://www.dhs.vic.gov.au/humanservicesnews/sep09/maroon.htm>>

there is no national framework for inclusion of human rights specific training for health professionals in Australia. He expressed regret that such training is not made mandatory.<sup>19</sup>

In our view, audit reports of public authorities' compliance activities, with an analysis of outcomes, must be made publicly available.

We endorse the VEOHRC's recommendation that it be empowered under the Charter with similar powers to the Victorian Auditor-General's Office, to review the compliance of public authorities' policies, programs or practices with human rights.<sup>20</sup> Critical to the exercise of such functions will be the adequate resourcing of the VEOHRC, to which we urge the government to commit.

### **3. Further provision for remedies**

Many of our clients have experienced at some point in their lives, involuntary detention and/or involuntary treatment, often with stigmatising, distressing and debilitating side effects such as weight gain, loss of sexual function, involuntary movements and tremors, vision problems, restlessness, memory loss, dry mouth, constipation, lethargy, inability to focus or concentrate and dulled mental functioning or emotional experience. Restrictive interventions, such as seclusion, mechanical restraint and electro-convulsive therapy (ECT) are also common among involuntary inpatients. It is perhaps no surprise that disability and mental health related casework comprises 14% of Charter-related legal proceedings - the fourth most prevalent legal issue.<sup>21</sup>

We are strongly of the view that individuals should have the right to bring an independent cause of action for breach of Charter rights by public authorities, either in VCAT or in a higher court. Courts and tribunals should further be empowered under the Charter to award damages in appropriate cases where public authorities have acted unlawfully in failing to comply with their obligations to give proper consideration to and act compatibly with human rights. The case of *Kracke* is a prime example of a breach so egregious that compensation in the way of damages should have been a remedy open to VCAT.

#### Independent cause of action

The Charter regime must provide real and timely access to justice for individuals. One of the key means of doing so is by bringing legal action in Victorian courts or tribunals. The current regime, by virtue of s39, effectively only permits the Charter to be enlivened indirectly in legal proceedings where there is otherwise an existing cause of action to which the Charter issue can 'piggy-back'. In the MHLC's view, this is a narrow characterisation of human rights and an arbitrary distinction when it comes to their protection. Whilst we have detailed above the benefit of the Charter in strengthening other claims, the inability to bring an action directly for breach of a Charter right alone is problematic, particularly where there are no adequately empowered or independent complaint mechanisms which are real alternatives to the Courts<sup>22</sup>.

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<sup>19</sup> Above n 12 at paragraph 16.

<sup>20</sup> VEOHRC submission, Recommendation 12, above n 6 at p13.

<sup>21</sup> VEOHRC submission, above n 6 at p9.

<sup>22</sup> See Sophie Delaney *An Optimally Rights Recognising Mental Health Tribunal – What Can be Learned From Australian Jurisdictions*, (2003) 10 *Psychiatry, Psychology and Law* 71.

Without an independent cause of action for breach of a Charter right, protecting and upholding people's rights in individual cases is severely restricted, as the following case study illustrates:

**Case study – stand alone cause of action in both courts and tribunals means greater access to justice**

*Antunovic v Dawson & Anor* [2010] VSC 377 (25 August 2010).

**Facts:**

Ms Antunovic was subject to involuntary psychiatric treatment by way of a Community Treatment Order under the Mental Health Act. She was also living in supported accommodation at a Community Care Unit (CCU) but when she said she wished to leave the CCU and live with her mother, the authorised psychiatrist told her she must return to the CCU each night for her treatment. There was no residence condition on her CTO which would otherwise compel her to live at the CCU. After negotiations with the CCU and authorised psychiatrist to allow our client to move home whilst continuing treatment were unsuccessful, the MHLC made an application to the Victorian Supreme Court for a writ of habeus corpus.

**Charter:**

Justice Bell found that, since there was no residence condition in place, there was no lawful authority for the defendant authorised psychiatrist and Area Mental Health Service to require our client to reside in the CCU. Nevertheless, Bell J found that our client felt compelled to follow the directions of the authorised psychiatrist which amounted to "power or control" over her personal liberty and freedom of movement. As a consequence Ms Antunovic had the right to seek a writ of Habeus Corpus in relation to her unlawful restraint. The Charter reinforced this common law right as it was consistent with the right to freedom of movement under s 12 of the Charter.

