



Victorian Equal Opportunity
& Human Rights Commission

The Charter of Human Rights and Responsibilities

> 20 individual rights protected



**Victorian Equal Opportunity
& Human Rights Commission**

Published by the Victorian Equal Opportunity and Human Rights Commission
Level 3, 204 Lygon Street, Carlton, Victoria 3053. June 2013.

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The Charter of Human Rights and Responsibilities: 20 individual rights protected.

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Section 8

> Right to recognition and equality before the law

Scope of the right

Section 8 of the Charter protects three different but related rights.

1. The right to recognition as a person before the law

The first right is the right to recognition as a person before the law. This is an absolute right which, under international law, cannot be limited under any circumstances.

The essence of this right is equality of legal capacity, for example the capacity to enter into contracts or access Government services. In some countries, such capacity is denied to certain groups (such as women or particular ethnic groups).

2. The right to enjoy other human rights free from discrimination

The second right in section 8 of the Charter is the right to enjoy other human rights without 'discrimination'. Everyone has the same rights and deserves the same level of respect. This means that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory way.

Note: Under the Equal Opportunity Act, public authorities also have a positive duty to take reasonable steps to eliminate discrimination when they are acting as an employer or service provider, for example, in education or the provision of accommodation.

Discrimination refers to the definition of discrimination in the *Equal Opportunity Act 2010* (Vic), which includes discrimination on the basis of:

- age
- breastfeeding
- employment activity
- gender identity
- disability
- industrial activity
- lawful sexual activity
- marital status
- parental status or status as a carer
- physical features
- political belief or activity
- pregnancy
- race
- religious belief or activity
- sex
- sexual orientation
- personal association with a person who is identified by reference to any of the above attributes.

3. The right to the protection of the law without discrimination

Section 8 of the Charter also provides that everyone is entitled to equal protection of the law without discrimination.

This right refers to the enforcement and administration of the law.

Special measures

Section 8(4) of the Charter makes clear that measures taken for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. This allows for what are sometimes called 'special measures'. For example, some programs aimed at addressing disadvantage confronting many Aboriginal Victorians would qualify as special measures. Employment programs for people with disabilities, when there is evidence that that group has been traditionally under-employed, could also qualify as special measures.

Case examples

Lifestyle Communities Ltd (No 3) (Anti-Discrimination) [2009] VCAT 1869 (22 September 2009)

In this matter, Lifestyle Communities Ltd, which runs aged care facilities, sought an exemption from the *Equal Opportunity Act 1995* (Vic) to enable it to provide places only to people aged over 50. The Victorian Civil and Administrative Tribunal held that such an exemption would not constitute a special measure under section 8(4) of the Charter, nor was it justified under section 7 as a reasonable limitation on the right to equality before the law. In the Tribunal's view, there was no reason to exclude all applicants under 50 – the company's proposal to do so being based on stereotypes about their suitability to live in the type of accommodation it provides.

Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238 (28 November 2011)

In another case, Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. The Tribunal found that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The Tribunal was satisfied that the measure was proportionate because at the time the application was made only 7.6 per cent of Parks Victoria's workforce was Indigenous. This measure of limiting the employment opportunity to Aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 8 could be engaged by activities that:

- provide for the delivery of an entitlement or service to some groups but not others
- assist or recognise the interests of Aboriginal persons or members of other ethnic groups
- are stated in neutral terms but have a disproportionate impact on a sector of the community whose members have one or more protected attributes under the Equal Opportunity Act 2010 (for example, sex, race, age or disability)
- deal with any of the human rights set out in the Charter in a discriminatory way. For example, if the legislation curtails freedom of expression or if a person has engaged in industrial activity
- set age brackets that are expressed as protective measures, graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting)
- establish eligibility requirements for access to services or assistance (such as legal aid)
- contain measures that aim to assist people who have been socially, culturally or economically disadvantaged
- take steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged (positive discrimination)
- regulate access to infrastructure and public facilities including building, roads, transport, schools, housing and hospitals
- affect information and communications services including electronic services
- regulate access to public services including education, healthcare, the justice system, courts, voting and advocacy
- provide for mobility aids, assistive devices and technologies designed for people with disabilities
- set standards or guidelines for access to facilities and services to ensure businesses that provide public services consider access for people with disabilities.

Section 8 of the Charter of *Human Rights and Responsibilities Act 2006* says that:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

These rights are modelled on Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Note: Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 9

> Right to life

Scope of the right

The right to life is primarily concerned with preventing the arbitrary deprivation of life. It can be relevant in situations such as:

- the use of force by public authorities
- the delivery of medical treatment
- the investigation of the conduct of public authorities, particularly when a person dies while in the care of public authorities.

The right to life imposes both positive and negative duties on public authorities – negative duties to refrain from taking someone’s life, and positive duties to take reasonable steps to protect people from a real and immediate risk to life.

The right to life recognises that in some limited circumstances government authorities may have to take life, such as in law enforcement or military activities. This can only be done in accordance with the law and when absolutely necessary.

The right to life applies from the time someone is born and the Charter does not apply to abortion laws in Victoria (section 46).

In other jurisdictions, the right to life has been held not to extend to assisted suicide or the right to choose death (*Pretty v United Kingdom* (2002) 35 EHRR 1).

Under international law, the right to life is one of the rights that cannot be suspended, even in emergency situations. The unlawful and arbitrary deprivation of life is never allowed.

Negative duties

The negative duties imposed by the right to life mean that public authorities must refrain from arbitrarily or intentionally depriving someone of life.

The use of force by government officials that has resulted in a deprivation of life must have been ‘absolutely necessary’ and ‘strictly proportionate’ to the achievement of the permitted purpose. For example, this might occur when the police have to use lethal force to protect the lives of other people in imminent danger.

The European Court of Human Rights has found violations of the right to life because of deficient operational planning and control. For example, in *Gulec v Turkey* (Application No 54/1997/838/1044, 27 July 1998), the Court found that the right to life had been violated when police fired guns to disperse demonstrators and that the unavailability of less lethal means of crowd control was ‘unacceptable’.

Positive duties

The right to life also requires public authorities to take positive steps to protect the right to life.

a. Law and procedures to protect life

This includes a duty on the government to establish a framework of laws, precautions and procedures that will protect life. This means that the government needs to have appropriate criminal laws in place, and that Victoria Police, for example, needs to have appropriate policies, procedures and training setting out when and how police officers can use force.

b. Duty to warn

The right to life also imposes a duty on government to warn people about life-threatening hazards that the government knows or should know about (such as fires or chemical spills).

c. Special duty of care

The government must also take steps to protect the life of people within its care and control (in places such as prisons, detention centres, medical facilities, or state care). For example, the United Nations Human Rights Committee has found that the right to life extends to the provision of health care in prisons (*Fabrikant v Canada*, Communication No 970/2001 (11 November 2003), para 9.3).

d. Health care

The right to life extends to public health care and obliges health authorities to account for resource allocation and where life saving treatment is denied, 'they must explain the priorities that have led them to decline to fund the treatment' *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898 (CA).

e. Duty to investigate

Finally, the right to life includes a procedural obligation to investigate deaths which may have involved an arbitrary deprivation of life involving a public authority. The Explanatory Memorandum to the Charter recognises that the right to life includes 'a procedural obligation to undertake effective coronial investigations'.

