

## Realizing Human Rights in Clinical Practice and Service Delivery to Persons with Cognitive Impairment who Engage in Behaviours of Concern<sup>1</sup>

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Recent national and international legal developments have intensified the need for clinicians and service providers to understand and apply human rights in clinical practice and service delivery to persons with cognitive impairment who engage in behaviours of concern. Treatment and service interventions must now be subordinated to even more explicit human rights-related legal and ethical constraints and also to affirmative human rights-related objectives. The ability of clinicians and providers to engage in competent human rights analysis is a necessary methodological implication of this paradigm shift. In this paper we elaborate a formative method of human rights analysis that is being developed to assist the Victorian Office of the Senior Practitioner to apply human rights standards recognized under the Victorian Charter of Human Rights and Responsibilities to persons with cognitive impairment who engage in behaviours of concern. This approach relies significantly upon the CRPD as an interpretive aid to enliven Charter rights to specific human rights concerns faced by persons with disability. Although developed in a specific statutory and organizational context, this model has potential for broader application.

**Key words:** behaviours of concern; cognitive impairment; disability; Convention on the Rights of Persons with Disabilities; human rights; human rights analysis; Victorian Charter of Human Rights and Responsibilities.

### Introduction

Although human rights in their original formulation<sup>2</sup> have always applied to persons with disability on the same basis as they have applied to others, in reality these rights have largely failed to penetrate to the principal sites of human rights violation experienced by persons with disability. Even where human rights discourse and practice have penetrated to some degree, it is strongly arguable that implementation efforts have not been sufficiently precise, or sufficiently potent, to enliven the full beneficial content of key human rights.

Three intersecting reasons are typically suggested to account for this problem: the invisibility of persons with disability within human rights discourse (it is argued that there has been a failure to substantially recognize persons with disability as right-bearers, and a tendency to view the needs and concerns of persons with disability in terms of social development and population health rather than in terms of human rights); the somewhat abstract and general nature of the traditional formulation of some key human rights has created difficulties in the application of these rights

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with certainty to specific violations more likely to be, or uniquely, experienced by persons with disability; and, a lack of disability-related experience and expertise in human rights protection and implementation agencies.<sup>3</sup> These problems have been particularly acute in relation to persons with cognitive impairment who engage in behaviours of concern.<sup>4,5</sup>

Recent Australian and international legal developments have the potential to rapidly and substantially alter these dynamics. At the national level, Victoria and the Australian Capital Territory have enacted statutory Bills of Rights,<sup>6</sup> and the Tasmanian, Western Australian, and Australian governments are actively considering such a possibility.<sup>7</sup> Additionally, both the Victorian<sup>8</sup> and Queensland<sup>9</sup> governments have recently introduced legislation to provide a higher degree of regulation and, at least arguably, human rights protection<sup>10</sup> for persons with cognitive impairment who are subject to restrictive practices and compulsory assistance.

At the international level, the adoption by the United Nations, and the entry into force, of the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol signifies a fundamental, international, paradigm shift away from the conceptualization of *disability* as a social development and health concern to be *managed* towards the reconceptualization of *persons* with disability as bearers of human rights that must be respected, protected, and fulfilled. This has already resulted in the more active engagement of existing human rights treaty bodies and other experts with disability rights concerns, and this appears likely to intensify.<sup>11</sup> A recent, very significant example of this development is a report to the United Nations General Assembly prepared by the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, and degrading treatment or punishment that focuses extensively on violence

and abuse of persons with disability and calls for its reframing as torture and ill-treatment (restraint and seclusion are specifically adverted to).<sup>12</sup> Such mainstreaming<sup>13</sup> of disability rights concerns is in addition to the crucial specialist role that the CRPD Treaty Body will itself play once it becomes fully operational.<sup>14</sup>

It is also salutary to note that more than a decade of relative isolationism from international human rights developments under the previous Australian government has very abruptly and very dramatically ended with the election of the current Australian government.<sup>15</sup> Still in its first year of Office, the current government has, among other initiatives,<sup>16</sup> ratified the CRPD,<sup>17</sup> and it has indicated an intention to accede both to the Optional Protocols to the CRPD<sup>18</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>19</sup> Additionally, it has taken the remarkable symbolic step of issuing a "standing invitation" to United Nations human rights experts to visit Australia, apparently in an effort to demonstrate its willingness to engage positively with the international community to implement human rights obligations.<sup>20</sup>

Of course, it is important to distinguish between rhetoric and substance, and in the absence of an Australian Bill of Rights or other explicit measures to fully incorporate international human rights treaties directly into Australian law, Australia's current human rights agenda may be largely cosmetic.<sup>21</sup> Nevertheless, the CRPD and CAT Optional Protocols establish new oversight arrangements that have the potential to create significant international pressure for change within Australia, even if no further steps are taken to fully incorporate international human rights obligations into Australian law. The CRPD Optional Protocol will permit complaints to be made to the CRPD Treaty Body about violations of CRPD rights.<sup>22</sup> It

will also permit the CRPD Treaty Body to conduct inquiries into alleged grave or systemic violations of CRPD rights.<sup>23</sup> Australia's accession to the CAT Optional Protocol will permit the United Nations Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to establish a system of regular visits by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture or other cruel, inhuman or degrading treatment or punishment. This certainly includes residential institutions, treatment centres, and other facilities for persons with disability.<sup>24</sup> This provision is in addition to the individual complaints procedure incorporated into CAT,<sup>25</sup> to which Australia is already a party.

In light of these and other developments it is inevitable that clinicians and service providers working with persons with cognitive impairments who engage in behaviours of concern will be exposed to more intense scrutiny of proposed and actual treatment and service interventions from a human rights (as distinct from a clinical) perspective. Additionally, the source of such scrutiny will increasingly become multilayered as national and international monitoring bodies are progressively designated or established and become operational in addition to the existing Australian state- and territory-based oversight arrangements. Indeed, given the very significant human rights implications of restrictive practices and compulsory treatment, and the attention they received in the debates that developed the CRPD text, it might be expected that these measures will be among the first to be scrutinized by the CRPD Treaty Body and other experts, and this scrutiny may be expected to be particularly rigorous.<sup>26</sup> It might also be expected that this scrutiny will be qualitatively different to that exercised by the existing state- and territory-based oversight

mechanisms (for example, disability, mental health and guardianship laws, and their administering agencies and officials), in part because these forms of surveillance were, themselves, the subject of trenchant criticism for their perceived impotence, and, indeed, their own conflict with human rights principles, during the development of the CRPD.<sup>27</sup> They will, themselves, progressively be the subject of intense new pressure to conform to, and enliven, human rights protections.<sup>28</sup>

Consequently, these developments amount to a paradigm shift that requires the subordination of treatment and service interventions to even more explicit human rights-related legal and ethical constraints and also to affirmative human rights-related objectives. This will necessitate clinicians and providers developing a more sophisticated understanding of human rights principles and an ability to apply these principles to the specific circumstances of persons with disability. It will also require clinicians and service providers to develop the ability to engage in competent human rights analysis of issues. This is a necessary methodological implication of this paradigm shift.

In this paper we elaborate a formative method of human rights analysis that is being developed by the Victorian Senior Practitioner to ensure that that Office effectively applies human rights recognized in the Victorian Charter of Human Rights and Responsibilities (the Charter) to persons with cognitive impairment who engage in behaviours of concern.<sup>29</sup> This method relies significantly upon the CRPD as an interpretive aid to illustrate and elaborate how Charter rights are to be applied in relation to persons with disability.

#### **The Victorian Charter of Human Rights and Responsibilities**

The Victorian Charter of Human Rights and Responsibilities (the Charter) is a Bill

of Rights enacted by the Victorian Parliament in 2006, and it has been fully operational since 1 January 2008.<sup>30</sup> The Charter serves a public integrity function by regulating the relationship between the citizen and the state. It seeks to ensure that public powers and functions are exercised in a principled way that has regard for human rights, and that public power is not misused or abused in a way that is incompatible with human rights.<sup>31</sup> The Charter applies to the three branches of government – the Legislature, the Judiciary and the Executive – but it does so in different ways. The Charter applies to the Legislature by imposing an obligation on parliamentarians to prepare and table compatibility statements for each Bill introduced to the Parliament. It applies to the Judiciary by imposing upon it an obligation to interpret Victorian laws in a way that is compatible with human rights. It applies to Executive government – referred to in the Charter as “public authorities”<sup>32</sup> – by imposing upon it obligations to act compatibly with human rights and to give proper consideration to human rights in decision-making.<sup>33</sup>

At this stage the Charter is limited to civil and political rights (so-called “negative”, or “non-interference” rights, also referred to as “first-generation” rights).<sup>34</sup> Twenty different rights are recognized, although some rights contain multiple elements. With two exceptions,<sup>35</sup> the source of these rights is the International Covenant on Civil and Political Rights (ICCPR).

#### **The Office of the Senior Practitioner**

The Office of the Senior Practitioner is a public authority established under the Victorian Disability Act 2006 (Vic)<sup>36</sup> as the key outcome of the Victorian Law Reform Commission’s inquiry into compulsory treatment and care of persons with intellectual disability who are viewed as a

risk to themselves and the community.<sup>37</sup> The Senior Practitioner is generally responsible for ensuring that the rights of persons who are subject to restrictive interventions and compulsory treatment are protected and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with.<sup>38</sup> In order to fulfil the Office’s role, the Senior Practitioner is vested with particular functions<sup>39</sup> and powers<sup>40</sup> which operate, in effect, as tertiary level procedural and substantive safeguards against potential breaches of human rights by disability professionals and service providers in the delivery of behaviour support practices. As a public authority, the Senior Practitioner has duties under the Charter to act compatibly with human rights and to take human rights into account in decision-making. These duties are in addition to the Office’s more specific obligations under the Disability Act 2006 (Vic) to protect the human rights of persons with disability. The method human rights analysis outlined later in this paper has been developed to ensure that the Senior Practitioner can competently fulfil these duties.

