

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

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Introduction

The task of interpreting legislation compatibly with human rights standards can prove challenging. The familiar methods of statutory interpretation appear at odds with the ethereal nature of human rights. A recent decision from the Victorian Civil and Administrative Tribunal (the Tribunal), although not the first decision to consider the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*), is noteworthy as the most significant to date on suggesting one possible approach.

1. The decision in *Kracke v Mental Health Review Board*

The applicant was a mentally ill patient being administered drugs without his consent. He sought to establish that orders made by the Mental Health Review Board (the Board), under which he was given involuntary medical treatment pursuant to the *Mental Health Act 1986* (Vic) (the Act), were invalid as violating his human rights.¹ The Act authorises involuntary treatment for individuals in detention and within the community.² Treatment orders are subject to several statutory safeguards, including mandatory requirements for the Board to review any orders within specified timeframes.³ However, the Board had failed to do so: Mr Kracke's involuntary treatment order was more than 12 months overdue and his community treatment order should have been reviewed at least twice. Although the applicant's requested adjournments had contributed to delay, the Board had lost track of his case due to administrative oversights. The Act was silent as to the consequences. Mr Kracke submitted that he could not be compelled by involuntary treatment orders when safeguards such as strict adherence to review periods had not been properly applied. Noting the importance of respecting Mr Kracke's human rights, the Board nonetheless affirmed the orders and the applicant sought review.

The Tribunal found that the Board had breached Mr Kracke's right to a fair hearing under section 24(1) of the *Charter* by failing to conduct mandatory reviews of his involuntary and community treatment orders, as required under section 30(3) and (4) of the Act, within a reasonable time.⁴

The Tribunal considered that the purpose of conducting reviews within the legislatively-mandated timeframes was to safeguard the interests of vulnerable persons. However, the review time limits 'do not operate like a dead-man's handle which stops the

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¹ *Kracke v Mental Health Review Board* [2009] VCAT 646 (Bell J, 21 May 2009) ('*Kracke*').

² *Mental Health Act 1986* (Vic) ss 12, 14.

³ *Ibid* s 30.

⁴ *Kracke* [2009] VCAT 646, [532].

treatment as it would a train'.⁵ Similarly, '[a] system compatible with human rights because it contains many such safeguards is not necessarily made incompatible with human rights because of the failure of one'.⁶ The treatment orders remained valid in view of Mr Kracke's medical needs, human rights standards,⁷ precedent⁸ and the Act's purpose: to protect the health of mentally ill patients.⁹ To invalidate the orders because the reviews were not conducted within time, even though breaching his human rights, would be disproportionate.¹⁰

On the appropriate remedy, the *Charter* 'is not a toothless tiger'.¹¹ The Tribunal found that, in the social interest, Mr Kracke was entitled to a formal declaration.¹² This remedy was considered consistent with discretionary principles,¹³ vindicated the applicant's rights, expressed the Tribunal's disapproval, upheld human rights and drew community attention to the broader issue of delayed mental health reviews.¹⁴

2. Analysis and implications

Of particular note is that Justice Bell adopted the approach utilised in the United Kingdom, distilling certain principles from English jurisprudence under the *Human Rights Act 1998* (UK).¹⁵ When interpreting Victorian legislation in light of the *Charter*, four analytical stages were proposed:¹⁶

- (i) determine whether legislation limits a particular human right. To describe this stage, the soft term 'engagement' was preferred to the familiar language of 'breach', 'violation' or 'infringement'. To decide whether a statutory provision 'engaged' a human right, it was first necessary to interpret the provision according to standard interpretative principles, then to identify the scope of the right in issue using a broad, rather than legalistic, approach having regard to its purpose, and finally comparing the two. This stage focused upon 'the cardinal values [the human right] embodies and the fundamental interests it was meant to protect'.¹⁷
- (ii) if the legislation limits a human right, it is then necessary to consider whether this limitation is justified by the general limitations provisions under section 7 of the *Charter* ('justification').¹⁸ Human rights may be limited 'under law' only if

⁵ Ibid [715].