According to international jurisprudence (*R (Amin) v Home Secretary* (2004) 1 AC 653) an effective investigation must be: independent, prompt, open to public scrutiny, involve the deceased's near relatives, and where possible establish the cause of death, the identity of the persons involved and whether the use of lethal force was reasonable in the circumstances.

Case example

Coronial Investigation of 29 Level Crossing Deaths, 25 June 2010

In this case, the Victorian Coroners Court considered its ability to 'address systemic and prevention issues' in the investigation of 29 deaths that occurred on level crossings in Victoria. The Coroner held that the interpretive mandate in section 32(1) of the Charter obliges the Coroners Court to interpret all legislation compatibly with human rights. The Court found that the right to life 'requires the Coroner to conduct an inquest that investigates not only the immediate circumstances of the death but also the possibility of systemic failure on the part of the authorities to protect life'.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 9 could be engaged by activities that:

- impact on the way that essential services are provided, or how and whether these services can be accessed in a way that impacts on the welfare or safety of persons (such as medical or welfare services)
- impact on the delivery of medical resources for patients
- impact on procedures for the management of those held in care
- create or amend law, policy or practices permitting law enforcement officers to use force, including the use of weapons in the course of their duties
- create or amend the law withholding or requiring medical treatment, or coronial inquests
- relate to investigation into the conduct of public authorities, especially when people die while in the care of public authorities, for example, deaths in custody or of children in the child protection system.

Section 9 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

Every person has the right to life and has the right not to be arbitrarily deprived of life.

The right to life in the Charter is modelled on Article 6(1) of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 10

> Right to protection from torture and cruel, inhuman or degrading treatment

Scope of the right

Torture generally refers to the deliberate infliction of very severe pain or suffering. This can include acts that cause both physical pain and mental suffering. It is also often interpreted to require the act or authorisation of a public official for purposes such as interrogation, threat, punishment or some other purpose.

Cruel, inhuman or degrading treatment or punishment, is a broader concept than torture. This generally refers to treatment that is less severe or does not meet the technical requirements of the torture definition, but that still involve abuse or humiliation. Examples of cruel, inhuman or degrading treatment include acts carried out by police using excessive force or unduly prolonged detention that causes mental harm. The assessment of whether something falls within this category will depend on the circumstances, including the duration and nature of the treatment and its impact on the victim.

The scope of degrading treatment can include forcing people to perform acts which humiliate them or gravely offend their sensibilities – especially in public – as form of punishment.

Section 10(c) of the Charter also specifically prohibits involuntary scientific or medical experimentation – a prohibition which stems from Nazi experimentation in the Second World War, but remains relevant today, particularly in relation to people giving informed consent to medical procedures. This issue comes up frequently for people with disabilities in our community.

All government authorities and agents (including contractors) have a duty to refrain from inflicting torture or other cruel, inhuman or degrading treatment on individuals. Governments also have a duty to prohibit such acts in the law and to prevent them through effective legislative, administrative, judicial and other measures.

The prohibition on torture and cruel, inhuman or degrading treatment under international law applies at all times and under all circumstances.

Application of the right in Victoria

Conduct covered by this right will often be a criminal offence.

Torture is a crime anywhere in Australia under the Commonwealth *Criminal Code Act 1995* (Division 274). Most other acts of cruel, inhuman or degrading treatment would be covered by laws such as those dealing with assault or causing serious injury (see for example, *Crimes Act 1958* (Vic), sections 16-33).

Public authorities can play a role in promoting, respecting and protecting this right through their laws, policies and programs, and services. They can also support people in our community who have been victims of torture overseas.

Cruel, inhuman or degrading treatment comes up more frequently in our domestic context and can be relevant in situations such as the:

- use of force by police
- conditions in places where people are held in custody
- treatment of people in the care of state authorities – such as prisons, mental health facilities, disability services and schools
- authorisation of medical treatment.

Note: The Victorian Charter does not apply to the Commonwealth Government. So, for example, it does not apply to federal officials running immigration detention centres. Australia's obligations under international human rights law, the *Australian Human Rights Commission Act 1986*, and relevant criminal laws and procedures apply to the Commonwealth Government.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 10 could be engaged by activities that:

- affect the physical or mental well-being of a person in a manner that may cause serious physical or mental pain or suffering, or humiliate or debase a person
- create new powers, modifying or increasing existing powers of police, inspectors or authorised officers or other persons
- remove or restrict the right to complain about service delivery
- remove or restrict the right to complain of mistreatment by a public authority, or limits by those with a role of independent scrutiny to places of detention
- affect the operation of detention facilities and conditions attached to all forms of State care and detention (including access to goods and services, such as medical treatment, while in detention)
- create new types of penalties (including mandatory minimum sentences, and limits to or denial of a service)
- authorise changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals
- introduce or permit corporal punishment by a public authority
- authorise a person to be searched or puts in place procedures for conducting searches
- regulate the treatment of persons located at any site for which a public authority is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service
- allow for prolonged periods of segregation or other particularly harsh prison regimes
- involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint
- define and regulate procedures for obtaining consent to medical treatment and experiments
- regulate medical treatment of persons without their consent
- regulate the conduct of medical or scientific research.

Case examples

Cruel and degrading treatment - *Davies v State of Victoria* [2012] VSC 343 (15 August 2012)

In this case, the Supreme Court of Victoria found that the treatment of a resident with disabilities, who was dragged naked along a hallway in a Community Residential Unit, was cruel and degrading and contrary to section 10(b) of the Charter.

The case was part of an action for wrongful dismissal brought against the Department of Human Services after it terminated the officer's employment following the incident.

It follows a decision by Fair Work Australia to uphold the Department of Human Services' dismissal of two employees after a similar incident.

These decisions highlight the importance of the Charter and Victorian Public Service Code of Conduct in protecting Victorians, and the need for all public sector employees to respect and promote Charter rights in the course of their day-to-day work.

Compulsory medical treatment – *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009)

In this case, Mr Kracke was subject to compulsory medical treatment prescribed by a psychiatrist. The Medical Health Review Board was required to review the psychiatrist's authorisation within a certain time period, but failed to do so. Mr Kracke argued that the orders therefore became invalid and his treatment amounted to a breach of section 10 of the Charter, which specifically prohibits medical treatment without consent. The Tribunal held that, since Mr Kracke was in medical need, the legislation providing for the involuntary treatment was a reasonable limitation on Mr Kracke's rights. It also held that, in this particular case, the right to be free from torture and ill-treatment in section 10 was not engaged because the treatment in question did not reach the minimum level of severity required.