**Outcome:**

As he had already found our client's detention to be unlawful, he did not issue a writ of habeus corpus, but rather made an order that she be immediately released from the CCU. The client is living at home with her mother & has continued treatment with the Area Mental Health Service.

**Commentary:**

As there is no stand-alone cause of action for breach of the Charter, our client, Ms Antunovic had no option but to apply for an urgent writ of habeus corpus at the Supreme Court. If there had been a standalone cause of action, our client would have had greater access to justice by, for example, making an application to VCAT for breach of Charter. Not only is VCAT is a far more accessible jurisdiction than the Supreme Court, but, importantly in a jurisdiction such as the MHRB where around 90% of people are unrepresented, it is likely that most people would be unaware of their right to appeal the decision, let alone actually lodge an application, for a writ of habeus corpus.

**4. The effects of the Charter on:**

- a. the development and drafting of statutory provisions, and
- b. the consideration of statutory provisions by Parliament

The Charter provides an important lens through which legislation is developed, drafted and considered by parliament.

The dialogue model is an important way for the broader community to engage in a discourse with government and government departments and agencies about human rights. For example, through viewing and responding to Statements of Compatibility by government upon a Bill's introduction to parliament and reports by and submissions to the Scrutiny of Acts and Regulations Committee. This can promote greater transparency in government policy-making and can help to focus the attention of decision-makers on the impact of policies and laws on individuals.

The importance of the *Kracke* decision has been highlighted by Freckleton and McGregor who argue that:

It facilitates a recognition of the disempowerment experienced by many people with mental illnesses that is relevant to the interpretation of provisions within mental health legislation. It will go a way towards influencing the tone and rhetoric of future mental health law in Victoria and also throughout Australia.<sup>23</sup>

Indeed, the Department of Health's Review of the Mental Health Act is a pertinent example of the how Charter jurisprudence, by the *Kracke* decision in particular, has had a positive impact on the reviewing and re-framing of legislation to encourage the promotion of dignity and respect. A key aim of the review was to ensure that the Act appropriately protects human rights in light of the Charter of Human Rights and Responsibilities 2006. Many members of the community, including the MHLC, through submissions and consultation referred to the need for the MHA to be compatible with the Charter, calling for better recognition and protection of fundamental rights, such as the right to a fair and expeditious hearing by an independent review body.<sup>24</sup> As the (then) government commented in its response to the community consultation report in July 2009, modernisation of the law is important to ensure the new Act "contain a range of safeguards to protect the human rights outlined in the charter and the Disabilities Convention".<sup>25</sup>

### **c. the provision of services, and the performance of other functions by, public authorities**

Public mental health services, including community mental health services and psychiatric inpatient units, as well as the authorised psychiatrist and other staff of the service, are all public authorities under s4(1)(j) of the Charter.<sup>26</sup> Similarly, the Chief Psychiatrist, which bears responsibility for the provision of public mental health services generally in Victoria, is also a public authority.

#### Impact of the Charter on mental health service provision

In 2006 the federal Senate Select Committee on Mental Health found that: "Abuses within [mental health] services are said to include hostile environments, mental health staff ignoring or dismissing

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<sup>23</sup> Ian Freckleton and Simon McGregor (2010) 'Human rights and review of the involuntary status of patients with a mental illness: *Kracke* after *Momcilovic*' *Psychiatry, Psychology and Law* vol 17, no 2, 173 – 186, at p184.

<sup>24</sup> See for example, submissions by the MHLC to the Consultation Paper and Exposure Draft Mental Health Bill (2010), available at: [http://www.communitylaw.org.au/mhlc/cb\\_pages/mental\\_health\\_act\\_reform.php](http://www.communitylaw.org.au/mhlc/cb_pages/mental_health_act_reform.php). See also summaries of the community consultations on the Exposure Draft Mental Health Bill, available at: [http://www.health.vic.gov.au/mentalhealth/mhactreview/rt\\_meetings.htm](http://www.health.vic.gov.au/mentalhealth/mhactreview/rt_meetings.htm) (Accessed 17 June 2011).