⁶ Ibid [849].

⁷ See, eg, *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, 75th plen mtg, UN Doc A/Res/46/119 (17 December 1991).

⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [93].

⁹ *Kracke* [2009] VCAT 646, [716]–[725], distinguishing *RIV v Mental Health Review Board* (2000) 17 VAR 42.

¹⁰ *Kracke* [2009] VCAT 646, [782].

¹¹ Ibid [801]. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 36, 39.

¹² *Kracke* [2009] VCAT 646, [826].

¹³ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 596–7 (Brennan J).

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 124.

¹⁵ *Kracke* [2009] VCAT 646, [230].

¹⁶ Ibid [65].

¹⁷ Ibid [540].

¹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *ibid* [132]–[161].

demonstrably justified in specified circumstances, including the importance of the purpose of the limitation and any less restrictive means that are reasonably available.¹⁹

- (iii) where a limitation cannot be justified, then it may be possible to interpret the legislation compatibly with human rights under the ‘special interpretative obligation’ of the *Charter* (‘reinterpretation’).²⁰ Section 32(1) requires all legislation to be interpreted compatibly with human rights so far as possible, consistently with their purpose. This tool is, like its English parent, ‘very strong and far reaching’ and may require ‘the court to depart from the legislative intention of Parliament’.²¹ Nor are courts bound by pre-*Charter* interpretations of the same provision. However, the judicial obligation to make legislation conform to transcendent human rights standards contemplates an objective interpretative role, in accordance with the section 32(1) direction, and not one of amendment.²² Although interpreting human rights legislation could be seen as ‘evolutionary, dynamic and responsive to changing social and economic conditions’,²³ parliamentary sovereignty is ostensibly preserved.
- (iv) finally, if the legislation cannot be interpreted in accordance with the special interpretative obligation, then the Victorian Supreme Court will consider whether to issue a declaration of inconsistent interpretation.²⁴

Applying these four stages to the circumstances considered in *Kracke*, the Board had engaged the right to a fair hearing.²⁵ International jurisprudence indicated that this right required a hearing to be conducted within a reasonable time by reference to such factors as a matter’s complexity, its importance to the applicant and any explanations for delay.²⁶ In this case, the delay in reviewing his involuntary and community treatment orders was considerable, lacked reasonable explanation and amounted to a limitation on that right. The justification and reinterpretation stages did not require consideration. By failing to conduct the legislatively-mandated reviews within a reasonable time, the Board violated Mr Kracke’s right to a fair hearing.²⁷

Furthermore, when assessed against international conventions and jurisprudence, involuntary and community treatment orders engaged other human rights. These included the right to freedom from medical treatment without full, free and informed consent; freedom of movement; the right to privacy; and the right to liberty and security.²⁸ Given Mr Kracke’s personal interest in his autonomy and integrity, these rights ensured his capacity to make decisions concerning his own treatment, respected his inherent dignity and facilitated the free development of his personality.²⁹

¹⁹ *Kracke* [2009] VCAT 646, [132]–[135], [137]–[161].

²⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *ibid* [202]–[211].

²¹ *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, [28] (Lord Bingham).

²² *Kracke* [2009] VCAT 646, [218]–[219].

²³ *Ibid* [33].

²⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(2); *ibid*, [232]–[234].

²⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

²⁶ *Kracke* [2009] VCAT 646, [496].

²⁷ *Ibid* [532].

²⁸ *Ibid* [741], [775]. The right to protection from torture and cruel, inhuman or degrading treatment was not engaged.

²⁹ *Ibid* [776].

Thus far, all well and good. On a more cautionary note, *Kracke* also suggests several reasons why, notwithstanding considerable contemporary interest, human rights charters may promise much, but deliver little.