Section 10 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

A person must not be –

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

The protection from torture, and cruel, inhuman or degrading treatment is modelled on Article 7 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 11

> Right to freedom from forced work

Scope of the right

Although slavery and servitude have been against the law across the world for many decades, contemporary forms of slavery and servitude still happen every day. Under international law, the protection from slavery is an absolute right and may not be limited in any circumstances.

Contemporary forms of slavery and servitude include child soldiers, debt bondage, forced labour and forced marriage. There are many people in Victoria who either experience these things or live with the consequences of them every day.

Slavery is when someone exercises ownership rights over another person, as if the person were a piece of property.

Someone in servitude may be directed where to live and may be unable to leave.

Forced labour is when someone is compelled to do work. It brings with it a sense of physical or mental constraint. It may involve the threat of punishment if the person does not perform the work. 'Work' has a broad meaning and can cover all kinds of work or service, not just physical work.

The Charter makes clear that forced labour does not include work a person might be required to do by a court as part of a community service order, work required because of an emergency or work that forms part of normal civil obligations, such as jury duty, compulsory fire service or community labour under social welfare programs like 'work for the dole' schemes.

Case examples

We are fortunate in Victoria that our public authorities are not generally engaging in slavery or forced labour, but the Charter is there to say that government agencies still have a role to play in promoting, respecting and protecting this right – through laws, policies and programs, services and law enforcement activity. This includes things like:

- following up on allegations of human trafficking, slavery and forced marriages
- implementing measures to prevent and protect people from becoming victims
- regulating and overseeing brothels and other areas of the sex industry
- programs to support former child soldiers who have come as refugees to Australia
- working with communities to address the practice of forcing women to marry against their will.

Sex slavery: *R v Wei Tang* [2008] HCA 39

In 2008, the High Court of Australia upheld convictions of Melbourne brothel owner, Wei Tang, for slavery.

The *Commonwealth Criminal Code 1995* expressly prohibits slavery in section 270. This provision was considered by the High Court in this case, where it was alleged that the accused kept as slaves five women who came to Australia from Thailand to work as prostitutes. Each woman entered into an agreement whereby they incurred a debt of approximately \$40,000, which was to be paid off by having sex with men in Australia. On arrival, the women had their passports and return tickets confiscated.

The High Court adopted a relatively broad view of slavery, and noted that a strict definition, which involved the legal ownership of a person, is not tenable given that under Australian law there is no legal basis for owning another person. The Court noted that the notion of extent of control over another person is an important consideration and the control that is necessary is akin to what would occur if a right of ownership of a person is legally possible. Further, consent does not necessarily rule out a state of slavery, and it is possible for slavery to result from a contract.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 11 could be engaged by activities that:

- compel the provision of any labour or the performance of any service under threat of a penalty
- give a minister or public authority the power to employ or direct people to perform work in a vital industry or during a state of emergency
- relate to people trafficking or forced marriage.

Section 11 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of sub-section (2) 'forced or compulsory labour' does not include
 - (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
 - (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or
 - (c) work or service that forms part of normal civil obligations.
- (4) In this section 'court order' includes an order made by a court of another jurisdiction.

This freedom in the Charter is modelled on Article 8 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 12

> Right to freedom of movement

Scope of the right

This right means that people have the right to move freely within Victoria, to enter and leave Victoria, and have the freedom to choose where to live.

The right to freedom of movement developed because of the forced displacement of people in Europe and elsewhere in the early part of the twentieth century, where 'unwanted' people were moved out. This has led to the important rule that governments have to act within the law if they restrict people's freedom of movement.

In Victoria today, this right is relevant in circumstances involving people's access to public spaces, laws relating to trespass, and court orders (such as restricted bail orders) and powers to direct people's movements in times of emergency.

The right to freedom of movement applies only to persons who are 'lawfully within Victoria.' People will not be lawfully in Victoria if they are classified as 'unlawful non-citizens' under the *Migration Act 1958* (Cth) – for example if they have overstayed their visitor's visa, or if they have entered Victoria in defiance of legal restrictions in another jurisdiction (for example a court order not to leave NSW).

Right to move freely within Victoria

The right to move freely within Victoria means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular location. The right includes freedom from physical and procedural impediments, such as the requirement for prior authorisation before entering a public park or participating in a public demonstration in a public place. The right may be engaged where a public authority actively curtails a person's freedom of movement (for example through 'move on' police powers, orders excluding adolescents from a licensed premises, orders made under the *Mental Health Act 1986* (Vic) or orders that subject a person to strict surveillance or reporting obligations before or when moving.

Right to enter and leave Victoria

The right to be free to enter and leave the state is also protected by section 92 of the Australian Constitution, which guarantees freedom of 'interstate intercourse', including the movement of both goods and people. This was confirmed by the High Court in *Nationwide News P/L v Wills* [1992] HCA 46. Restrictions on the right to enter and leave Victoria must be proportionate to a legitimate and sufficiently important government aim under both the Charter and the Constitution.

Right to choose where to live

The right to choose where to live may be engaged by laws relating to trespass or protected areas such as national parks. It may also be affected by court orders or orders under statutory regimes such as the *Mental Health Act 1986* (Vic) to direct where people on bail or under supervision may reside.

When can freedom of movement be limited?

The Explanatory Memorandum to the Charter and Victorian and international case law provide examples of reasonable restrictions on freedom of movement, including lawful detention, guardianship orders, involuntary treatment orders, Parole Board orders, family violence intervention orders, residence conditions on persons suspected of terrorist activities, and restrictions on leaving the country where judicial proceedings are pending.

Does the right to freedom of movement mean I should get free public transport?

No. The Explanatory Memorandum for the Charter states that the right to freedom of movement 'should be observed through government restraint...[and] does not require the provision of positive steps by a public transport operator to promote free movement'. This clarifies that demands can not be made on public transport operators for the provision of a particular service and charging reasonable fees for public transport was not intended to be an unreasonable limitation on the freedom of movement set out in the Charter.

Case examples

In Victoria, the right to freedom of movement has typically been raised in cases about court orders restricting movement. For example:

- A supervision order placed on a convicted person who had already served his term of imprisonment was found to be a reasonable limitation on his freedom of movement because of the risk of him committing another offence (see *Secretary, Department of Justice v AB* [2009] VCC 1132 (28 August 2009)).
- A man with a mild intellectual disability was subject to an order which only allowed him to leave his psychiatric facility if accompanied by staff members. The Tribunal concluded that the only less restrictive option – voluntary treatment – was not appropriate given his history of violent outbursts, and so upheld the order (see *AC (Guardianship)* [2009] VCAT 1186 (8 July 2009) or *Antunovic v Dawson & Anor* [2010] VSC 377 (25 August 2010)).
- A mental health service wanted to sell a man's house to ensure he stayed in a care facility, because he allegedly could not manage his own finances and refused to take his medication. The man objected on the basis that it infringed upon his rights to privacy and freedom of movement (including his right to choose where he lived). The Supreme Court concluded that where a person is in mental health detention and wishes to return home, taking steps to transfer management and control of a person's home to an administrator in order to sell that home interferes with a person's freedom to choose where to live (see *PJB v Melbourne Health and State Trustees Ltd* [2011] VSC 327 (19 July 2011)).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 12 could be engaged by activities that:

- limit the ability of a person to choose where to live in Victoria
- restrict the movement of people as part of the criminal process, for example, the imposition of bail conditions
- allow for an intervention order against a person, or enables their detention
- propose surveillance of an individual
- empower public authorities to restrict people's movement based on national security considerations
- compel someone to provide information (for example, a subpoena)
- regulate access to land based on quarantine considerations, or eligibility requirements permitting exclusion from public land or premises
- affect the conduct of public protests.