<sup>25</sup> Review of the Mental Health Act 1986 Government response to Community consultation report (July 2009), p2. Available at: <http://www.health.vic.gov.au/mentalhealth/mhactreview/>

<sup>26</sup> *Kracke* above n 1 at [320]

consumers' personal feelings, physical abuse and forced treatment."<sup>27</sup> Through our casework however, largely in representing clients subject to community treatment orders (CTOs) before the MHRB, we have found the Charter has brought added scrutiny to specific aspects of their treatment, such as the dose of medications and monitoring of adverse side effects.

The Chief Psychiatrist's Annual report from 2007-2008 also confirms:

The introduction of the *Victorian Charter of Human Rights and Responsibilities* (the charter) also directs renewed attention to the issue of patient rights. As part of the review of the Mental Health Act currently underway, the Act will be examined for its compliance with the charter. This also provides an opportunity for the mental health sector to reflect on its obligations to respect and protect the rights of those with a mental illness.<sup>28</sup>

The Office of the Chief Psychiatrist has, we understand, been conducting quarterly forums for authorised psychiatrists to assist in fulfilling their functions, including discussing the impact of the Charter of Human Rights.<sup>29</sup>

#### **Case study – increased scrutiny of potentially cruel inhuman and degrading treatment**

*Re Review of 09-085 VMHRB (23 February 2009)*

Our client, P, was 28 years old. He had arrived in Australia from Somalia as a refugee. Since around 2001, he had been subject to involuntary treatment on a CTO under the MHA. One component of his treatment involved injections of Depo Provera, which was prescribed as a libidinal suppressant. This particular treatment had been prescribed following a sex offence around 7 years previously and which had been long since resolved, summarily, by the criminal justice system, with a good behaviour bond.

As a direct result the Depo Provera, our client had developed severe osteoporosis in his lower back and was eight times more likely to suffer a fracture of his lumbar spine than an average man.

At his hearing before the MHRB, we argued on P's behalf that the administration of Depo Provera could not be called "necessary treatment" because it infringed the protection against "cruel, inhuman or degrading" treatment provided by s 10(b) and s 7 of the Charter. Secondly, it was submitted that the making of the treatment plan did not take into account P's rights under the Charter, and that the MHRB was compelled to order its revision.

#### **Decisions on Charter issues: - interpreting "treatment" and scope of "cruel, inhuman and degrading"**

The MHRB held that the interpretation of the criteria for involuntary treatment under s 8(1) MHA must be consistent with the Charter; and so "treatment" must be defined to exclude treatment which is "cruel, inhuman or degrading".

The MHRB found that, as a general principle, treatment which is a "medical necessity" cannot be regarded as "cruel, inhuman or degrading". Notwithstanding, it found that such treatment could, potentially, amount to cruel, inhuman and degrading treatment. On the facts however, the MHRB ultimately found that, whilst the side effects – Osteoporosis – was significant and deleterious, it did not meet the required level of severity to "cross the line" to constitute a breach. Where this balance

<sup>27</sup> Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health: From Crisis to Community (First Report)* (2006), [3.18].

<sup>28</sup> Annual report, p 29

<sup>29</sup> Annual report 07/08 at p 29, see also Annual report 08/09 at p 27, and

lies, ultimately depends on the analysis of the authorised psychiatrist; and stressed that this must involve regular monitoring and assessment of the risks and benefits.

The Board also used the Charter to interpret the treatment planning provisions of the MHA (s19A) consistently with the Charter and find therefore that the provisions also include the requirement to consider the effect of the treatment on the person's.

#### **Decision on P's CTO and treatment plan:**

The Board found that the s 8(1) criteria for involuntary treatment were met, and did not discharge P from involuntary status subject to a CTO.

However, the Board was not satisfied that the authorised psychiatrist had prepared, reviewed or revised P's treatment plan in accordance with s 19A. It found that there were flaws in the development of the plan, and ineffective communication between the treating parties. The Board ordered that the treatment plan be revised to include a detailed regime for monitoring the ongoing risks and benefits of treatment.

#### **Discussion**

The Charter did have an impact in this hearing by encouraging the MHRB to actually exercise its discretion to order a revision of the treatment plan, where, on previous occasions before the implementation of the Charter, it had declined to do so.