#### **Contextual Issues**

##### *Restrictive Practices and Compulsory Treatment*

In Victoria, restrictive interventions are regulated by Part 7 of the Disability Act 2006 (Vic). The Act distinguishes between “restrictive interventions” and “other restrictive interventions”. Restrictive interventions are defined to mean any intervention that is used to restrict the rights or freedom of movement of a person with disability, and includes chemical restraint, mechanical restraint, and seclusion. A person with disability may be subject to a restrictive intervention where this is necessary to prevent the person from causing physical harm to themselves or another person or from destroying property where

to do so could involve the risk of harm to themselves or any other person.<sup>41</sup> A restrictive intervention must be the least restrictive option possible for the person in the circumstances, and it must comply with a range of other procedural safeguards.<sup>42</sup> Nevertheless, during the year ending 30 June 2008, a staggering 2,096 persons with disability were subject to restraint or seclusion in Victoria.<sup>43</sup> “Other restrictive interventions” (defined as those other than restraint or seclusion) are also permissible in certain circumstances.<sup>44</sup> Oddly; “other restrictive interventions” are not expressly subject under the Disability Act 2006 (Vic) to the principle of the least restrictive alternative, and nor are they subject to the same procedural safeguards as restrictive interventions.<sup>45</sup> No statistics are available in relation to the use of other restrictive interventions.

Compulsory treatment is regulated by Part 8 of the Disability Act 2006 (Vic). Under Part 8 the Governor may proclaim residential premises operated by the Department of Human Services as either short- or long-term “residential treatment facilities”.<sup>46</sup> These facilities provide “secure accommodation” (detention) and “treatment” for persons with intellectual disability as an alternative to their imprisonment in a correctional centre,<sup>47</sup> or following their release from a correctional centre on parole, or who are subject to an extended supervision (or preventative detention) order made under the Serious Sex Offenders Monitoring Act 2005 (Vic). To be eligible for admission to such a facility, the person must present a serious risk of violence to another person, other less-restrictive options must have been tried or considered and eliminated as unsuitable, and the facility must be capable of providing suitable treatment for the person. During the year ending 30 June 2008, ten people were subject to compulsory treatment orders in Victoria. Seven of this group were accommodated in a short-term

residential treatment facility, and the remaining three were accommodated in a residential institution.<sup>48</sup>

Part 8 also empowers the Victorian Civil and Administrative Tribunal (VCAT) to make a (civil) “supervised treatment order” which provides for the detention of a person with intellectual disability who poses a significant risk of harm to others by an authorized service provider. Such an order can only be made if VCAT is satisfied that:<sup>49</sup>

- the person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm;
- there is a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means;
- the services to be provided to the person under the treatment plan will be of benefit to the person and substantially reduce the significant risk of serious harm to another person;
- the person is unable or unwilling to consent to voluntarily complying with the treatment plan; and,
- it is necessary to detain the person to ensure compliance with the treatment plan and prevent a significant risk of serious harm to another person.

During the year ending 30 June 2008, 36 persons with intellectual disability were subject to supervised treatment plans in Victoria.

#### *Acting Compatibly with Human Rights*

The Charter requires public authorities to act in ways that are compatible with human rights, but it does not define what it means to “act incompatibly” with a

human right. No doubt the scope and content of this obligation will be elaborated as Victoria's Courts and Tribunals progressively consider the matter in cases brought before them.<sup>50</sup> In the meantime, it might be observed that under international law, nations have a general obligation to *respect, protect and fulfil* human rights.<sup>51</sup> Although an equivalent obligation is not explicitly incorporated into the Charter, it may perhaps be implied from the fact that Australia is subject to this obligation in relation to ICCPR rights under international law, and the Victorian Parliament, in enacting the Charter, may reasonably be assumed to have intended that the Charter would be interpreted and applied consistently with these international obligations.<sup>52</sup>

These different levels of obligation may be illustrated with respect to the right to life.<sup>53</sup> In order to respect the right to life, a state ought to refrain from warfare, abolish the death penalty, strictly control its security forces (such as its army, police, and prison guards) to prevent them engaging in acts of arbitrary deprivation of life, and prevent state-mandated enforced disappearance of persons. In order to protect the right to life, a state ought to take measures such as enacting and enforcing laws against homicide among its citizens, and preventing discrimination in the provision of health care (particularly with respect to life-sustaining treatments) in order to prevent other actors from violating human rights. In order to fulfil the right to life, states ought to take positive measures (or active steps) such as those necessary to reduce infant mortality and increase life expectancy, including measures to eliminate malnutrition and epidemics.

The Charter does make it clear that "acts" (and therefore "acting") includes positive acts (the doing of things), proposals to act (a decision to do something in the future), and omissions (the failure to do

things).<sup>54</sup> It is also important to comprehend that acting incompatibly with a human right does not require an intention to deny or violate a human right. Acts incompatible with human rights may be entirely unintentional or well meaning.

There are also different standards of obligation under international law for civil and political rights, and economic social and cultural rights. Civil and political rights are subject to the standard of "immediate realisation".<sup>55</sup> This means that states have an absolute responsibility to ensure that these rights are respected, protected, and fulfilled for all persons. In other words, states must immediately comply with their obligations in relation to these rights. Although the Charter does not specifically address this issue, as we have already noted, the rights it contains are civil and political rights that might be assumed to be subject to the standard of immediate compliance, otherwise Australia, as a party to the ICCPR, would be in breach of its international obligations.<sup>56</sup> It might therefore be suggested that acting compatibly with human rights must be understood as also requiring immediate compliance with Charter rights, rather than their progressive realisation.

#### *Giving Proper Consideration to Human Rights in Decision-making*

The Charter requires a public authority to give proper consideration to human rights when making a decision, but it does not define the meaning of "decision". Nevertheless, the term should be understood as broad in scope. It might be expected that the usual principles of administrative law would apply, and that the scope of the term should be understood to be as broad as its meaning in the Victorian Civil and Administrative Tribunal Act 1998.<sup>57</sup> In this respect, it would include the drawing of a conclusion, the making of a decision or determination, the giving of a direction,

and the granting of a consent, approval, or permission. It would also include the positive act of determination and decision-making, the changing or amending of a determination or decision, the review and reaffirmation of a determination or decision, as well as the failure or refusal to make a determination or decision. Again, it is important to comprehend that the failure to give proper consideration to a human right in making a decision does not require an intention to deny or violate a human right. This failure might be quite unintentional or well intentioned.

### Human Rights Analysis

In effect, the Charter obligations to act compatibly with human rights and to take human rights into account in decision-making require the Senior Practitioner to engage in human rights analysis of issues that fall within the Office's role and responsibilities. This is a necessary methodological implication of these obligations. Unless there is analysis of issues from a human rights perspective, there can be no safeguard against action that is incompatible with human rights.

We have all developed ways for interpreting and understanding situations we encounter. These are sometimes referred to as heuristics.<sup>58</sup> Heuristics assist us to ascertain and predict meaning in new situations. A heuristic might be conceptualized as the "lens" through which we look at things. The heuristics we use may be determined or influenced by professional disciplinary rules or approaches, or result from our general experience, values, and beliefs. We may or may not be conscious of these heuristics and the ways in which they influence or determine our responses. Although the reliability of the heuristics we use will vary enormously, they are all limited. All will illuminate and emphasize some aspects of a situation over other aspects. None will provide us with a

complete understanding of that situation. In fact, in many cases, our heuristics will entirely obscure important elements of information, perhaps even the most critical elements. This is why it is argued that great advances in knowledge can sometimes only be achieved through paradigm shifts.<sup>59</sup> Paradigm shifts abandon the existing heuristics and substitute them with new ones that are capable of yielding more valuable insights.

The Charter is just such a paradigm shift. It requires the adoption of a human rights based approach to analysing and deciding issues, and to formulating and evaluating action. This does not necessarily mean that our traditional ways of analysing and understanding situations are no longer relevant. Indeed, in many instances, disciplinary expertise and experience will continue to yield essential insights. However, this insight and expertise must now be supplemented with a human rights perspective, and applied within a human rights framework. Treatment and service interventions must be subordinated to explicit human rights-related legal and ethical constraints and to affirmative human rights-related objectives.

### Human Rights Analysis under the Charter

Essentially, the Charter requires public authorities to undertake a three-stage analysis to ensure that human rights are protected. First, they must determine if their conduct or decision-making engages a Charter right (the engagement question). If it does, they must then determine if the conduct or decision imposes a limitation on any Charter right (the limitation question). If it does, they must then determine if the limitation is reasonable and justified having regard to the terms of s 7(2) of the Charter (the justification question).<sup>60</sup> This analysis necessarily also involves consideration of a number of antecedent and consequential issues.

This sequence of deliberation is depicted graphically in Figure 1.

**The Engagement Question**

In the first phase of analysis the Senior Practitioner must determine if the Office's acts or omissions engage Charter-recognized human rights. This requires the identification of any human rights-related subject matter in the Office's conduct or decision-making. We distinguish the more

general concept of "human rights subject matter" from specific human rights at this early stage of the analysis as the same subject matter may enliven a number of separate human rights. Approaching the issue broadly, particularly for non-lawyers, avoids the risk that an unduly narrow frame of analysis will be established at the outset.

Unlike most public authorities, the Senior Practitioner will encounter human rights subject matter in virtually all the

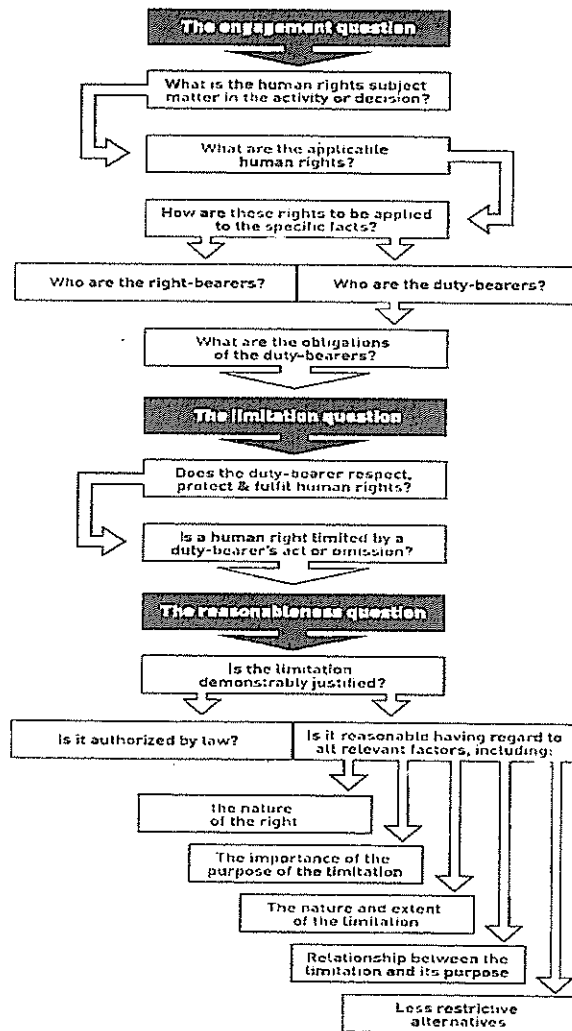


Figure 1. Human Rights Analysis under the Charter.