Section 12 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

This freedom in the Charter is modelled on Article 12 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 13

> Right to privacy and reputation

Scope of the right

Under international law, the right to privacy has been interpreted as applying in a variety of different circumstances. It has been defined widely as 'the right to be left alone' (the right to live free from interference), and so includes the right to autonomy.

The right to privacy under section 13 of the Charter protects people in Victoria from 'unlawful' interference with their privacy – this means that no interference can take place except in cases authorised by law.

The term 'arbitrary interference' in the right to privacy can extend to lawful interference. Arbitrary interference in someone's private or family life is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need. The inclusion of the concept of arbitrariness in the Charter right to privacy ensures that even lawful interference should be in accordance with the provisions, aims and objectives of the Charter and should be reasonable in the particular circumstances.

The term 'family' in the right to privacy should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of 'family' in Australian society. For example, a 'family' could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term 'family' could also include extended family in some circumstances. For example, where there are kinship ties to extended family, or where someone's culture or ethnicity gives their extended family unit particular significance for them.

Case examples

The diversity of international cases about privacy, family life and reputation demonstrates the breadth of these rights. Examples include:

- *Toonen v Australia*, a prominent case in which the UN Human Rights Committee held that the criminalisation of homosexuality under Tasmanian law was an unlawful incursion on a person's right to privacy under the ICCPR (UN Doc CCPR/C/50/D/488/1992)
- *Sayadi & Vinck v Belgium*, in which the UN Human Rights Committee found that Belgium's listing of two innocent people on the Security Council terrorist watch list constituted an unjustified attack on their honour and/or reputation (CCPR/C/94/D/1472/2006).

In Victoria, a number of cases have dealt with rights under section 13 of the Charter, including:

- *WK v The Queen* [2011] VSCA 345, in which the court held that privacy considerations had to give way to police surveillance practices authorised by other legislation
- *Swancom Pty Ltd v Yarra CC* [2009] VCAT 923, in which the Victorian Civil and Administrative Tribunal held that a Council's refusal to approve extension of trading hours and increase patron numbers for a pub was justified because the council had to consider (amongst other things) residents' right to privacy under section 13 of the Charter
- *AC (Guardianship)* [2009] VCAT 1186, in which the Victorian Civil and Administrative Tribunal held that it was reasonable to limit a mentally-ill person's right to privacy (and freedom of movement) if he presented a risk to the public
- *Michelle Dawson v Transport Accident Commission* [2010] VCAT 796, which held that the right to freedom from interference with privacy and family life does not extend to a right to child care benefits

- *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472, in which the Victorian Civil and Administrative Tribunal considered the rights to privacy, freedom of expression and peaceful assembly in the Charter and found that the police retention of protest footage was authorised by the *Information Privacy Act 2000* and that there was no breach of the right to privacy.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 13 could be engaged by activities that:

- involve surveillance of persons for any purpose (such as closed-circuit television)
- involve collection, storage, use or publication of personal information and how that information is accessed, used or disclosed
- regulate information held on a public register
- restrict access by people to their own personal information
- provide for sharing of personal information across or within agencies
- involve powers of entry, search, seizure, confiscation or forfeiture (including entry into a controlled environment)
- allow publication of personal information (for example, results of surveillance, medical tests, electoral roll)
- provide for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced gynaecological or other medical examination; or corporal punishment
- provide for treatment or testing of a patient without his or her consent
- involve a professional duty of confidentiality
- change or create any confidentiality provisions or secrecy provisions relating to personal information
- provide for mandatory disclosure or reporting of information (including disclosure of convictions, injury or illness), or by professionals reporting abuse, for example, doctors regarding patients or teachers regarding students
- regulate a person's name, private sexual behaviour, sexual orientation or gender identification
- involve the interception, censorship, monitoring or other regulation of postal articles and all other communications
- relate to handling personal information for research or statistics
- recognise or fail to give legal recognition to close or enduring personal relationships
- provide for the removal of children from a family unit or a family intervention order
- regulate tenancy or eviction
- regulate a state-run care facility or mental health service
- regulate standards, consultation and procedures operating in respect of public housing
- authorise compulsory acquisition of a home or regulate planning or environmental matters that may affect a person's home.

Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

A person has the right –

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

(b) not to have his or her reputation unlawfully attacked.

The right to privacy is modelled on Article 17 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 14

> Right to freedom of thought, conscience, religion and belief

Scope of the right

This right is divided into a freedom of personal autonomy (a freedom to think and believe whatever you choose) and a freedom of manifestation (to demonstrate your thoughts or beliefs publicly).

The first kind of freedom has been held to be absolute at international law and can not be limited in any circumstances (see UN Human Rights Committee, General Comment 22). However, it is accepted that the freedom to manifest your beliefs externally may be limited – especially where it has the potential to have a negative impact on others.

The kinds of manifestations which would be protected by section 14(1)(b) include things like:

- organised religious rituals and ceremonies
- building places of worship or religious teaching
- publishing and dissemination of religious tracts and texts
- displaying symbols or wearing particular kinds of clothing
- observing holidays and days of rest
- observing a particular diet or avoiding certain food products.

Case examples

***Hobsons Bay City Council & Anor (Anti-Discrimination Exemption)* [2009] VCAT 1198 (17 July 2009)**

In this case, the Victorian Civil and Administrative Tribunal considered whether to grant an exemption to the *Equal Opportunity Act 1995* to allow women-only swimming sessions. The Tribunal noted that the rights of women to practice their culture and religion where relevant to this decision as 'it is the exercise of those rights to practice aspects of their culture and religion which makes them unable to swim at the Centre while men are present and so means that use of the pool area is currently barred

to them'. The Tribunal granted the exemption.

In international cases considering similar provisions, the right has been found to protect:

- religious education that provides a pluralistic view of religion and does not proselytise
- a right to a certain diet in State-run institutions (for example, vegetarian, Halal or Kosher), and
- a student's right to wear a Sikh kirpan (ceremonial dagger) under his clothes at school.