First, the Victorian *Charter* identifies certain human rights and envisages several mechanisms including parliamentary statements of legislative compatibility.³⁰ Public authorities are obliged to act compatibly with human rights under section 38. The *Charter* also applies “horizontally” to anybody whose rights, obligations and interests may be governed or affected by legislation.³¹ However, as legislation, the *Charter* is ever liable to amendment. Fortunately, the role played by the common law in protecting internationally-recognised human rights remains ‘very much alive in the legislative human rights age’.³² Consistent with modern approaches to statutory interpretation,³³ legislation may be interpreted, so far as language permits and in the absence of any contrary intention, consistently with fundamental rights and freedoms (the principle of legality).³⁴ Furthermore, international law, including the judgments of domestic, foreign and international courts and tribunals, can be considered and the *Charter* acknowledges ‘the utility of referring to international law and judgments in understanding the relevant human right and how it may be reflected in or influence the interpretation of the statutory provision’.³⁵ Thus, human rights and fundamental freedoms recognised under other laws, including international law, are not displaced.³⁶

Second, the *Charter* applies to primary legislation and subordinate instruments whether made before or after its commencement. However, it does not displace the presumption against retrospectivity.³⁷ The special interpretative obligation under the *Charter* does not alter the legal consequences of past events or settled legal relations arising from them. To do otherwise ‘would be very damaging to the conduct of public administration, and give rise to all sorts of unsatisfactory consequences, for the exercise of substantive statutory powers to be made unlawful, when they were lawful when made’.³⁸

Third, the Tribunal confirmed that the human rights protected under the *Charter* are not absolute. The limitations on Mr Kracke’s rights — being compelled to take medication — were demonstrably justifiable for reasons of medical and social necessity. Involuntary and community treatment orders do not operate arbitrarily and are subject to various safeguards, including conducting reviews within statutory time limits.³⁹ Although that did not occur in Mr Kracke’s case, the system operated in his interests overall: treatment orders are made upon strict criteria according to principles requiring the least intrusive method and complemented by monitoring and appeal rights.

³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 1(2)(a)–(e).

³¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Kracke* [2009] VCAT 646, [207].

³² *Kracke* [2009] VCAT 646, [37].

³³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

³⁴ See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 83 ALJR 327, [47] (French CJ).

³⁵ *Kracke* [2009] VCAT 646, [202].

³⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 5.

³⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 49(1); *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

³⁸ *Kracke* [2009] VCAT 646, [347]–[348], [363].

³⁹ *Ibid* [777]–[785].

On balance, *Kracke* illustrates the point that human rights standards can improve public administration by clarifying respective roles and responsibilities. The Tribunal outlined the statutory obligations of the Board to address a common problem that had been occurring for some time. The decision also noted that courts and tribunals ‘acting in an administrative capacity’ in the public law sense are ‘public authorities’ and wholly bound to comply with all the *Charter* rights. However, when acting in a judicial capacity, they are only bound to the extent that they apply or enforce those human rights relating to court or tribunal proceedings.⁴⁰ The Board and the Tribunal upon review fell into the former category when reviewing Mr Kracke’s involuntary and community treatment orders.⁴¹

Conclusion

Kracke was an important test case clarifying certain aspects of the operation of Victoria’s *Charter*. Its reasoning will appeal to human rights advocates and the outcome may appease sceptics. The decision provides a systematic method for construing legislative provisions compatibly with human rights and illustrates how special interpretative obligations interact with familiar principles of statutory interpretation. That said, the interpretation of human rights legislation is becoming quite particular to each state or territory.⁴² Thus, *Kracke* is a timely development likely to inform the National Human Rights Consultation on a proposed bill of rights at the federal level.

⁴⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4(1), (2), 6(2)(b); *ibid* [254], [282].

⁴¹ *Kracke* [2009] VCAT 646, [315], [332]–[333].

⁴² *Ibid*, [217] disagreeing with *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACT AAT 19, [78] (Peedom P).