The decision of *Kracke*<sup>30</sup>, brought to VCAT by the MHLC on behalf of our client, Mr Kracke, has been described by commentators as "[a]rguably, Australia's most significant judicial pronouncement on the human rights of those with mental illnesses".<sup>31</sup> The case resulted in a crucial vindication that Mr Kracke's rights to a fair hearing had been breached.

Even beyond this however, whilst it is easy to say Mr Kracke was denied the tangible outcome of discharge from the order, there is no doubt that the added scrutiny of the legal proceedings, with various parties and amicus broadly has had a profound impact on Mr Kracke's actual treatment. Indeed the antipsychotic medication he was being prescribed was slowly, yet significantly reduced throughout the course of the proceedings. Adverse side effects had been one of Mr Kracke's chief complaints against the medication and it is our considered view that an ordinary merits review at VCAT would not have yielded such a favourable result. In addition, our client was cited by *The Age Melbourne Magazine* as one of the top 100 most influential people of 2009, receiving, as he did, the inaugural declaration under the Charter.

The decision also made clear the obligations on area mental health services, authorised psychiatrists and other treating staff include ensuring that their administrative procedures are such that hearings do not take place outside the statutory time frames in the MHA. For example at paragraph 701, Bell J states:

The time limits in the legislation must be respected. Treating practitioners and other professionals must put the Board in a position that it can fulfil its legislative responsibilities in this regard.

<sup>30</sup> Above n 1.

<sup>31</sup> Ian Freckelton and Simon McGregor (2010) 'Human rights and review of the involuntary status of patients with a mental illness: *Kracke* after *Momcilovic*' *Psychiatry, Psychology and Law* vol 17, no 2, 173 – 186, at p173

Our discussions with the Victorian Mental Illness Council support our view that the Charter can be an effective tool in advocacy for individual consumers of mental health services, before a 'last resort' to issuing legal proceedings. In particular, advocates have said in their experience, once they raise Charter rights and responsibilities with the area mental health service, they believe there is greater scrutiny of a person's treatment by clinicians and a greater in know anecdotally – AMHS charter useful in advocacy

Impact of the Charter on the Mental Health Review Board & VCAT - in their administrative capacity as public authorities

The Charter has had a significant impact on both the administrative processes and procedures of the MHRB, as well as its substantive decision-making. Bell J in *Kracke* confirmed that when reviewing involuntary orders and a person's treatment plan, the Board is acting in an administrative capacity within s4(1)(j) of the Charter, and is therefore "wholly bound by the Charter as a public authority".<sup>32</sup> In another division of the MHRB, it determined that:

...the correct and preferable starting point for incorporation the implications of the Charter within the conduct and decision making of public authorities acting under the Act (which includes both the Board and mental health services) is s38 of the Charter.<sup>33</sup>

In referring to the Supreme Court decision of *Castles v Secretary to the Department of Justice & Ors*, the MHRB went on to describe:

...the objectives of the Charter as effectively being the integration of a human rights orientation into the day-to-day activities of public authorities at a very organic, individual level.<sup>34</sup>

Similarly, Bell J determined that VCAT, in this review jurisdiction, was also a public authority within s4(1)(b) and (c), as it had all the functions of the MHRB, namely, "to stand in the shoes of the board and to make the correct or preferable decision on the merits on the facts and circumstances before it".<sup>35</sup> Although he did not go so far as to determine invalidity to be the consequence of the breach, Bell J made clear the MHRB had failed to comply with the time limits for review under the MHA, namely, within 8 weeks of the making of an ITO,<sup>36</sup> or extension of a CTO<sup>37</sup> and periodically at least every 12 months following the initial review.<sup>38</sup> As a result, Bell J made an order that the MHRB had breached Mr Kracke's right to a fair hearing under s24(1) of the Charter by failing to conduct the reviews of his ITO and CTO within a reasonable time.

**d. Litigation and the roles and functioning of courts and tribunals**

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<sup>32</sup> *Kracke* above n1 at [320].

<sup>33</sup> Re Appeal and Review of 11-033 VMHRB (17 September 2010), at p 6.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at [323]

<sup>36</sup> s30(1) MHA

<sup>37</sup> s30 (4) MHA

<sup>38</sup> s30(3) MHA

The critical role that courts and tribunals play in interpreting legislation is enhanced by the Charter, pursuant to section 32 interpretive provisions which provide:

(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.

...