On the other hand, the right has been found not to protect:

- a Canadian Sikh railway worker's preference to refuse to wear protective headgear due to its incompatibility with his turban (it was found to be a reasonable safety measure)
- a tax evader who claimed that he shouldn't have to pay tax if it went to funding the military (since he was a conscientious objector)
- another conscientious objector who was charged with the criminal offence of insubordination because he objected to the loss of autonomy experienced during military service
- private schools in South Africa which claimed it was consistent with their Christian beliefs to impose physical discipline on students
- fox-hunters in England whose 'belief' in the sport did not go beyond a desire to hunt for recreation.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 14 could be engaged by activities that:

- promote, restrict or interfere with a particular religion or set of beliefs
- require a person to disclose his or her religion or belief
- affect an individual's ability to adhere to his or her religion or belief
- impinge upon or disadvantage a person because of the person's opinions, thoughts or beliefs
- attempt to regulate conduct that will affect some aspect of a person's worship, observance, practice or teaching of his or her religion or belief
- subject conduct that is required or encouraged by an individual's religion or beliefs to criminal penalties or fines
- restrict the capacity for those under state control (for example, prisoners) to comply with the requirements of their religion
- compel certain acts that may be inconsistent with a religion or set of beliefs
- restrict the capacity for those in the care or control of a public authority to comply with the requirements of their religion
- set dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress
- impose requirements as a condition of receiving a benefit that prevents a person from adhering to his or her religion or belief
- require students to learn about particular religions or beliefs or to be taught materials that might have the effect of undermining their religious beliefs
- regulate planning or land use that may make it difficult to use or establish places of religious worship.

Section 14 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including –
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

The freedom of thought, conscience, religion and belief is modelled on Article 18 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 15

> Right to freedom of expression

Scope of the right

The right to freedom of expression protects the right of people to hold an opinion and to seek, receive and impart information and ideas. The right to freedom of expression comes with responsibilities. The Government can lawfully restrict this right if the restriction is necessary to protect the rights of others or to protect public order, public health, public morality or national security.

Right to hold an opinion

Section 15 of the Charter says that every person has a right to hold an opinion without interference. The UN Human Rights Committee has clarified that this means that no person should be subject to discrimination or victimisation because of any actual or perceived opinions that she or he holds (see the Committee's General Comment 34 of 2011).

In addition, no one should be coerced into holding or abandoning an opinion. Under international law, the right to hold an opinion is an absolute right and is not subject to any limitations.

Right to freedom of expression

Every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria.

Expression is a broad concept that has been held by courts to encompass 'every form of subjective idea and opinion capable of transmission to others' and 'any act which is capable of conveying some kind of meaning'. This includes political, cultural and artistic expression; news and information; commercial expression and advertising; audio-visual, electronic and internet-based modes of expression, as well as spoken, written and sign language. Examples include news, posters, pamphlets, banners, books, dress, legal submissions, teaching, religious discourse and human rights discussion.

The right to freedom of expression protects

almost all mediums of expression, provided the expression conveys or attempts to convey a meaning. Whether an act conveys a meaning is judged by its impact on reasonable members of the public who are exposed to it, without reference to the purpose of the person who expressed it. In *Magee v Delaney* [2012] VSC 407 the Supreme Court of Victoria held that the act of painting over advertising posters on public bus shelters was capable of conveying a meaning (of protest against the presence of advertisements or the contents of a particular advertisement).

However not all forms of expression are protected. In *Magee v Delaney*, although painting over the advertising posters was expressive conduct, it was not a protected expression because it was delivered in the form of criminal damage to a third party's property. Violence is also not a protected expression. This means that while the concept of expression is a very broad one, the way people can exercise the freedom of expression can be limited (see *Magee v Delaney* [2012] VSC 407 and *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927).

Hate speech and pornography may constitute expression, as even 'repugnant' expression is still expression (cases on the first amendment to the US Constitution in particular illustrate this point – see for example, *Miller v California* (1973) 413 US 15. See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9). However, such expression may not be protected under the Charter because under section 15(3) the right to freedom of expression can be limited if it is necessary to protect the rights and reputation of others.

Communication of a commercial nature may be considered 'expression', although the right to freedom of expression is conferred on human beings and not corporations. Commercial expression has been found to be less important than social or political expression, and limitations on it have been more easily justified (see for example, *Campbell v MGN Ltd* [2004] 2 AC 457).

The right to seek and receive information

The right to freedom of expression also incorporates a right to freedom of information. In particular, it includes a positive right to access government-held information (*XYZ v Victoria Police* [2010] VCAT 255). However, the right to receive information is not absolute, and may be subject to objective, proportionate and reasonable limitations. In particular, information may be withheld for any of the reasons listed in section 15(3) 'to respect the rights and reputation of other persons' or 'for the protection of national security, public order, public health or public morality'.

Limiting freedom of expression

Freedom of expression is subject to a number of internal exceptions set out in subsection 15(3), where the limit is lawful and reasonably necessary for the purpose of respecting the rights and reputation of others or for the protection of national security, public order, public health or public morality.

A limitation is 'reasonably necessary' when it has a legitimate aim and when it is proportionate to that aim. In this case, a 'legitimate aim' consists of one of the purposes listed above. To be proportionate, the limitation must be appropriate for achieving its aim and must be the least restrictive means reasonably available.

When considering similar provisions, the High Court of England and Wales has found that an injunction sought by an animal testing laboratory to ban protestors from wearing facemasks and costumes splattered with blood and from holding banners accusing employees of murdering, torturing or abusing animals, was not a reasonable restriction on freedom of expression (see *Novartis Pharmaceuticals UK v Stop Huntingdon Animal Cruelty (SHAC)* [2009] EWHC 2716). In considering what forms of expression may constitute a 'protest', the Court acknowledged that determining the difference between protest and harassment can be a 'difficult question of degree'.

In another case, the England Court of Appeal found that an injunction by the Mayor to remove a group of long-term protestors from a public space did not violate their right to freedom of expression. The 'Occupy' campaign protestors had set up a protest camp of up to 100 tents at the foot of St Pauls Cathedral for over a month and during this time the camp had steadily grown in numbers and caused significant damage to the grounds. In reaching its decision, the Court had to determine whether the interference with the right to freedom of expression of the protestors was necessary to meet a pressing social need. The Court found that the prolonged and indefinite occupation by

the protestors was preventing the public from accessing the space, including others who also wished to protest, and was putting at risk the health of those on and around the grounds. Hence, the limitation on freedom of expression was found to be 'wholly proportionate' (see *Samede v City of London* [2012] EWCA Civ 160).

Case examples

Expression that damages third party property not protected – *Magee v Delaney* [2012] VSC 407

In this case, Mr Magee had painted over an advertisement in a bus shelter outside the County Court as a protest against the global advertising industry. He was charged with the offence of damaging property and possessing materials for the purpose of damaging property. He was convicted by a magistrate on both charges. Mr Magee appealed this decision, asking the Supreme Court to consider the interaction of the criminal charges with his right to freedom of expression under the Charter. The Supreme Court found that the painting over of the advertisement was an expression, in that it was capable of imparting information or ideas, but that damage to a third party's property or a threat of such damage is not protected. It found the right to freedom of expression is subject to lawful restrictions reasonably necessary to respect the property rights of other persons (irrespective of whether those persons are human beings, companies, government bodies or other types of legal entities). The Court also held that the criminal offence of intentionally causing damage to property of another without lawful excuse was a lawful restriction on the right to freedom of expression for the protection of public order.