Office's activities and decision-making. Human rights are raised when there is any restriction or compulsion affecting the autonomy and liberty of the individual. The protection of the human rights of persons with disability in these circumstances is the Senior Practitioner's central purpose. However, it is important for the Senior Practitioner to recognize the potential for the Office's conduct and decision-making to engage or encounter other human rights subject matter, particularly because of the extreme marginalization, genuine vulnerability, and powerlessness of those persons with disability with whom the Office interacts.

Once the human rights subject matter in an activity or decision has been clarified, the next step is to identify the human rights that apply to this activity or decision. In most cases restriction and compulsion will engage the rights to freedom of movement and to liberty and security of the person. However, they may also engage a range of other rights, including the right to protection from torture and cruel, inhuman or degrading treatment, the right to privacy and reputation, and the right to freedom of expression. In fact, the Senior Practitioner may encounter situations that engage any of the human rights recognized by the Charter. In many cases, a situation or issue that engages one human right will also engage other human rights. In part, this will be due to the indivisibility, interdependence and interrelatedness of all human rights.<sup>61</sup> For this reason it is important for the Senior Practitioner and the Office's staff to have a sound understanding of the scope and content of all of the human rights recognized by the Charter (not just those most obviously related to restriction and compulsion) and an ability to characterize and interpret situations and issues they encounter in terms of these rights.

Once the relevant human rights have been identified, it is necessary to assess the scope of these rights and their specific

requirements and implications. While the titles of the human rights set out in the Charter provide some indication of the content of these rights, most rights have more than one element, and some of these elements may be less obvious from the title than others. In this respect it is important to bear in mind Bell J's direction in *Kracke* to the effect that the scope of the human right is to be "identified broadly and not legalistically, focusing on its purpose and the interests it protects". He continues: "The significance of this task should not be misunderstood. It is drawing the boundaries around the protected arena."<sup>62</sup>

Most human rights are stated at a high level of generality. While the requirements and implications of some human rights will be immediately clear; in many other cases it will be necessary to interpret these rights so that they may be accurately applied. In enacting the Charter, the Victorian Parliament appears to have sought a general cultural shift towards the respect of human rights in Victorian public administration.<sup>63</sup> Nevertheless, because the Senior Practitioner's central purpose is the protection of human rights in circumstances where these rights are lawfully limited and frequently unlawfully denied and violated, a certain level of expertise, exceeding that of many other public authorities with more general functions, might reasonably be expected. The Senior Practitioner might therefore be obliged, in particular instances, to obtain expert legal opinion regarding the scope, content and application of human rights to inform the Office's activities and decision-making.

In this respect, it is important to appreciate that the Charter raises many issues about the scope, content, and application of human rights about which it will not be possible to draw definitive conclusions at this stage. Over time, these issues will be settled as they are raised and interpreted in legal proceedings. It will therefore be necessary for the Senior Practitioner, along with all other

public authorities, to remain alert to the outcomes and implications of this case law as it develops.

Once the human rights applicable to the activity or decision have been ascertained, they must be accurately applied. The first step in applying human rights to the activity or decision is identifying the right-bearers; that is, the person or persons entitled to human rights protection. Of course, the Charter protects the rights of all persons in Victoria. However, the Senior Practitioner will typically be concerned with specific persons with disability who are subject, or who are potentially subject, to restriction and compulsion. It is important to note, however, that there is likely to be more than one right-bearer in any situation. For example, the person the subject of the Senior Practitioner's attention may live in supported accommodation with one or more other persons. In such a situation, each person must be considered a right-bearer independent of each other person. While a limitation on a human right may ultimately be justifiable for one person, this limitation is unlikely to be justifiable for another person in the same situation. (A justifiable restriction on the liberty and autonomy of a person which involves the locking of a refrigerator door to prevent someone with a compulsive eating disorder from gorging him/herself would be unjustifiable for a co-resident who does not face such a risk.)

The next step is to identify the duty-bearers in the situation. As we have already noted, the Charter reposes duties on public authorities to act compatibly with human rights, and to give proper consideration to human rights in decision-making. The Victorian Department of Human Services, in all its divisions, is a public authority subject to these obligations.<sup>64</sup> There may also be other public authorities involved in the situation who bear this duty – for example, public health and education authorities, the Public Advocate, and the

Victorian Civil and Administrative Tribunal.

As we have already noted, if the duty-bearer is a public authority, it has a direct obligation to act compatibly with all Charter-recognized human rights, and to give proper consideration to these rights in its decision-making. In other words, the public authority has a duty to ensure that Charter rights are respected, protected, and fulfilled. What is specifically required of the duty-bearer to fulfil its duty in the particular case will depend upon which human rights are engaged by the duty-bearer's conduct, and the role and functions of the duty-bearer in the particular case. For example, whereas the Senior Practitioner will always have an immediate and direct responsibility to act compatibly with human rights, and to give proper consideration to human rights in decision-making in scrutinizing restrictive practices and compulsory treatment, the Department of Human Services will have a less immediate and direct, but equally important, role to play in ensuring that funded non-government services<sup>65</sup> respect, protect, and fulfil the human rights of their service users with disability. It will be obliged to fulfil this duty through its funding and monitoring role. Similarly, the Office of the Public Advocate is obliged to act compatibly with human rights and to take human rights into account in its individual and public advocacy roles, which essentially involves influencing the conduct of others, whatever their legal status may be. By these and other indirect means, the Charter will eventually reach far beyond the Victorian public sector.

The Senior Practitioner has a statutory obligation under 23(2) of the Disability Act 2006 to protect the rights of persons with disability subject to restrictive practices and compulsory treatment. This obligation is distinct from, but additional to, the obligations reposed in the Office as a public authority under the Charter.

Nevertheless, the two sources of statutory responsibility need to be fulfilled in an integrated way. For example, the responsibility to ensure that (justifiable) restrictive practices and compulsory treatment are the least restrictive appropriate option is a key intersection of the Senior Practitioner's Disability Act 2006 (Vic) and Charter obligations.

Although the Senior Practitioner has no particular power or responsibility under the Charter to ensure that other public authorities comply with their Charter obligations, the steps that such authorities have taken to fulfil their obligations are obviously a highly relevant consideration in the exercise of the Senior Practitioner's functions and powers under the Disability Act 2006 (Vic). Consequently, where relevant to an activity or decision, it is appropriate for the Senior Practitioner to invite other duty-bearers to demonstrate how their conduct or proposed conduct is compatible with Charter rights, and how they have taken Charter rights into account in their decision-making, as a preliminary consideration to the exercise of the Office's own functions and powers under the Disability Act 2006 (Vic).

It is important to note, however, that the neither the Charter, nor indeed the Disability Act 2006 (Vic), permit the Senior Practitioner to delegate the duty to ensure that the exercise of the Office's functions and powers are compatible with and take into account (in the case of the Charter) or protect (in the case of the Disability Act 2006 (Vic)) human rights. The Senior Practitioner must fulfil this duty independently of any other public authority. This will necessarily involve critical scrutiny of other public authorities' efforts to act compatibly with human rights.

#### *The Limitation Question*

The second phase in the Senior Practitioner's human rights analysis involves

determining if a human right that has been engaged or encountered has been limited in any way. For the most part, given the nature of the Senior Practitioner's functions, this will be a relatively uncomplicated question (any restriction on liberty or autonomy involves a limitation to a human right). However, the question will not always be that simple for a number of reasons. In this respect, we reiterate that the Charter requires – at least as we see it – a public authority to respect, protect, and fulfil human rights. While the non-interference-related requirements of the obligation to respect a human right (and therefore an interference-based limit to a human right) may be readily identifiable, the failure to take positive steps to protect and fulfil a human right might be less obvious. Charter rights are also subject to the standard of immediate compliance, and it therefore follows that any failure to respect, protect, or fulfil a Charter right amounts to a limitation of that right. We have also already observed the related point that a human right may be limited not only by a positive act, but also by a failure or refusal to act to protect a human right. This proposition finds strong support in the Canadian comparative jurisprudence.<sup>66</sup> The Senior Practitioner must therefore be vigilant in observing, scrutinizing, and, where required, acting to prevent, stop, or ameliorate any limitation to a human right whether that limitation arises as a result of a positive act, or a failure or refusal to act.

#### *The Reasonableness Question<sup>67</sup>*

Human rights recognized in the Charter are not absolute. They can be subject to "reasonable limits" in certain circumstances. However, s 7(2) of the Charter provides that a human right may only be subject to limits "under law". In other words, any limit to a human right must be specifically authorized by law.<sup>68</sup> In *Kracke*, Bell J held that this was an "essential

component of fundamental importance” to the protective regime established by the Charter.<sup>69</sup> This also means that the limitation must be subject to the rule of law; that is, it must be capable of being challenged before an independent and impartial tribunal or court.<sup>70</sup> In this respect it is salutary to note that in *Kracke*, Bell J cites with approval and applies the following principle established by Lord Bingham in *R (Gillan) v Commissioner of Police of the Metropolis*:

The lawfulness requirement . . . addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what . . . is meant by arbitrariness, which is the antithesis of legality.<sup>71</sup>

Later in the decision, Bell J also cites with approval the following passage from *Re Luscher v. Deputy Minister, Revenue Canada*:

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 [sic] is likely to be deterred from conduct which is, in fact, lawful and not prohibited.<sup>72</sup>

It ought also to be observed for completeness in relation to this issue that the Charter expressly provides that nothing in its terms gives a person, entity, or public authority a right to limit human rights to a greater extent than is provided for by the Charter, or to destroy the human rights of any person.<sup>73</sup> This would suggest that while a human right may be limited

according to law, such a limitation must never amount to the obliteration of the right.