### **Case study – the right to a fair hearing**

In the decision of *Kracke v MHRB & Ors* (General) [209] VCAT 646

#### **Facts:**

The MHLC's client, Mr Kracke was subject to compulsory psychiatric treatment pursuant to a Community Treatment Order (CTO) under the Mental Health Act (the Act). The Act establishes mandatory periods within which involuntary orders must be reviewed by a hearing of the Mental Health Review Board – including within 8 weeks of the making of or extension of a CTO and otherwise at least every 12 months of an involuntary treatment order (ITO). His CTO had not been reviewed for over 1 year, nor the underlying ITO for over 2 years.

#### **Charter**

On appeal from the Board, Justice Bell of the Victorian Civil and Administrative Tribunal found that several of Mr Kracke's rights were engaged by his involuntary treatment. Making the community treatment order engaged Mr Kracke's rights to freedom from medical treatment without his full, free and informed consent (s 10(c)), to freedom of movement (s 12) and to privacy (s 13(a)). Reviewing (or failing to review) the treatment orders engaged all of these rights and the right to a fair hearing (s 24(1)). The matter became a test case for the operation of the Charter in Victoria

#### **Decision –**

Bell J found that both the MHRB and VCAT were public authorities under the Charter and that Mr Kracke's right to a fair hearing under s24 of the Charter had been breached by the Board's failure to review his involuntary treatment within the statutory time periods. He emphasised at [699]:

*Must means must. The time limits are not guidelines or aspirational. Conducting these reviews within the specified time is not optional. Doing so is mandatory and what the legislation expects to happen. Parliament could hardly have made its expectation any clearer.*

Though the outcome of the case was not to invalidate the order as a result of the breach, Bell J made the inaugural declaration of breach of a Charter right – the right to a fair hearing.

As to the other rights, Bell J found the other rights were engaged but were nevertheless justifiable limitations on Mr Kracke's human rights.

The *Kracke* decision has had a significant impact on the policies and practices of the MHRB which is taking greater care to make sure hearings are conducted, as much as possible, within the statutory time frames. The MHRB noted in its Annual Report of 2008/09 that:

As a result of His Honour’s comprehensive analysis of the framework of the Charter and the relationship between the Charter and the Act, the Board is reviewing its administrative and hearing practices and procedures, and is conducting further training of members, especially the manner with which members deal with the engagement of human rights in making decisions about the application of the s8(1) criteria.<sup>39</sup>

The MHRB also noted:

Consistent with its role as a tribunal, the Board continues to review and refine its hearing processes, particularly to ensure compliance with the Charter s24 “fair hearing” right<sup>40</sup>

The decision arguably has had a broader impact on the administration of justice, particularly following the confirmation of VCAT’s power to order declaratory relief. A declaration as a remedy of itself would appear to have broader ramifications for other Tribunals and Boards by encouraging greater scrutiny of their administrative processes also. As Bell J stated at [801]

...the Charter is not a toothless tiger.... It extends the power of courts or tribunals to grant relief or remedies for unlawful acts or decisions of a public authority to a ground of unlawfulness arising under the Charter.

And further, at [817]-[818], Bell reinforces the power of declaratory relief as a means of vindication of rights which equate to the “vindication of someone whose reputation has been damaged by a breach of the rules of natural justice. A formal finding of violation of breach of human rights is a remedy of great importance in jurisdictions where those rights have application.”

The Charter is also an important additional interpretive tool in applications for judicial review of a decision by a Tribunal as illustrated by the following case-study of PJB.

**Case study – failure to interpret legislation consistently with the human rights as ground for judicial review**

An application was made to VCAT to appoint an Administrator under the *Guardianship and Administration Act 1986 (Vic)* (GAAct) for our client, PJB. The treating team had been unable to successfully enforce psychiatric treatment under the Mental Health Act by way of a Community Treatment Order, even where a residence condition had been made, which compelled our client to live at various supported accommodation. By having an Administrator appointed which was likely to sell our client’s home, this would effectively force PJB into accommodation where treatment could be enforced by the treating team. PJB wanted to continue living in his own home. The Tribunal granted the application and made an order that State Trustees be appointed our client’s administrator on the basis that it was in his “best interests”. We appealed the decision to the Victorian Supreme Court on the basis that the Tribunal had made an error of law.

