

IN THE Mental Health Review Board

Stephen Baumgartner: Review of Community Treatment Order

OUTLINE OF SUBMISSIONS ON THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

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The operation and effect of the Charter in the above hearing before the Mental Health Review Board

The Charter applies to this hearing in two ways, as an interpretive tool for reading the *Mental Health Act 1986* (s 32) and as the source of obligations for both the Mental Health Review Board and the relevant mental health service (s 38), which are public authorities under the Charter.

The Charter contains a number of rights that are relevant to the work of the Board:

- section 8: the right to recognition as a person; to enjoy Charter rights without discrimination; to the equal protection of the law (which will be engaged by any presumption that the requirement of consent to medical treatment does not apply to the mentally ill);
- section 9: the right to life (which may be engaged with suicidal or physically dangerous patients);
- section 10: the right to protection from torture, cruel, inhuman or degrading treatment – including from medical treatment without consent (certain non-consensual psychiatric treatment has been held to constitute torture, and obviously the medical treatment right is always engaged in the case of non-consensual psychiatric treatment);
- section 12: freedom of movement (for patients in the community and in hospital, to differing extents);
- section 13: privacy and reputation (to the extent that privacy has been interpreted as including aspects of bodily integrity and relating to invasion of the private sphere of a person's life);

- section 14: freedom of thought, conscience, religion or belief (to the extent that delusional beliefs may be a precursor to involuntary treatment);
- section 15: freedom of expression (to the extent that delusional opinions may be a precursor to involuntary treatment);
- section 21: the right to liberty and security of person (which may be engaged by detention or other deprivation of liberty);
- section 22: humane treatment when deprived of liberty (which requires humane treatment that respects the inherent dignity of the person when deprived of liberty and in particular imposes positive obligations of good treatment upon mental health services when patients are detained);
- section 24: fair hearing (which requires that Board hearings be competent, independent, impartial and fair).

Section 32 requires that the *Mental Health Act 1986* be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the rights in the Charter. As a tribunal the Mental Health Review Board is required to use s 32 in interpreting the Act as a matter of course *regardless of whether specific Charter issues are raised by patients or their advocates*. The interpretive obligation in s 32 in fact applies when anyone interprets Victorian legislation, because it now forms part of the general statutory interpretation process, along with the *Interpretation of Legislation Act*. Because of the nature of the jurisdiction it would be unusual for there to be any instance in which Charter rights are *not* engaged in a treatment order hearing.

Section 38 requires that the Board and the relevant mental health service act in a way that is *compatible* with any Charter rights that are relevant to the matter (such as those listed above). Acting compatibly means not limiting the right unless it is reasonable to do so under s 7 of the Charter, which allows for reasonable limits under law that are demonstrably justified in a free and democratic society based on human dignity, equality and freedom. It is unlawful for a public authority to act inconsistently with the Charter.

Section 38 also requires that the Board and the relevant mental health service must give *proper consideration* to relevant human rights (such as those listed above) when making a decision. Giving proper consideration means that Charter rights need to be explicitly considered, and for that consideration to be *proper*, it needs to be guided by the framework for balancing and limiting rights provided by section 7 of the Charter. It is unlawful for a public authority to ignore the Charter when Charter rights are relevant to a decision it is making.

Section 38 imposes obligations on public authorities that apply whether or not the individuals whose rights are engaged raise the Charter, or their human rights. Relying on individuals to raise Charter issues is not sufficient to fulfil the obligations imposed on the Board under the Charter.

The interpretation of the *Mental Health Act* in accordance with section 32 of the Charter

A number of sections of the *Mental Health Act* that are engaged in reviewing CTOs may be amenable to interpretation in a more human rights respecting manner than is currently the case. This consideration of alternative interpretations must be undertaken against the backdrop of the purpose of the Act and the pre-existing interpretive guidance provided in s 4(2) of the Act. Section 4(2) may mandate a similar approach to interpretation as s 32, without the express restraint of legislative “purpose”, it also provides an indication of the purpose of the legislation as a whole, and how each section was meant to be interpreted and implemented. The current judicial guidance in relation to applying s 32 (*DPP v Momcilovic*) requires that the interpretive process be undertaken without reference to the reasonable limits provision in s 7(2) of the Charter. This means that to the extent that sections of the Act can be interpreted as providing greater protection for Charter rights, such as the right not to be involuntarily medically treated, consistently with their purpose, they should be. To the extent that a provision cannot be interpreted consistently with an unfettered right, the Commission suggests that consideration should be given to whether a rights compatible interpretation can be achieved using the guidance provided in s 7(2) of the Charter.