In the cognitive disability context it will be important not to move too briskly past this element of the test. As the Victorian Law Reform Commission and Vincent inquiries have already concluded,<sup>74</sup> there has been no, or at least a doubtful, legal basis for a great deal of clinical and service practice for persons with cognitive impairment, even though it has quite obviously involved restrictions, and arguably violations of, human rights. It is unlikely such problems have been eradicated. A particularly concerning example of a treatment practice still widely utilized, but unlikely to be authorized by Victorian law, is physical restraint, about which the Disability Act 2006 (Vic) remains astonishingly silent. Even the express provisions of Victoria’s “new generation” disability services legislation fail, in some instances, to comply with Charter and broader human rights requirements. For example, s 199 of the Disability Act 2006 (Vic) provides that the Senior Practitioner may make an “assessment order” that permits the detention of a person with intellectual disability for a period of up to 28 days to allow a treatment plan to be developed for that person. Such detention is obviously a limit to the right to liberty, yet the Disability Act 2006 (Vic) does not provide any avenue of appeal in relation to such detention. This is arguably contrary to the requirements of s 21 of the Charter (and Art 9 of the ICCPR).<sup>75</sup>

Any limit to a human right must also be “demonstrably justified” in a society that is based on fundamental values of human dignity, equality, and freedom.<sup>76</sup> In other words, human rights have presumptive importance: they are assumed to take precedence over other factors, unless there is a compelling reason why they should not (the justifying factor).<sup>77</sup>

The third phase in the Senior Practitioner's human rights analysis therefore involves careful scrutiny of any limitation to a human right to determine if that limit is authorized by law, and if so, if it is reasonable. This involves – as we shall shortly explain – the dynamic analysis of the factors set out in s 7(2) of the Charter.

The “reasonable limits” test might be conceptualized as a summative standard, the foundations for which are established through the interrogation of a number of interlocking issues (or factors). The test requires a duty-bearer to take into account all relevant factors, which include (but importantly, are not limited to):<sup>78</sup> the nature of the right;<sup>79</sup> the importance of the purpose of the limitation,<sup>80</sup> the nature and extent of the limitation,<sup>81</sup> the relationship between the limitation and its purpose;<sup>82</sup> and, any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>83</sup> It may be tempting to interrogate each of these factors in a linear way,<sup>84</sup> however, it must be borne in mind that while these are mandatory factors for consideration, the duty-bearer must, in fact, consider *all* relevant factors. It is also likely that factual matrix to be analysed, if not the intellectual structure of the statutory factors themselves, will interact and overlap to a significant extent. Contrary to the Court's approach in *Sabet*<sup>85</sup> and VCAT's decision in *Kracke*<sup>86</sup> it may therefore be preferable to consider these factors as having a dynamic rather than progressive relationship.

Additionally, it is notable that in *Kracke*, Bell J conceptualized the first two factors as “threshold” or “foundational”, and once ascertained, as “fixed” rather than having interaction with later “balancing factors”.<sup>87</sup> With respect, while the logical basis for this approach is compelling, its legal basis appears doubtful, being neither explicitly supported by the structure of the statute, nor by the comparative jurisprudence. It may also prove ethically

unsatisfying in some cases as its method essentially relies on legal abstraction, rather than a law-in-context approach.

It is interesting to observe that although the Charter uses the language of “reasonableness”, the substance of the test is more readily recognizable as one of “proportionality”, which is commonly used in comparative jurisprudence in Canada,<sup>88</sup> South Africa,<sup>89</sup> New Zealand<sup>90</sup> and Great Britain.<sup>91</sup> In *Kracke*, Bell J clearly conceptualized the test as one of proportionality. However, in *Sabet*, Hollingworth J declined to do so, noting that the Charter test has a specific statutory structure which ought to be distinguished from the proportionality test applied in other jurisdictions.<sup>92</sup>

#### *The Nature of the Right*

The first express factor the duty-bearer must consider if contemplating a limit to a human right is the nature of the right. In *Kracke*, Bell J described this element of the test as a “threshold or foundational value and not as a balancing factor”. The “task” at this stage is to identify the fundamental values and interests protected by the human right being limited. Once this has been achieved, “you have something precious in your hands”, and its nature “remains fixed in the justification analysis”. This stage of the analysis applies the results of the earlier engagement analysis, which identified the boundaries of the “protected arena”.<sup>93</sup> Bell J explicitly rejects the idea that this stage of analysis involves any “ranking” of rights “in terms of their order of supposed different quality”,<sup>94</sup> but this issue may require further consideration.

Although the Charter provides that each of the human rights it recognizes may be subject to limitation, the degree to which such limits may be imposed, if at all, will inevitably depend upon the nature of the right. In this respect, there will be an important interaction between Charter jurisprudence and jurisprudence and

commentary in relation to the ICCPR itself.<sup>95</sup> One important reason for this is that Australia is a party to the ICCPR and has therefore, with four limited exceptions,<sup>96</sup> accepted its obligations. Under Art 50 of the ICCPR, these treaty obligations extend to all parts of federal states (such as Australia) without any limitation or exception. This provision is reinforced by Art 27 of the Vienna Convention on the Law of Treaties,<sup>97</sup> which provides that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The Victorian government, in enacting the Charter, may therefore be reasonably assumed to have intended for its provisions to be interpreted and applied consistently with Australia's international obligations.<sup>98</sup>

Under international law, ICCPR rights may be restricted (or derogated from) according to the terms of the right itself (for example, some rights are expressed to permit restrictions where necessary to protect national security, public order, public health, or morals or the rights or freedoms of others) or in situations of public emergency. However, some ICCPR rights cannot be derogated from in any circumstances; that is, the public emergency exception does not apply, and the right itself does not entertain the potential for restriction. The rights that fall into this category are ICCPR Arts: 6 (the right to life); 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment, including non-consensual medical and scientific experimentation); 8(1) and 8(2) (freedom from slavery and servitude); 11 (freedom from imprisonment for inability to fulfil a contractual obligation); 15 (freedom from being held guilty of a criminal offence for an act or omission that did not constitute a criminal offence when committed); 16 (recognition as a person before the law); and 18 (freedom of thought, conscience, and religion). Interestingly, although the right to freedom

from torture and other cruel, inhuman or degrading treatment or punishment was raised in *Kracke*, Bell J ruled that the right was not engaged by the conduct complained of. Nevertheless, his analysis appears to have proceeded on the basis that all Charter rights could potentially be subject to limits.<sup>99</sup> We will have to wait for another case for this issue to be tested.

The most authoritative text on the circumstances in which other ICCPR rights may be subject to derogation, and the scope of permissible derogation, are the Siracusa Principles adopted by the United Nations Economic and Social Council in 1984.<sup>100</sup> Although not directly legally binding on states, these principles carry high moral authority, and they have heavily influenced Treaty Body approaches to the issue and informed international human rights jurisprudence more generally.<sup>101</sup> The Siracusa Principles are constituted by 14 general interpretative principles, a series of specific interpretative principles relating to nine types of limitation clauses used in the ICCPR, and detailed principles relating to the elements of the public emergency exception. The 14 general interpretative principles are set out in Table 1. In this context we merely note that there has been little, if any, disciplined analysis of how these principles are to be applied in relation to restrictive and compulsory treatment for persons with cognitive impairment who engage in behaviours of concern.<sup>102</sup> Scholarship in this area is urgently needed.

#### *The Importance of the Purpose of the Limitation*

The second express factor to be considered by the duty-bearer is the importance of the purpose of the limitation. In *Kracke*, Bell J explains that at this stage of the analysis attention is directed to the importance of the relevant purpose (or justifying factor), and not the actual limitation, which is considered later. The focus is on the

Table 1. Siracusa Principles: General Interpretive Principles Relating to the Justification of Limitations.

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1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
  2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardise the essence of the right concerned.
  3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.
  4. All limitations shall be interpreted in the light and context of the particular right concerned.
  5. All limitations on a right recognised by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
  6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
  7. No limitation shall be applied in an arbitrary manner.
  8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
  9. No limitation on a right recognised by the Covenant shall discriminate contrary to Article 2, paragraph 1.
  10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
    - (a) is based on one of the grounds justifying limitations recognised by the relevant article of the covenant,
    - (b) responds to a pressing public or social need,
    - (c) pursues a legitimate aim, and
    - (d) is proportionate to that aim.
- Any assessment as to the necessity of a limitation shall be made on objective considerations.
11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
  12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
  13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognised in the Covenant, is implicit in limitations to the other rights recognised in the Covenant.
  14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.
- 

"importance of the ends sought to be achieved by the means, not the means themselves". The fundamental values and interests of that purpose are to be ascertained. Once the importance of the purpose of the limitation has been identified, it also becomes "fixed" in the analysis.<sup>103</sup>

Although (at least most) human rights may be limited under the Charter, the purpose served by such a limitation must be sufficiently substantial and compelling<sup>104</sup> to justify the limitation in circumstances in which human rights have been recognized as fundamental democratic and social values. For this reason, in *Kracke*, Bell J viewed the outcome of this analysis

as potentially determinative of the action. If the purpose of a limitation is of insufficient importance, or for an impermissible purpose, it will be unjustifiable, and there will be no need to proceed to the analysis of other factors. If pressing and substantial societal concerns are identified they may lead to reasonable and demonstrably justified limits being placed on human rights.

In this respect it is important to remember that in its interrogation of this issue, the duty-bearer is performing a public integrity function. Although we will have to wait for the Victorian case law to develop, it is notable from the

Canadian comparative jurisprudence that objectives which are arbitrary (including discriminatory),<sup>105</sup> which offend fundamental freedoms,<sup>106</sup> or which are without any particular objective (but advanced by way of excuse)<sup>107</sup> have been found by the courts to be an insufficient justification to limit a human right.