<sup>39</sup> MHRB Annual report, available at [www.mhrb.vic.gov.au](http://www.mhrb.vic.gov.au) at p 13

<sup>40</sup> *Ibid* at p14

**harter:**

We argued the Tribunal had not interpreted the GAACT consistently with the Charter and in particular that the appointment of an administrator was or was likely to be an unjustifiable limitation on our client's rights to choose where he lived (s12 Charter), to be free from the arbitrary interference with his property (s 20) and to be free from unlawful or arbitrary interference with his home (s13). Further, the Tribunal, as a public authority, had not acted compatibly with and failed to give proper consideration to, our client's human rights.

We are awaiting the outcome of the appeal at the Victorian Supreme Court

The Charter has also been instrumental in determining the scope and lawfulness of courts' interpretation of suppression orders in relation to 'open justice' and the right to freedom of expression, as the following case illustrates:

**Case study – the right to freedom of expression & suppression orders**

*XFJ v Director of Public Transport and The Herald and Weekly Times Pty Ltd (unreported) VCAT (9 February 2009)*

**Background:**

Our client, XFJ had been acquitted on the (then) ground of insanity on a charge of murdering his wife in 1990. He was then detained at the Governor's pleasure and given treatment. In 1998 XFJ was conditionally released by Supreme Court, then in 2003, was released unconditionally. Both times a suppression order was granted prohibiting any identification of him, his wife (victim) or their family members through publication or broadcasting..

In around 2008, our client, XFJ, applied for a taxi licence and was refused by the Director of Public Transport. We appealed the decision to VCAT on our client's behalf, which resulted in Deputy President Macnamara setting aside the Director's determination and ordering our client be granted a driver's accreditation to drive a taxi. In coming to his decision, Macnamara DP referred to our client's exemplary supporting psychiatric evidence from two consultant psychiatrists, one of whom had been involved with his treatment during his post-release supervision. One psychiatrist noted he had been symptom free for 14 years and had maintained good mental health without any medication.

**Facts of the case:**

The Herald Sun, through its publisher, The Herald and Weekly Times Pty Ltd (HWT), reported the outcome of the 2008 VCAT decision with the sensationalist headlines 'Killer Cabbie on our Roads', and '...but law stops us telling you who wife stabber is'. This was followed by a similarly inflammatory headline the following day, referring to a 'red-faced' Minister for Public Transport vowing to 'act on killer cabbie' to close a 'loophole' which would otherwise have automatically disqualified our client from getting a taxi licence. An appeal was then lodged by the Director.

HWT applied to have the Supreme Court suppression orders lifted on the basis that XFJ's identity should be disclosed "to allow fully informed and educated debate on th[e] issue" and that it was "in

the public interest” to identify XFJ so would-be passengers could “exercise their fundamental right as a consumer to choose whether or not to enter a taxi being driven by XFJ”.<sup>41</sup>

### **Charter**

HWT asserted that the suppression order was an unlawful limitation on the right to freedom of expression in s15 of the Charter. We argued, on the other hand, that removal of the suppression order would breach the right to recognition and equality before the law (s8), freedom from cruel, inhuman and degrading treatment (s10(b)), our client’s right to privacy and reputation (s13) and protection of families and children (s17(2)), would have prevented him from working to support his son.

### **Outcome -**

VCAT dismissed the application to discharge the suppression order, noting that the process of rehabilitation for XFJ was a valid justification for limiting the right to freedom of expression. In doing so, Macnamara DP defined the limits to freedom of expression to where it would intrude on the privacy of an individual, in this case our client. Ultimately the arguments under the Charter focussed the decision on the sensationalised reporting of our client’s circumstances in the media. In this respect it is notable that Macnamara DP stated:

*The sensationalised reporting of XFJ’s application laced with emotive language and replete with inaccuracies, describing him as ‘insane’ and as ‘a murderer’ has the capacity to set back his rehabilitation by years.*

We have found the Charter to be a very useful tool to negotiate adjournment guidelines and practices and procedures of the MHRB which themselves are compatible with human rights. The Charter Practice Direction for example, distributed in around 2007, which steps out the procedure for initiating a ‘special fixture’ hearing to determine ‘genuine’ questions of interpretation.