While the Commission has not undertaken a re-interpretation of any specific provisions of the *Mental Health Act* and bearing in mind the Commission has not acquainted itself with the breadth of the Board’s current interpretation of these provisions, the Board may wish to consider whether the following provisions can be interpreted using s 32 in a more rights protective manner:

Section 8 Criteria for involuntary treatment:

- (1)(a) Might the criterion “appears to be mentally ill” be interpreted as requiring a very high level of satisfaction by the Board, approaching ‘beyond reasonable doubt?’.
- (1)(b) Might the criterion that the mental illness “requires immediate treatment” be interpreted as involving a consideration of why the treatment is required? For example there may be different ways to view the word “requires” that are more or less protective of Charter rights.
- (1)(c) Might the requirement of being “necessary for his or her health or safety” be interpreted as requiring that there be no less restrictive treatment option available? Might it also be interpreted to mean that the health or safety of the patient or the protection of members of the public being considered should involve an assessment of whether the illness or danger being protected against warrants abrogation of the right not to be medically treated without consent. As with the protection of other rights such as free speech, members of the public may be expected to put up with some discomfort where the medical treatment right requires it. It does not strain the meaning of the word “necessity” to include a consideration of these non-medical factors.

Section 36C Power of Board on appeal or review for patients on CTOs:

- (2) Might the provision that ‘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’ be interpreted as requiring only a reasonable doubt about whether the criteria are met in order to discharge the CTO.

The obligations of the Mental Health Review Board under section 38 of the Charter when conducting hearings and reviewing treatment orders

It is not appropriate to require patients to raise Charter issues before they are explicitly considered by the Board, as appears to be the practice under Practice Direction 2009/1. The Board is a public authority when performing its hearings functions, as well when undertaking its other functions. As a public authority the Board is required to act consistently and decide having given proper consideration to Charter rights – the patient does not need to ask before this legal obligation is engaged. A failure to do this is unlawful. The recent Supreme Court decision of *Castles v Secretary to the Department of Justice & Ors* outlines what is required of public authorities under s 38.

The nature of the obligation under s 38 of the Charter will be influenced by the particular role and functions of the Board and the rights engaged by its work. Given that the Board conducts itself in an inquisitorial manner and forms a conclusion on the basis of its own exploration of the issues, the obligation under s 38 requires that it conduct its inquisition rigorously so that it can fulfil its role under the Act as a check on the power of the authorised psychiatrist to abrogate the medical treatment right. Obviously, to the extent that the Act *requires* the Board to breach the medical treatment right, the Board's conduct will not be unlawful by virtue of s 38(2).

Each member of the Board needs to be sufficiently trained in order to be able to fulfil the obligation under s 38 during every hearing that the Board conducts. Every matter before the Board raises significant and important Charter issues because all Board matters involve the total removal of the requirement of consent to medical treatment. Every single Board panel needs to give consideration to Charter rights and engage in the balancing process required by s 7 before limiting Charter rights.

In light of the fact that all compulsory treatment involves an abrogation of the medical treatment right in the Charter, the Board's s 38 obligations may also involve an element of patient education about that right and the other rights engaged in Board matters. This may involve providing material to assist patients in raising issues relevant to a consideration of the Charter, such as discussing the factors that have been found relevant to a reasonable limitation of the medical treatment right under s 7(2) of the Charter in other matters. This would enable patients to ensure that any aspects of their treatment or the effect of that treatment that are relevant to a consideration of reasonable limits under s 7(2) can be brought to the Board's attention.

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