#### *The Nature and Extent of the Limitation*

The third express factor in the analysis requires the duty-bearer to ascertain and characterize the precise nature and extent of the limitation. In *Kracke*, Bell J determined that the focus at this stage is on the limitation, not the right itself (dealt with under s 7(2)(a)) or the purpose of the limitation (dealt with under s 7(2)(b)). It is necessary to objectively identify the nature and extent of the limitation of the right in issue: "the greater the limitation of the right, the more compelling must be its justification." Importantly, according to Bell J, the impact of the limitation on the affected person is not considered at this stage; it is the degree to which the right itself is impaired that must be established. This is because every limitation of a human right must be demonstrably justified, even if such limits have minor consequences.<sup>108</sup>

Identifying the nature and extent of a limitation is also an essential preliminary step to determining if there may be less restrictive options available to the proposed limitation, which is the final element in the analysis. It is again worth noting in this respect that the Charter speaks in terms of the limitation of human rights, and does not expressly contemplate circumstances in which a human right might be (justifiably) extinguished. As we have already noted, this interpretation appears to be reinforced by the terms of s 7(3) of the Charter, which provides that nothing in the Charter permits the human rights of any person to be destroyed. The comparative jurisprudence under the Canadian

Charter would also appear to support such an interpretation.<sup>109</sup>

In the absence at this stage of Victorian authority on this point, it might be suggested that this element of the reasonableness test requires the duty-bearer to establish that any limitation is targeted and precise – plenary or vague limitations would not be justifiable given that they are likely to offend the rule of law.<sup>110</sup> It might also be speculated that the analysis of this factor would seek to identify and eliminate limitations that are in their nature arbitrary<sup>111</sup> or harsh and disproportionate responses to the justifying factor<sup>112</sup> (which may involve some different considerations to the question of what is least restrictive),<sup>113</sup> which are also unlikely to be justifiable.

#### *The Relationship Between the Limitation and its Purpose*

The fourth express factor to be considered is the relationship between the limitation and its purpose. This aspect of the reasonableness test requires the duty-bearer to be satisfied that there is a compelling logical relationship between the limitation and the justifying factor. In *Kracke*, Bell J observed that this element of the test required the limitation to be "rationally connected to the objective;" "the harm done to the right must be proportionate to the benefits achieved." In other words, the limitation must be carefully and responsibly designed to achieve the justifying purpose:

if the limitation on the right is not rationally connected to its purpose, it is not justified on that account, however important that purpose may be.<sup>114</sup>

It cannot be devoid of an objective, or based on arbitrary, irrational, or vague objectives.<sup>115</sup> Inevitably, this will require the duty-bearer to carefully assess the evidence-base for the claimed rational relationship between the limitation and its objective.



### *Any Less Restrictive Means Reasonably Available to Achieve the Purpose*

The final express factor to be considered under the reasonable limits test is any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. In *Sabet*,<sup>116</sup> the Victorian Supreme Court, following its Canadian counterpart in *RJR MacDonald*<sup>117</sup> took the view, somewhat counter-intuitively, that this factor does not require the duty-bearer to adopt the least restrictive alternative. Instead, it requires the duty-bearer to identify and balance "reasonable alternatives", with a view to limiting the human right "as little as is reasonably possible". Bell J applied took the same approach in *Kracke*.<sup>118</sup> This aspect of the proportionality test applied by the Canadian Supreme Court in *RJR MacDonald* descends from *R v. Edwards Books and Art*<sup>119</sup> in which that Court modified the test it had originally established in *R v. Oakes*<sup>120</sup> so that it might show greater deference to government objectives.<sup>121</sup> However, it is clear from the jurisprudence that has followed *Edwards Books and Art* that the scope of such deference is highly context-specific. It therefore might be suggested that the degree of deference that will be accorded executive government in the regulation of tobacco advertising (which engages freedom of speech)<sup>122</sup> might be very different from the deference to be shown should a law limit the right to equality before the law.<sup>123</sup>

In this respect, at this stage, we can merely be anxiously optimistic that the Victorian Supreme Court will take a more robust approach to ensuring that the principle of the least restrictive alternative is applied to limitations to the human rights of persons with cognitive impairment than its approach to this factor in *Sabet* currently suggests. Certainly, from an advocate's perspective, more ought to be made of the guidance provided by the Siracusa

Principles in this context, which positively require that any limitations to ICCPR rights be no more restrictive than is necessary to achieve the purpose of the limitation (General Principle 11; see Table 1).

The Senior Practitioner's conduct and decisions in relation to Charter rights are potentially reviewable by courts and tribunals.<sup>124</sup> It is therefore essential that the Office clearly documents the evidence upon which its conduct and decisions are based, especially where they result in the limitation, or continued limitation, of a human right. For the same reason, it is also essential for the Senior Practitioner to record reasons for the Office's conduct and decisions. Documenting the evidence upon which conduct is based, and formulating and recording reasons for this conduct, also assists in promoting the human rights-related quality of such conduct. It will also ensure decisions are transparent and that they can be effectively communicated to affected persons, and where applicable, to other stakeholder groups.

### **The Convention on the Rights of Persons with Disabilities**

Earlier in this article, we noted that human rights in their original formulation have largely failed to penetrate to the principal sites of human rights violation experienced by persons with disability. There is a risk that this situation will be perpetuated under the Charter, which also frames human rights at a high degree of generality, and in ways that do not necessarily appear easily applicable to specific issues affecting persons with disability. The CRPD has significant potential to reduce this risk by illuminating the ways in which human rights ought to be applied in relation to persons with disability. Although the CRPD is not itself incorporated into Australian law,<sup>125</sup> the Charter provides

that international law relevant to a human right may be considered in interpreting a statutory provision.<sup>126</sup> This applies not only to other Victorian laws, but also to the Charter itself. In *Kracke*, Bell J observed that this section of the Charter:

... is permissive. But it is powerfully permissive. It should be applied to the full extent that its language allows.<sup>127</sup>

It is therefore entirely appropriate for public authorities, such as the Senior Practitioner, to rely upon the CRPD as an interpretive aid in applying Charter rights to issues affecting persons with disability.

The CRPD developed at the international level in temporal parallel with the Charter. It was adopted by the General Assembly on 13 December 2006 and came into force internationally on 3 June 2008. Australia ratified the CRPD on 16 July 2008 and it came into force with respect to Australia 30 days later on 15 August 2008. The General Assembly mandate under which the CRPD was developed stipulated that the CRPD was not to develop any new human rights, but was to apply existing rights to the particular circumstances of persons with disability. Accordingly, the CRPD has been conceptualized as an implementation convention; one that sets out a detailed code for how existing rights should be put into practice with respect to persons with disability.<sup>128</sup>

The CRPD is a "comprehensive" human rights convention in that it incorporates civil and political and economic, social, and cultural rights.<sup>129</sup> The substantive elements of the CRPD might be conceptualized as having a dynamic, matrix structure (see Figure 2). On the vertical dimension, there are 20 rights and fundamental freedoms principally derived from either the ICCPR or ICESCR. These specific obligations range considerably in density and specificity. On the horizontal dimension, there are nine Articles which

have cross-cutting applicability; that is, they articulate general principles and obligations to be taken into account in the interpretation and implementation of each of the specific obligations. While these general obligations are principally facultative of the specific obligations (in the sense that they condition and amplify their content), they also contain substantive elements.<sup>130</sup> Consequently, to ascertain the implications of the CRPD for the interpretation of Charter rights, it is necessary to look at the dynamic created by the intersection of a relevant specific obligation with the CRPD's general obligations.

Although the General Assembly mandate under which the CRPD was developed stipulated that the negotiating committee was not to develop any new human rights, it is strongly arguable that in the course of the CRPD's development, traditional rights have been amplified, transformed, and extended. At the very least it may be said that the CRPD adds extensively to state obligations in relation to traditional rights.<sup>131</sup> This will present considerable new challenges for interpretation not only for CRPD rights, but also the traditional formulation of the rights from which they are derived, at least in so far as these rights apply to persons with disability. This point obviously has direct implications for the way in which the CRPD might be used to interpret Charter rights. Although, over time, it might be expected that the United Nations treaty bodies and independent experts will elaborate and clarify the scope, content, and implementation implications for CRPD rights, and their relationship to traditional formulations of these rights, at this point in time it is simply not possible to be certain about many of these points.

The CRPD is relevant to the interpretation and application of Charter rights to persons with disability in at least two fundamental ways. First, it elaborates a range of state obligations that must be fulfilled if persons with disability are to

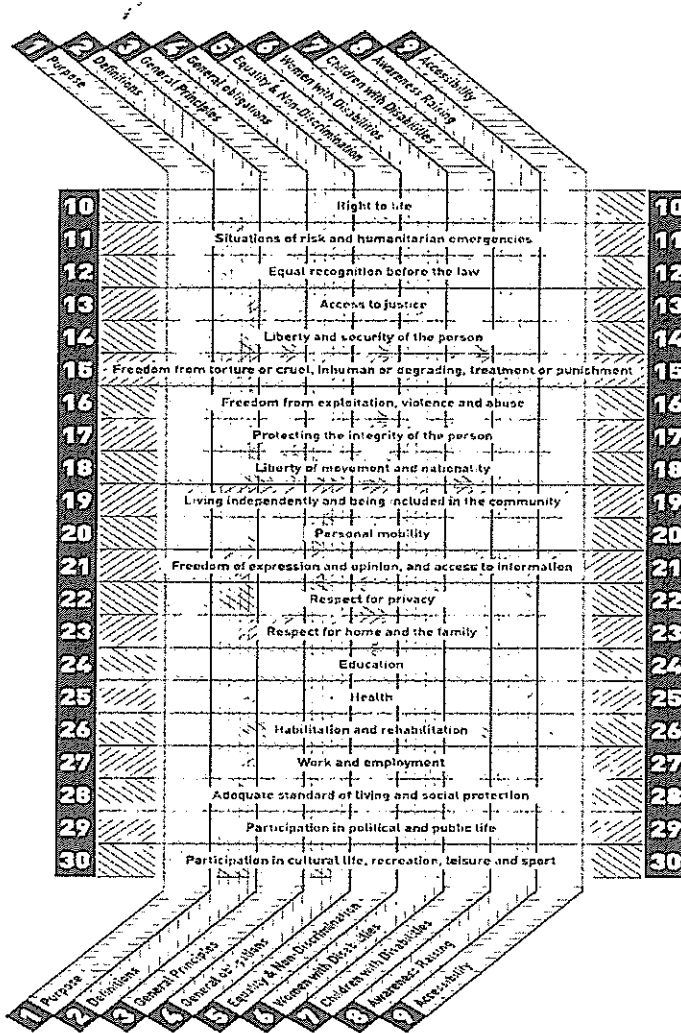


Figure 2. Matrix Structure of CRPD Rights.