Protesting in public spaces – *Victoria Police v Anderson & Ors* (Magistrates Court, 23 July 2012)

In this case, protestors outside Max Brenner's Chocolate Bar in the QV shopping complex in Melbourne were charged with trespassing after QV management and Victoria Police asked them to leave and they refused. The Magistrates' Court dismissed the trespass charges. It found that the protestors had entered the square for the purpose of a political demonstration and had a lawful right to do so. The Court said that to find the protestors, who were demonstrating their disapproval of the political and social interests of the store, were trespassing would not be compatible with their right to freedom of expression. Section 15(3) of the Charter does allow for restrictions on the right to freedom of expression for the protection of public order, but in this case the extent of the inconvenience caused to the public by the protest was found to be not so great as to warrant a restriction on their right to express their

political views. While the protesters may have caused some inconvenience to members of the public, their protest did not pose any threat to public order.

Restrictions on publications to ensure a fair trial – *General Television Corporation Pty Ltd v DPP & Anor* [2008] VSCA 49

In this appeal, the question was whether a trial judge's suppression order (to stop publication of details of the trial) was justified. It concerned the broadcast of the television series *Underbelly*, before the conclusion of the criminal trial of one of the people portrayed in the show. It was found that the broadcast would pose a serious risk to the fairness of the trial in question and that the interests of freedom of expression should be temporarily limited to give effect to the right to a fair hearing.

Restrictions to protect consumers – *Noone, Director of Consumer Affairs v Operation Smile (Australia) Inc* [2012] VSCA 91

This case concerned claims made by operators of a clinic on their website regarding the effectiveness of the alternative treatments it offered for cancer and other serious illnesses. Consumer Affairs Victoria brought proceedings against the clinic under the *Fair Trading Act 1999* on the basis that the statements were misleading and deceptive in representing their effectiveness in treating cancer. While the trial judge did not consider the statements to be misleading and deceptive, the Court of Appeal held that they were. The operators of the clinic argued that this finding would be incompatible with their right to freedom of expression, but the Court of Appeal rejected this. The Court held that the statutory protection against misleading and deceptive conduct is compatible with the right to freedom of expression because the restrictions it places on expression are reasonably necessary to respect the rights of other persons.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 15 could be engaged by activities that:

- regulate the manner, content and format of any public expression (for example, the contents of a speech, publication, broadcast, display or promotion). Examples could include requiring prior approval for public protest or restricting where protest activity can take place
- censor materials or require that they be reviewed or approved before being published

- compel someone to provide information (for example, a subpoena)
- impose a dress code
- regulate or restrict an individual's access to information (including access to material on the internet)
- attach criminal or civil liability to publications of opinions or information.

Section 15 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Every person has the right to hold an opinion without interference.**
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether –**
 - (a) orally; or**
 - (b) in writing; or**
 - (c) in print; or**
 - (d) by way of art; or**
 - (e) in another medium chosen by him or her.**
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –**
 - (a) to respect the rights and reputation of other persons; or**
 - (b) for the protection of national security, public order, public health or public morality.**

The right to freedom of expression in the Charter is modelled on Article 19 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 16

> Right to peaceful assembly and freedom of association

Scope of the right

The right to peaceful assembly

The right to peaceful assembly is the right of individuals to gather for a common purpose or to pursue common goals, such as protesting or meeting. The right to peaceful assembly includes gatherings in both public or in private, but does not include 'assemblies' of just one person.

Although the primary or original purpose of the right to peaceful assembly was the protection of peaceful demonstration and participation in democratic processes, it has been recognised that this right may extend to assemblies that are of a social, cultural, religious, charitable or professional nature. For example, in *Countryside Alliance v the UK* [2009] ECHR 2068, the European Court of Human Rights stated that to confine the right to peaceful assembly only to the political sphere would be an 'unacceptably narrow interpretation' of the right.

The right to peaceful assembly does not guarantee the use of a particular forum. For example, when considering a similar provision in *Appleby v United Kingdom* [2003] ECHR 222, the European Court of Human Rights found that not permitting an environmental group to petition in a privately owned shopping centre did not infringe on their right to peaceful assembly as they had the option of petitioning elsewhere. The Court stated that the right to peaceful assembly 'does not bestow any freedom of forum for the exercise of that right'.

In addition, the need to apply for authorisation to assemble also 'does not normally encroach on the essence of the right', especially if it allows authorities to ensure the peaceful nature of the meeting.¹ Any such restrictions, however, need to be proportionate. For example, in *Bukta v Hungary* [2007] ECHR 25691/04, the organisers were unable to comply with the three-day notice requirement because the

demonstration was organised in response to the Prime Minister's announcement that he would be attending a particular function the following day. The Court held that dispersing the peaceful assembly solely based on the inability to provide sufficient notice was a disproportionate restriction on the right to peaceful assembly.

The freedom of association

The right to freedom of association is the right to associate with others for the purpose of protecting common interests. These interests may be economic, professional, political, cultural or recreational.

The right to freedom of association also includes the right not to join an association. In *Young, James and Webster v The UK* [1981] ECHR 4, the European Court of Human Rights stated that the notion of 'freedom' implies the exercise of choice and that this 'negative freedom of association' was to protect individuals from being forced to associate with groups with whom she or he does not agree.

The right to freedom of association does not give the right to join any association. Associations have the right to administer their own affairs, to set their rules of membership, and to decide upon admission and expulsion from their association (*Cheall v United Kingdom* (1985) 42 Eur Comm HR 178).

In addition, not all organisations constitute 'associations' and the right to freedom of association will not be engaged where there is no 'association'. For example, professional organisations which require compulsory membership in order for an individual to practice within the profession are not considered 'associations'. In *Le Compte v Belgium* [1981] ECHR 3, the Court held that the *Ordre des médecins* (a body regulating the medical profession) was not an 'association' because it was founded by the legislature (and not individuals)

¹ *Rassemblement Jurassien and Unite Jurassienne v Switzerland* (1979) 17 Eur Comm HR 108 [3]

and served a public function to safeguard the health of the population by keeping a register of all medical practitioners. The Court differentiated this body from several associations that had been formed to protect the interests of medical practitioners and to which the right to freedom of association did apply.

The Explanatory Memorandum to the Charter gives the example of ensuring the safety and security of prison facilities as a justifiable reason to limit the right to peaceful assembly. Laws dealing with criminal organisations are another example of limitations that Parliament has placed on the freedom of association to protect the rights of other people in the community.

Case example

Reasonable limitations - Victorian Electoral Commission (Anti-discrimination Exemption) [2009] VCAT 2191 (30 September 2009)

In this matter, the Victorian Electoral Commission (VEC) was granted an exemption from complying with the *Equal Opportunity Act 1995* (Vic). The purpose of the exemption was to enable the VEC to consider, amongst other things, information about political party or lobby group membership of potential employees.