#### **e. the availability to Victorians of accessible, just and timely remedies for infringements of rights**

It is the MHLC’s strong view that the justiciable nature of human rights under the Charter is critical to ensuring individual’s rights are effectively protected. Again, it was the decision of *Kracke* that confirmed the jurisdiction and the power of VCAT to order a declaration for breach of a person’s human rights. Such a power is an important means of promoting accessible remedies for infringements, rather than compelling the person to lodge an appeal at the Supreme Court for example, with all the cost implications that would bring with it. However, as we have discussed above, it is our strong view that stronger measures need to be put in place to ensure greater access to redress, through an independent, direct cause of action and compensation in appropriate circumstances.

## **5. The overall benefits and costs of the Charter**

The benefits of the Charter can be seen for individuals and also at the service system level.

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<sup>41</sup> See para [23]

The MHLC reiterates its strong support for the justiciable nature of Charter rights which, in our view, is a fundamental means of guaranteeing the protection of rights and for individuals to seek redress. Through our casework, clients have benefited from the Charter for example by the vindication of their rights by a determination of the MHRB, or their treating team conducting more robust monitoring of side effects of medication.<sup>42</sup>

Whilst the Charter has been in full force since 1 January 2008, with responsibilities falling squarely on public authorities such as mental health services since that time, we are mindful of the fact that changing the culture of service provision – including to a human rights framework – in reality often takes time. Cultural change may be influenced by a range of factors however, in our view, the ability for individuals to have a determination made by a court or tribunal about an infringement or breach of their human rights sends an important message to the wider community about acceptable limitations or otherwise on a person’s rights. It can also be an important catalyst for greater scrutiny of the way in which services are provided, or more robust procedures are put in place.

## **6. Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria**

We are firmly of the view that the exclusion of the Adult Parole Board (APB) from within the ambit of the Charter<sup>43</sup> in its entirety cannot be justified. In our view, this is an aspect requiring urgent reform. We do not see how the APB differs in any material respect from other courts or tribunals, many of which deal with particularly sensitive information, but yet which are accountable under the Charter in their judicial capacity to at least act compatibly with the person’s right to a fair hearing. Prisoners should have the right to participate fully in the hearing process, consistent with the right to procedural fairness in an accountable decision-making process.<sup>44</sup> However, in our experience even basic tenets of the right to a fair hearing, such as being informed of the hearing, being advised of the issues and allegations being raised against the person, being given reasons for decisions, are denied people in prison.

### **Case study – Denial of fundamental rights before the Adult Parole Board**

We assisted a client, Daryn, in Port Philip prison whose case had come up for parole. The four or five previous hearings that had taken place at the APB had all been conducted in Daryn’s absence, on the papers. Daryn’s mental health release plan, which had been prepared before our involvement, was, in any event we understand, lost in the system.

We arranged for mental health treatment support services and housing for Daryn in Melbourne, to take up upon his release and we wrote to the APB advising them of these arrangements. Our client had no family, no support and no advocate other than a worker from ACOSS and the MHLC assisting him. We then discovered plans had changed for some reason and Daryn was being transferred to Ararat prison in the meantime. No reason was given to Daryn about the transfer and, despite our numerous assertive attempts to get access to information or detailed reasons, these were not forthcoming either. In the end, we made written submissions to the APB on the basis of the limited

<sup>42</sup> See for example the decision of Re Review of 09-085 VMHRB (23 February 2009)

<sup>43</sup> See sections 5-6

<sup>44</sup> See Naylor, Bronwyn and Schmidt, Johannes, (2010) ‘Do prisoners have a right to fairness before the Parole Board?’ *Sydney Law Review* 32: 437.

information we had. Accessing reasons for the APB's decisions and notes was extremely difficult and time consuming.

The entire process in securing our client's parole - from the first date Daryn contacted us, to when he was finally released, was over six months. Our client was never given any reasons for the decisions that were being made in his absence.

Were the APB subject to a right to a fair hearing, including procedural fairness, no doubt the process would have been far more accountable, expeditious and less costly, with our client and us informed in a timely manner about the progress.

Making the APB subject to the same obligations on all courts and tribunals under the Charter, in particular the right to a fair hearing and procedural fairness under s24, including the right to legal representation before the APB, is a critical means of enabling accessible and accountable justice system that promotes good consistent decision-making.