effectively enjoy their human rights and fundamental freedoms on an equal basis with others. This is achieved by a number of means. In some cases the CRPD incorporates an Article that directly or substantially parallels a traditional right – for example, Art 15 of the CRPD (freedom from torture or cruel, inhuman or degrading treatment or punishment) parallels Art 7 of the ICCPR. However, the Article then imposes a specific facultative obligation to ensure that the right is fully realized in relation to persons with disability. In the

case of Art 15 of the CRPD for example, states are required to “take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment”. In other cases, a traditional right is elaborated to incorporate additional substantive elements – for example, Art 14 of the CRPD (liberty and security of the person) is elaborated from its ICCPR equivalent (Art 14(1)) to additionally

provide "that the existence of a disability shall in no case justify a deprivation of liberty". In still other cases, traditional rights undergo extensive substantive and facultative elaboration and are disaggregated to create additional "heads" for these rights – for example, Art 26 of the ICCPR (which relates to equality before the law and equal protection of the law) is transformed into two detailed rights in the CRPD (Art 5, equality and non-discrimination, and Art 13, access to justice). Additionally, as we have already discussed, the dynamic structure of the CRPD's general and specific obligations also serves to significantly extend, amplify, and particularize state obligations that must be fulfilled if the rights of persons with disability are to be realized by requiring certain principles to be observed in implementation of all rights – for example, CRPD Art 3 General Principles, paragraph (c) requires the principle of "full and effective participation and inclusion in society" to be applied in the interpretation and implementation of all other human rights.

Second, and more generally, it is important to observe that the CRPD establishes a distinctive disability rights paradigm. It is possible only to note some of the most salient elements of this paradigm here. In its underlying conceptual basis, the CRPD rejects the traditional, and still socially dominant, perspective of impairment and disability as an individual problem to be cured or "treated". It mandates the social model of disability as fundamental to the realization of the human rights of persons with disability.<sup>132</sup> According to the social model, "disability" is the result of the interaction between persons with impairments and a barrier-filled physical and social environment. The social model therefore carries the action implication that the physical and social environment must change so as to enable persons with impairments to participate on

an equal basis with others. While the CRPD does not expressly prohibit measures to prevent, ameliorate, or correct impairment, it places very little emphasis upon them. Instead, it challenges physical and social environments to accommodate impairment as an expected incident of human diversity. In other words, the CRPD seeks to change society in order to accommodate persons with disability: it does not seek to change persons with impairment in order to accommodate society.<sup>133</sup>

The social model of disability has very important implications for the way in which Charter rights are to be interpreted in relation to persons with disability. One such implication is that restrictive practices and compulsory treatment would not be justifiable limitations to autonomy and liberty if the person's environment could reasonably be adapted to accommodate or eliminate the behaviour that would otherwise justify the restrictive practice or compulsory treatment.

Also central to the disability rights paradigm elaborated by the CRPD are the principles of equality and non-discrimination.<sup>134</sup> The standard of equality required by the CRPD is substantive equality,<sup>135</sup> which essentially requires positive measures to be instituted to ensure that persons with disability enjoy conditions of life equivalent to others. Substantive equality does not mean treating persons with disability the same as everyone else, where this would only result in the entrenchment of pre-existing disadvantage.

The right to equality is undergirded by the CRPD right of non-discrimination.<sup>136</sup> Importantly, the CRPD defines discrimination to include the denial of reasonable accommodation, which is the duty to provide modifications and adjustments, where needed, to ensure that persons with disability are able to enjoy or exercise all human rights and fundamental freedoms on an equal basis with others.<sup>137</sup> Although the Charter prohibition of discrimination

does not expressly refer to a requirement to reasonably accommodate the needs of persons with disability, such an obligation ought to be inferred from the CRPD.

The right to equality and non-discrimination have important implications for the regulation of restrictive practices and compulsory treatment. Essentially, they will not permit treatment of persons with disability differently to other persons, except where this treatment is a positive measure designed to overcome pre-existing disadvantage, or a reasonable accommodation designed to ensure that human rights and fundamental freedoms may be exercised on an equal basis with others. For persons who have behaviours of concern, this may require substantial positive measures, such as the provision of appropriate accommodation and adequate skilled support staff to assist the person to realize their positive developmental potential.

A third fundamental element of the CRPD's disability rights paradigm is inclusion and participation.<sup>138</sup> Inclusion and participation in society are fundamental dimensions of the right to equality and non-discrimination and give effect to the long-established civil rights principle that segregation on the basis of a personal characteristic (such as race) is inherently unequal and discriminatory.<sup>139</sup> The rights to liberty and freedom of movement are also extended and applied to give effect to the principle of inclusion and participation by imposing obligations on state parties to enable persons with disability to live independently in the community with choices equal to others with the supports they require to achieve this, and by imposing an obligation on state parties to ensure that persons with disability are able to enjoy personal mobility with the greatest possible independence.<sup>140</sup> It will thus be very important that the rights to equality and non-discrimination and the rights to liberty and freedom of movement provided in the Charter are interpreted and applied

in ways that will prevent the segregation of persons with disability, and that will fulfil their right to in and be a part of the community, and mobilize with the greatest possible degree of independence.

### Conclusion

The normative basis for clinical practice and service delivery in relation to persons with disability who engage in behaviours of concern is set to change substantially as human rights standards are more vigorously and more intelligently applied in this area. This will require clinicians and providers to develop the knowledge, skills, and tools necessary to recognize the human rights implications of their work, and to interpret and effectively apply human rights. In this paper, we have outlined a formative method of human rights analysis that has been developed by the Victorian Office of the Senior Practitioner to assist that Office to apply the human rights recognized in the Victorian Charter of Human Rights and Responsibilities in the exercise of the Office's functions and powers. Although developed in a specific statutory and organizational context, this methodology has potentially wider application.

The implications of Charter rights for many of the specific human rights concerns faced by persons with disability are not always immediately apparent. In this respect it perpetuates some of those dynamics that, historically, have denied persons with disability effective enjoyment of their human rights. We have therefore advocated an approach to the interpretation and application of Charter rights that relies significantly upon the CRPD as an interpretive aid. Although the CRPD is not without its own limitations, it is our contention that it offers fundamental insights into the way that human rights ought to be applied in relation to persons with disability. It does so not only in its specification of additional facultative and substantive obligations that must

be fulfilled to realize the right of persons with disability, but also, and perhaps far more importantly, by elaborating a distinctive disability rights paradigm that has the potential to enliven rights that have historically been dormant to some particular human rights violations experienced by persons with disability.

#### Notes

1. This article has been developed from a paper delivered at 'Risks v Rights', the 28th Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law (NSW), 23–26 October 2008.
2. For the purpose of this discussion we shall regard the International Bill of Rights as the original formulation. It is constituted by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR). Under Art 2(1) of the ICCPR and Art 2(2) of the ICESCR, all persons are guaranteed recognition of human rights irrespective of their status. This includes persons with disability, who are understood to fall within the equal protection guarantee afforded persons of "other status" to those groups specifically enumerated.
3. See further: Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8:1 Human Rights Law Review 1, 12ff, and Theresa Degener and Gerard Quinn, *Human Rights and Disability: The Current and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, HR/PUB/02, 1ff.
4. For the purpose of this discussion we loosely define "behaviours of concern" to be behaviours that pose a risk of serious harm to self and others, and that challenge the capacity of the service system to provide positive support.
5. As evidence of this we note recent or current inquiries in three Australian states that examine how human rights and legal protections are to be applied to this population group; see further, Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Report*, Victorian Government Printer, November, 2003; WJ Carter, *Report to Honourable Warren Pitt MP Minister for Communities, Disability Services and Seniors: Challenging Behaviour and Disability: A Targeted Response*, Disability Services Queensland, July 2006; NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system* (reference date September 2007; expanded July 2008; forthcoming).
6. Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT).
7. The Tasmanian government is currently considering the question following the release of Tasmania Law Reform Institute, *A Charter of Rights for Tasmania, Report No 10*, October, 2007; The Western Australian government is currently considering the question following the release of Government of Western Australia, *Report of the Consultation Committee for a Proposed WA Human Rights Act*, November, 2007. The Australian government has initiated a national consultation to consider the question; see further <<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf>> accessed 9 June 2009.
8. Disability Act 2006 (Vic): especially Part 3: Division 5: Senior Practitioner; Part 7: Restrictive Practices and Part 8: Compulsory Treatment.
9. Disability Services and Other Legislation Amendment Act 2008 (Qld). This Act amends the Disability Services Act 2006 (Qld) and the Guardianship and Administration Act 2000 (Qld) to provide greater regulation of restrictive practices for persons with "challenging behaviour". These amendments commenced on 1 July 2008.
10. Detailed analysis of these measures is beyond the scope of this paper. However, it should be noted that some commentators argue that any form of such restriction or compulsion is a human right violation. According to this analysis these measures would be more evidence of the problem, rather than its solution: see further Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right