Rights to equality; privacy; participation in public life; freedom of expression; freedom of association; freedom of thought, conscience, religion and belief were relevant to the application by the VEC. It was held that the exemption's purpose was an important public purpose, as it is vital to conducting elections in an impartial and unbiased manner. The exemption was granted as a reasonable limitation on these rights.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 16 could be engaged by activities that:

- regulate membership of groups or associations
- limit the ability of a person or group of people to exercise their right to peacefully protest or to come together for a common purpose
- treat people differently on the basis of their membership of a group or association, for example, trade unions
- create disincentives or confers preferences for membership in a group or association (including a disclosure requirement)
- prohibit membership in a group or association, for example a motorcycle gang.

Section 16 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Every person has the right of peaceful assembly.**
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.**

Section 16 is modelled on articles 22 and 23 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 17

> Right to protection of families and children

Scope of the right

The explanatory material accompanying the Charter says that Parliament intended that the term 'families' be given a meaning that recognises the many different types of families that live in Victoria, all of whom are entitled to protection.

The term 'family' should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of 'family' in Australian society. For example, a 'family' could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term 'family' could also include extended family in some circumstances: for example, where there are kinship ties to extended family, or where someone's culture or ethnicity gives their extended family unit particular significance for them.

Protection of families

The Charter says that families must be protected by society and the State.

This right is also supported by the right to privacy in section 13 of the Charter which prohibits a public authority from unlawfully or arbitrarily interfering with a person's family.

Legislative provisions that allow a child to be removed from a family unit need to be considered in light of sections 17(1), 17(2) and 13 of the Charter. While family unity is an important part of human rights, different rights may need to be taken into account. For example, subsection 17(1) might be qualified by the right to protection of children in subsection 17(2), if a child needs to be removed from a situation of family violence.

Protection of children

Subsection 17(2) of the Charter recognises that children are entitled to special protection. It is based on the recognition of children's vulnerability because of their age. A child is defined in section 3 of the Charter as a person under 18 years of age.

Under the Charter, children are entitled to the enjoyment of all of the rights it contains (except where there is an eligibility criterion that they cannot satisfy, for example the right to vote under section 18(2)).

Under this right, the Government must adopt special measures to protect children, and the best interests of the child must be taken into account in all actions affecting a child.

What will be in each child's 'best interests' will vary according to their personal circumstances. To consider these circumstances, a child should have the opportunity to express her or his views in matters concerning them and for their views to be taken into account. Human rights recognise children as rights-bearers whose capacity to express their interests evolves with increasing maturity.

Case examples

Promoting flexible decision-making for the elderly and vulnerable

A woman who was the sole carer for her elderly parents (one of whom had recently suffered a stroke and the other had dementia) was issued with a notice from the local council that the accommodation she had arranged for her parents was contrary to planning approvals. The woman's legal representative wrote to the council asking them to consider the right to privacy and family life. The council granted the woman extra time to make alternative arrangements for her parents.

Flexibility in the way children give evidence – DPP v Brian Pottinger ([2010] VCC unreported)

In this case, the County Court was asked to give priority to the Charter rights of child complainants in criminal proceedings when interpreting and applying a provision in the *Criminal Procedure Act 2007*.

The Act provides that the complainants' evidence may be given at a special hearing and recorded as an audiovisual recording in sexual offence and assault cases where, at the time at which the proceeding commenced, the complainant was either a child (under 18) or has a cognitive impairment. The hearing must occur within three months of the date the accused is committed for trial, unless exceptional circumstances exist.

In this case, the Court was unable to comply with the three-month timetable for a special hearing as the required court resources were unavailable.

The Director of Public Prosecutions made an application before the Court for an extension of time on account of exceptional circumstances and asked the Court to take into account the Charter rights of the child complainants when it interpreted what 'exceptional circumstances' meant.

The Court found that exceptional circumstances did exist, having regard to the Charter among other factors, and the child complainants were able to provide their evidence by special hearing.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 17 could be engaged by activities that:

- affect the law regarding close or enduring personal relationships or fail to give legal recognition to these relationships
- affect any aspect of care of children, including children cared for by parents, guardians, informal carers, children in out-of-home care, children with a disability, parents or carers with a disability
- relate to treatment of children in the criminal process
- relate to family violence
- affect adoption or surrogacy
- regulate the obligations of family members towards each other, including parents and guardians towards children

- provide for the separation and removal of children from parents or guardians or other adults responsible for their care
- regulate family contact for those in the care of public authorities or enables intervention orders to be granted between family members
- affect the welfare of children within the family or state care
- regulate family contact of prisoners or others in involuntary state care
- create a regime for giving children access to information about biological parents when the child has been adopted or born using assisted reproductive technology
- deal with the division of estates on intestacy.

Section 17 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.**
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.**

This right in the Charter is modelled on Articles 23(1) and 24(1) of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 18

> Right to take part in public life

Scope of the right

Section 18 specifies three different but overlapping rights.

Every person in Victoria has the right to participate in the conduct of public affairs, but only 'eligible' persons have the right to vote and be elected at elections, and to access the public service and public office.

The Charter does not define the meaning of 'eligible,' but criteria for being eligible to participate in different aspects of public life are set out in state and federal legislation. For example, the *Constitution Act 1975* (Vic) states that to be eligible to vote in Victoria, a person must be an Australian citizen over the age of 18 and sets out criteria that may disqualify a person from voting. The eligibility to vote also includes residency requirements set out in the *Electoral Act 2002* (Vic).

The *Constitution Act 1975* (Vic) sets out the criteria for being eligible for election to the Legislative Assembly or the Legislative Council.

The UN Human Rights Committee (HRC) has commented that any limitations placed on the right to take part in public life must be based on 'objective and reasonable criteria'. The High Court of Australia recently supported this approach when it struck down a piece of legislation that prohibited all prisoners from voting. In *Roach v Electoral Commissioner* [2006] HCA 43, the Court found that the blanket prohibition on prisoner voting was not 'proportionate,' and that disqualification must be based on 'substantial' reasons, such as conviction of a serious criminal offence.

Note: Participation in 'public life' means participation in the political affairs and public administration of the State. The word 'public' life in this context does not mean 'community' life or 'social' life. Participation in one's community may engage other rights under the Charter such as the right to freedom of movement (section 12) or equality rights (section 8). The right to take part in public life does not mean the right to access public space through the use of public transport.

What does 'participate in the conduct of public affairs' cover?

Section 18 outlines the right of every person in Victoria to participate in the conduct of public affairs. The Explanatory Memorandum states that this clause is to ensure that every person has the **opportunity** to participate in public life and that every person is able to participate without discrimination.

Participation in public affairs may be direct or indirect. 'Public affairs' is not defined in the Charter, but the UN Human Rights Committee (HRC) has described public affairs as a 'broad concept which relates to the exercise of political power...[and] covers all aspects of public administration, and the formulation and implementation of policy.'