- to be Free from Non-Consensual Psychiatric Interventions' (2007) 34(2) Syracuse Journal of International Law and Commerce 405; Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34(2) Syracuse Journal of International Law and Commerce 429.
11. In fact, this engagement was escalating throughout the CRPD negotiation process, and it was provided with particular impetus by the United Nations Commission on Human Rights Resolution 200/51 (25 April 2000) which, *inter alia*, (par 11) "Invites all the human rights treaty monitoring bodies to respond positively to its invitation to monitor the compliance of States with their commitments under the relevant human rights instruments in order to ensure full enjoyment of those rights by persons with disability, and urges Governments to cover fully the question of the human rights of persons with disabilities in complying with reporting obligations under the relevant United Nations human rights instruments"; and (par 12) "Invites all special rapporteurs, in carrying out their mandates, to take into account the situation and human rights of persons with disabilities."
  12. United Nations General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/63/175 at paras 37–76.
  13. Sometimes referred to as the "multi-track" or "twin-track" or "mainstreaming" approach because it relies not only upon a vertical implementation and monitoring strategy arising from the CRPD obligations directly, but also upon a horizontal implementation and monitoring strategy arising from the application of other treaty obligations specifically to persons with disability; see further United Nations General Assembly, Human Rights Council, Seventh Session, *Report of the United Nations High Commissioner for Human Rights on progress in the implementation of the recommendations contained in the study on the human rights of persons with disabilities*, A/HRC/7/61, 16 January 2008 especially at paras 6–7.
  14. Under Art 34 of the CRPD, a Committee on the Rights of Persons with Disabilities is established. The Committee is initially comprised of 12, and ultimately 18, experts who serve in a personal capacity. The role of the Committee is to monitor and advise on the implementation of the CRPD at the international level by receiving and considering State Reports and formulating and publishing General Comments. Under the CRPD Optional Protocol the Committee may also receive and adjudicate individual communications (complaints) alleging CRPD right violations, and conduct inquiries into gross or systemic violations of CRPD rights. The initial members of the Treaty Body were elected at the First Conference of State Parties, which was held in November 2008. They take Office from 1 January 2009.
  15. See generally Address of Hon Robert McClelland, MP, Attorney-General for Australia (Protecting Human Rights Conference, Melbourne Law School, 3 October 2008) <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_3October2008-Protecting Human RightsConference](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_3October2008-Protecting%20Human%20RightsConference)> accessed 9 June 2009.
  16. Australia has also acceded to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women and it has indicated an intention to specifically associate itself with the United Nations Declaration on the Rights of Indigenous Peoples.
  17. In fairness, it ought to be noted that, contrary to its general stance on human rights, the former Australian government, after initially expressing opposition to the development of the CRPD, became an active and constructive participant in negotiations. Prior to the general election, it had also indicated an intention to ratify the CRPD following consultation with the states and territories; see further Phillip French, Rosemary Kayess, and Robin Banks, *Report to the Human Rights and Equal Opportunity Commission on the Workshop on Promoting the Ratification and Implementation of the Convention on the Rights of Persons Disabilities in Australia* 27–28 June 2007 (Public Interest Advocacy Centre for the Human Rights and Equal Opportunity Commission) (unpublished, available at <<http://www.hreoc.gov.au/disabilityrights>> accessed 9 June 2009.

18. Following submission of this article for publication the Australian Government acceded to the Optional Protocol to the CRPD on 21 August 2009, and it entered into force with respect to Australia on 20 September 2009.
19. McClelland (n 16). Australia signed the CAT Optional Protocol on 16 May 2009.
20. Hon Robert McClelland, MP, Attorney General for Australia, *Invitation to United Nations Human Rights Experts* (Media Release, 7 August 2008) <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_7August2008-StrengtheningHumanRightsandtheRuleofLaw](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_7August2008-StrengtheningHumanRightsandtheRuleofLaw)> accessed 9 June 2009.
21. Australia's ratification or accession to an international treaty does not incorporate the terms of the treaty into Australian law. For that to occur, with very limited exceptions, the Australian Parliament must specifically legislate to incorporate the obligation: see generally, *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1985] HCA 20 per Mason CJ and Deane J at 25ff, with whom Gaudron J agreed on this point at 3; Toohey J at 20; McHugh J at 35ff.
22. Art 2, CRPD Optional Protocol
23. Art 6, CRPD Optional Protocol
24. General Comment No 2 of the Committee against Torture par 15 (CAT/C/GC/2); see also *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (n 13). For progress towards implementation of the CAT Optional Protocol in Australia see: Richard Harding and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (Australian Human Rights Commission, 2008) available at: <[http://www.hreoc.gov.au/human\\_rights/publications/opcat/opcat.pdf](http://www.hreoc.gov.au/human_rights/publications/opcat/opcat.pdf)> accessed 9 June 2009.
25. Art 21, CAT.
26. The Special Rapporteur on Torture's report is a first example of such scrutiny: (n 12).
27. Minkowitz (n 10); Dhanda (n 10).
28. See, for example, a recent statement by Louise Arbour, United Nations High Commissioner for Human Rights to the 8th Session of the Human Rights Council on 6 June 2008 in which she said: "Just one example of this change from a passive/charity model to a rights-based model is the Convention's affirmation that persons with disabilities enjoy legal capacity on an equal basis with others. Even today, persons with disabilities are robbed of their capacity to buy and sell property, to make decisions on inheritance, to choose medical treatment or to refuse to enter institutions. Guardians, even where properly appointed, make decisions in the name of the individual which are not in these individual's best interests. The supported decision-making model required by the Convention affirms the legal capacity to act of persons with disabilities and ensures that people are always at the centre of the decisions affecting their lives even if they might need support to take decisions or make decisions heard in some cases." <<http://www.unhchr.ch/huricane/huricane.nsf/view01/1370BB1A2C13E7F0C12574600027A971?opendocument>> accessed 9 June 2009; Bell J recent decision in *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646 (revised 21 May 2009) is a salutary example of this.
29. This work is being undertaken by the Office of the Senior Practitioner, Victorian Department of Human Services. The views expressed in this article are, however, entirely our own, and should not be attributed to the agency.
30. Charter of Human Rights and Responsibilities Act 2006 (Vic). The Charter is based upon what is sometimes conceptualized as the dialogue model for incorporating human rights into domestic law, which preserves parliamentary sovereignty. This is because the Charter does not empower courts to strike down a law of the Victorian Parliament. Instead the Charter empowers the Victorian Supreme Court to issue a declaration that a statutory provision cannot be interpreted consistently with human rights. This declaration is then referred to the Attorney General who, in turn, refers it to the Minister responsible for the statutory provision. The Minister responsible must then table the declaration and their response in both houses of the Victorian Parliament within six months. This process causes the Parliament and the public to critically debate the statutory provision. However, there is no legal obligation on the Parliament to change the provision, and the Parliament



- has the power to expressly declare that a statutory provision has effect despite being incompatible with a human right. See further on the "dialogue model" F. Klug, 'The Long Road to Human Rights Compliance', (2006) 57(1) Northern Ireland Legal Quarterly, Special Issue: Human Rights and Equality 185-202.
31. Pamela Tate, *A Practical Introduction to the Charter of Human Rights and Responsibilities*, Solicitor General Victoria, 29 March 2007, 3 (on file with author).
  32. Public authorities are defined in s 4 of the Charter to be: public official; an entity established by a statutory provision that has functions of a public nature; an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the state or a public authority; Victoria Police; a Council; a Minister; and members of a Parliamentary Committee when the Committee is acting in an administrative capacity.
  33. It does so by making it unlawful for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to a relevant human right when a decision is made: s 38(1) Charter of Human Rights and Responsibilities Act 2006 (Vic).
  34. Civil and political rights are "negative" in the sense that they operate as a constraint on the exercise of power. The term "negative rights" was coined by Isaiah Berlin in his essay 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, London 1969); Karel Vasak has categorized negative rights as first generation rights: K. Vasak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights' (1977) 30(11) *UNESCO Courier*.
  35. The Charter's exception of positive measures from the obligations related to non-discrimination (s 8(4)) is derived from Human Rights Committee General Comment 18: Non-Discrimination, 1989, para 10; also Art 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination, and Art 4 of the Convention on the Elimination of All Forms of Discrimination Against Women.
  36. The Senior Practitioner is established under Part 5, Division 5 of the Disability Act 2006 (Vic).
  37. Victorian Law Reform Commission (n 5).
  38. Section 23(2)(a) of the Act.
  39. The Senior Practitioner's functions are set out in ss 24, 150, 153, 190 and 195 of the Disability Act 2006 (Vic).
  40. The Senior Practitioner's powers are set out in ss 27, 150, 191 and 199 of the Disability Act 2006 (Vic).
  41. Section 3 of the Disability Act 2006.
  42. Sections 140 and 141 of the Disability Act 2006 (Vic)
  43. Victorian Government Department of Human Services, *Office of the Senior Practitioner Annual Report 2007-2008* (Victorian Department of Human Services, Melbourne, 2008) 17.
  44. Section 150 of the Disability Act 2006
  45. For example, only service providers that have been approved by the Secretary are authorized to use a restrictive intervention (ss 134 and 135 of the Disability Act 2006), whereas it would appear that no such approval is required for other restrictive interventions (s 150 of the Disability Act 2006). Similarly, a restrictive intervention can only be used if it is included in the person's behaviour management plan and is practised in accordance with that plan (ss 140 and 141 of the Disability Act 2006). This does not appear to be required in relation to other restrictive interventions.
  46. To date, only one short-term residential treatment facility has been gazetted; no long-term residential treatment facilities have been gazetted.
  47. Subsection 152(2) of the Disability Act 2006: either persons who are subject to a "residential treatment order" made under the Sentencing Act 1991 (Vic), or a "custodial supervision order" made under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, or persons transferred from correctional facilities under s 166 of the Disability Act 2006.
  48. Gazetted under s 86 of the Disability Act 2006 (Vic)
  49. Section 191(6) of the Disability Act 2006 (Vic)
  50. In *Kracke* (n 28) this issue does not appear to have been explicitly considered. The analysis tended to focus on the scope and content of the duty to "respect" Mr Kracke's human rights (that is, the "non-interference" or "negative" dimension), rather than upon what was required to affirmatively protect and fulfil his rights.

51. United Nations Human Rights Committee, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev 1/Add.13, 26 May 2004.
52. *Teoh* (n 21) *Kracke* (n 28) para 38.
53. This analysis is based upon United Nations Human Rights Committee General Comment No 6: Right to Life 27 July 1982.
54. Section 3.
55. United Nations Human Rights Committee General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004 HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, 243.
56. Economic, social, and cultural rights are subject to the standard of "progressive realisation". This does not require nations to immediately fulfil these rights. However, the standard does require nations to work towards the fulfilment of these rights as quickly as possible, using the maximum resources at their disposal. Nations must also meet minimum essential levels of the right and avoid deliberately regressive measures. These issues do not yet arise under the Charter because, as noted, it is limited to civil and political rights at this stage.
57. Section 4.
58. See generally, Daniel Kahneman, Amos Tversky and Paul Slovic (eds) *Judgment under Uncertainty: Heuristics & Biases* (Cambridge University Press, Cambridge 1982).
59. See generally, TS Kuhn, *The Structure of Scientific Revolutions* (2nd edn University of Chicago Press, Chicago 1970).
60. This analysis is based on that proposed in *Ahmed Sabet v Medical Practitioner's Board of Victoria* [2008] VSC 346 (12 September 2008) per Hollingworth J at para 108. In *Kracke* (n 28), Bell J determined that for the judiciary there are four stages of analysis for interpreting legislation against the Charter: "engagement" (which conflates the engagement and limitation questions outlined here); "justification" (which is broadly equivalent to the "reasonableness" question outlined here); "reinterpretation" (which involves the application of the "special interpretive principle" set out in s 32(1) of the Charter requiring legislation to be interpreted consistently with human rights wherever possible); and, only in the case of the Supreme Court, declaring inconsistency. With respect, at least with regard to administrative action by executive government, we do not think it is helpful to conflate the engagement and limitation questions. One unfortunate effect of this may be to confine the analysis to non-interference with human rights, rather than to their protection and fulfilment.
61. See further I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (University of Pennsylvania Press, Philadelphia 2001).
62. *Kracke* (n 28) para 97.
63. Hon Robert Hulls, MP, Attorney General for Victoria, Charter of Human Rights and Responsibilities Bill; Second Reading Speech, Legislative Assembly, Hansard, 4 May 2006.
64. These divisions include Disability Services (which provides directly and funds a wide range of specialist services for persons with disability), the Senior Practitioner, and the Disability Services Commissioner.
65. It is not yet clear if non-government organizations funded by the Victorian government may be reliably characterized as "public authorities" bound by the Charter (on the basis that they are publicly funded and are exercising functions of a public nature under contract with government). The Victorian Department of Human Services has adopted the policy position that they are so bound: see also in support of this interpretation, Victorian Equal Opportunity and Human Rights Commission, 'The Meaning of "Public Authority" under the Charter' (undated) (on file with author). However, apart from being counter-intuitive, on the basis of the current comparative case law from the United Kingdom, it would appear that this position is far from certain: see for example, *YL (by her litigation friend the Official Solicitor) v Birmingham City Council & Ors* [2007] UKHL 27; see also *Johnson v London Borough of Havering* [2007] EWCA Civ 26.
66. *Vriend v. Alberta* [1998] 1 S.C.R. 493.
67. In *Kracke* (n 28), Bell J frames this stage of the analysis as the "justification stage".
68. This would appear to be the intention of the use of the words "subject under law" in s 7(2) of the Charter.
69. *Kracke* (n 28) para 168.
70. This implication arises from General Interpretive Principle 8 of the Siracusa

- Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights; United Nations Economic and Social Council, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Annex UN Doc E/CN.4/1984/4 (1984) which requires that "Every limitation imposed shall be subject to the possibility of challenge to and to remedy against its abusive application."
71. (2006) 2 AC307 at 34, cited in *Kracke* (n 28) 168.
  72. [1985] DLR (4<sup>th</sup>) 503 at 506.
  73. Section 7(3) of the Charter.
  74. Victorian Law Reform Commission (n 5).
  75. Such detention would be subject to judicial review.
  76. Bell J, s 7(2) of the Charter; this test derives from a decision of the Canadian Supreme Court in *R v Oakes* [1986] 1 S.C.R. 103, see in particular Dickson CJ at 138–139. In *Kracke* (n 28), Bell J referred to these requirements as the legality and the proportionality requirement respectively.
  77. In *Kracke* (n 28), Bell J expresses this point by describing the Charter as "fundamental law": at para 22.
  78. These five factors are based on s 36 of the South African Bill of Rights.
  79. Section 7(2)(a)
  80. Section 7(2)(b)
  81. Section 7(2)(c)
  82. Section 7(2)(d)
  83. Section 7(2)(e)
  84. The Court appears to have adopted a linear approach to the interrogation of these factors in *Sabet* (n 60) para 187 in particular.
  85. *Sabet* (n 60).
  86. *Kracke* (n 28).
  87. *Kracke* (n 28) para 135.
  88. *Oakes* (note 76).
  89. *S v Makwanyane* 1995 (3) SA 391 [104].
  90. *Moonen v Film and Literature Board of Review (Moonen (no.1))* [2000] 2 NZLR 9
  91. *R v Home Secretary; ex parte Daly* [2001] 2 AC 532. See further, J McBride, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) and S Choudhry, 'So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 (No. 2d) Supreme Court Law Review 501.
  92. In *Sabet*, the Court said in *obiter* "although many of the international cases to which I was taken apply general notions of proportionality . . . the Charter requires a Victorian court to have regard to the specific factors mentioned in s 7(2), not to such general concepts": (n 60) para 187. With respect, it is not clear what the intellectual structure of these tests is if it is not one of proportionality, so we would argue that the comparative jurisprudence remains an important guide to the interpretation and application of these factors.
  93. *Kracke* (n 28) paras 137–142.
  94. *Ibid.* para 140.
  95. At various points in his judgement in *Kracke* (*ibid.*), Bell J also asserts that this is the case.
  96. Australia lodged reservations to ICCPR Arts 10, 14 and 20 at the time of its ratification (13 August 1980). These reservations relate to the separation of accused persons from convicted offenders, the separation of accused and convicted juveniles from adults; provision of compensation for miscarriage of justice; and legislative prohibition of war propaganda and advocacy of national, racial, or religious hatred.
  97. United Nations, *Treaty Series*, Vol 1155, 331; See also United Nations Human Rights Committee, General Comment No. 31 *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add13.
  98. This would also appear to be an implication of the High Court's decision in *Teoh*'s case (n 21).
  99. *Kracke* (n 28) paras 541–577.
  100. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984 (E/CN.4/1985/4) <<http://www.unhcr.org/refworld/docid/4672bc122.html>> accessed 23 February 2009.
  101. For background to the Siracusa Principles, see JF Hartman 'Working Paper for the Committee of Experts on the Article Derogation Provision' (1985) 7 *Human Rights Quarterly* 89.
  102. In contrast, the principles are frequently applied to human right limitations in public health: see further LO Gostin, *Public Health Law: Power, Duty and Restraint* (University of California Press, Berkeley and Los Angeles, CA, 2000).
  103. *Kracke* (n 28) 143–148.

104. Cf. under the Canadian Charter, *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
105. For example, *Brooks v. Safeway Canada*, [1989] 1 S.C.R. 1219.
106. For example, *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.
107. For example *Vriend* (n 66).
108. *Kracke* (n 28) paras 149–152.
109. For example *Ford v. Quebec (Attorney-General)*, [1988] 2 S.C.R. 712; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.
110. The Preamble of the Charter affirms that human rights are essential to a society that, *inter alia*, respects the rule of law.
111. Cf. *Vriend* (n 66) (discrimination is a form of arbitrary conduct).
112. Cf. *Moonen v Flim and Literature Board of Review (Moonen No 1)* [2000] 2 NZLR 9, per Tipping J: “A sledgehammer should not be used to crack a nut.”
113. For a discussion as to the redundancy of this aspect of the test under the Canadian Charter, see PW Hogg, *Constitutional Law of Canada* (Thomson Canada Limited, Toronto 2003) 817.
114. *Kracke* (n 28) paras 153–155.
115. Cf. *R v. Morgentaler* [1988] 1 S.C.R. 30.
116. (n 72).
117. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.
118. *Kracke* (n 28) paras 156–161.
119. *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713.
120. In *Oakes* (n 78), the test requires the impairment of the right “as little as possible”, para 70.
121. See further Choudhry (n 91).
122. This was the issue in *RJR MacDonald* (n 117).
123. Cf. *Vriend* (n 66).
124. The Charter does not provide any “free-standing” right of action for breach of a human right. However, if there is an independent basis in law for the action, then unlawful conduct under the Charter may be raised in those proceedings as evidence of the unlawfulness of the primary conduct complained of. Apart from Victorian Civil and Administrative Tribunal proceedings under the Disability Act 2006 and the Guardianship and Administration Act 1986, one pre-existing right of action that is likely to accommodate Charter claims is the right of a person affected to seek judicial review of the legality of exercises of power by administrators. The Charter will allow the Victorian Supreme Court to review a decision or conduct of a public authority on two new grounds: acting incompatibly with a human right, and failing to give proper consideration to a relevant human right. The functions and powers of the Senior Practitioner under the Disability Act 2006 could potentially be the subject of an application for judicial review.
125. See (n 21).
126. Section 32(2) of the Charter. In any event, according to a more general principle, an international treaty may be used as an interpretive aid where a statutory provision is ambiguous or unclear: *Teoh* (n 21).
127. *Kracke* (n 28) para 202.
128. Kayess and French (n 3) 20.
129. GA Res. 56/168, Resolution on a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities, 19 December 2001, A/56/583/Add 2.
130. This is particularly so for Arts 5, 8 and 9.
131. Kayess and French (n 3) 32.
132. This model of disability is asserted in Art 1 of the CRPD, which describes persons with disability as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. For a discussion on the influence of the social model in the development of the CRPD, see further Kayess and French (n 3) 5–12.
133. *Ibid.* 24
134. Equality and non-discrimination are both cross-cutting principles and obligations to be applied in all aspects of CRPD implementation (Art 3(b) and (e) and Art 5 respectively) and are also peppered through the CRPD specific obligations (for example Art 24(1) (Education); Art 25 chapeau (health) and Article 27(1) (Work and employment).
135. Art 3(e) and Art 5(3) and (4).
136. Article 5 in particular.
137. Article 5(3) and Art 2 “Reasonable Accommodation” (Definitions).
138. Article 3(c) (General principles) and Art 19 (Living independently and being included in the community).
139. *Brown v. Board of Education*, 347 U.S. 483 (1954)
140. Article 19 (Living independently and being included in the community) and Art 20 (Personal Mobility) respectively.