Examples of participating in public life may include:

- being a member of a legislative body or holding executive office
- deciding on public issues through referendum or other electoral processes
- taking part in popular assemblies to make decisions about local issues
- being part of a community consultation with government
- being able to attend and ask questions at a local council meeting
- participating in public debate and dialogue with representatives (either as an individual or as part of an organisation).

Case example

Community advocacy and engagement with council

One of the goals of a local council's Action Plan was to ensure that '[a]ll residents have the opportunity to participate equally in the planning and consultation processes which shape our community'.

However, when a local man with a disability wanted to attend a council meeting to pose a question to councillors about the discriminatory nature of one of the council's local laws, he found no services available to help him attend.

He was a local resident, ratepayer and community advocate for people with disabilities. He also has a disability which meant he needed assistance to attend Council meetings in the evening.

The man was concerned about public question time procedures for council requiring all questions to be submitted in writing. He raised the question of whether the local law requiring this was consistent with the Charter, in that it discriminated against residents who rely on other forms of communication. The requirement that all questions are put in writing means that residents who cannot write have no chance of asking questions during council meetings. This effectively excludes them from participating equally in the consultation processes shaping the council area.

In response to the concerns raised, the council helped the resident attend a council meeting by providing carer support, a hearing loop and the cost of a taxi. In response to the issues of procedure he was raising, the council reiterated its strong commitment to ensuring that everyone in the community is able to participate in the affairs of the council and said it would consider ways the council could facilitate access to meetings and question time by persons with disabilities.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 18 could be engaged by activities that:

- limit the ability to take part in municipal and parliamentary elections
- require individuals to meet certain conditions in order to be eligible to participate in municipal and parliamentary elections
- regulate how individuals vote in elections (for example, the method of voting)
- regulate eligibility and access to employment in the public service or appointment to public office
- establish requirements for membership of public bodies
- regulate the conduct of elections and the electoral process
- regulate the suspension and conduct of local government
- regulate the suspension and removal of statutory office holders
- regulate electoral processes including funding of and expenditure by political parties and the drawing of electoral boundaries
- affect communication of information and ideas about public and political issues.

Section 18 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination
 - (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the Victorian public service and public office.

The right to take part in public life is modelled on Article 25 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 19

> Right to protection of cultural rights

Scope of the right

The right to culture provides for people to practise and maintain shared traditions and activities. It allows for those belonging to minority groups to enjoy their own culture, to profess and practise their own religion and to use their own language (in private and in public), as well as to participate effectively in cultural life.

The second part of this section focuses on the rights of Aboriginal persons regarding their cultural institutions, ancestral lands, natural resources and traditional knowledge.

This right puts an onus on public authorities to adopt measures for the protection and promotion of cultural diversity, enabling people from diverse communities to engage freely and without discrimination in their own cultural practices and take appropriate measures or develop programs to support minorities or other communities, including migrant communities, in their efforts to preserve their culture.

Case examples

- A local council considered cultural rights when making a decision about the use of community facilities for religious worship, and decided to extend the hours of availability to accommodate a range of different faith-groups
- The cultural rights of Aboriginal Victorians were taken into account in the development of the *Traditional Owner Settlement Act 2010* and agreement-making between the state and traditional owner groups
- Cultural rights were a key theme in the Wulgunggo Ngalu Learning Place, a residential diversion program for adult Koori males. The program was established to help address the over-representation of Aboriginal people in the state's criminal justice system. The focus on cultural rights recognised the importance of residents connecting or reconnecting with their culture.

Some examples of where cultural rights have been raised in international cases include:

- a Sikh man being asked to bare his head for an ID photo (*Singh v France*, UN Doc CCPR/C/D/102/18767/2009)
- a man from a Russian-speaking minority in Latvia was forced to spell his name a certain way on official documents (*Raihman v Latvia*, UN Doc CCPR/C/100/D/1621/2007)
- a Peruvian alpaca farmer whose traditional way of life was threatened by government waterway diversions (*Poma v Peru*, CCPR/C/95/D/1457/2006)
- where traditional reindeer husbandry in Finland was threatened by logging permission (*Länsman v Finland*, CCPR/C/83/D/1023/2001)
- when a Canadian of indigenous background was denied the right to live on a reservation (*Lovelace v Canada*, CCPR/C/13/D/24/1977).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 19 could be engaged by activities that:

- limit the observance of any religious practices
- address discrimination based on attributes including race or religion
- restrict the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group
- limit or prohibit communication in languages other than English, including through the provision of information
- prevent people using their language in community with others

- limit the ability of Aboriginal persons or members of an ethnic group to take part in a cultural practice, or otherwise interferes with their distinct cultural practices
- regulate the conduct of commercial activities on the traditional lands of Aboriginal persons
- restrict the provision of services or trade on religious holidays
- regulate access to public spaces including libraries, museums, sports facilities
- regulate cultural or religious practices around the provision of secular public education
- may interfere with the relationship between Aboriginal people and land, water and resources
- impose or coerce individuals to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire
- regulate traditional medical practices
- license or provide a restriction on the preparation and serving of food.

Section 19 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language**
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –**
 - (a) to enjoy their identity and culture; and**
 - (b) to maintain and use their language; and**
 - (c) to maintain their kinship ties; and**
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.**

This section is based on Article 27 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980. However, unlike Article 27, section 19 is not limited to minority groups. Section 19 also specifically highlights Indigenous cultural rights, which have been recognised as distinct in more recent human rights instruments and cases.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 20

> Property rights

Scope of the right

Section 20 is relevant when three criteria are met.

1. The interest interfered with is 'property'
2. The interference is a 'deprivation' of property
3. The deprivation is not 'in accordance with the law'.

The term 'property' is not defined in the Charter. It includes both real and personal property and any right or interest regarded as property under Victorian law. For example, the following will be included under section 20:

- personal possessions
- land
- contractual rights
- leases
- shares
- patents.

Property could also apply to non-traditional and less formal rights in relation to property, such as a licence to enter or occupy land and the right to enjoy uninterrupted possession of land.

Under this right, the government must refrain from depriving people of their property otherwise than in accordance with the law.

Section 20 may also give rise to a positive obligation on public authorities to take action to prevent an unlawful deprivation of a person's property by someone else.

Section 20 does not provide a right to compensation.

This provision is distinct from the provision in the Australian Constitution, which provides property guarantees in relation to property acquired under federal law.

Case example

Planning decisions in accordance with the law – *Swancom Pty Ltd v Yarra CC* [2009] VCAT 923

In this case, the Victorian Civil and Administrative Tribunal considered the property rights in section 20 of the Charter.

This matter involved an application by Swancom (operators of the Corner Hotel) to amend an existing planning permit to extend trading hours in its beer garden from 11.30pm until 3am, and to increase patron numbers from 750 to 1300.

The Tribunal held that the application to extend hours and patron numbers should fail, after balancing various competing policies and objectives against considerations of net community benefit and sustainable development. The Tribunal agreed with the local council that they were bound by the Charter in exercising their review jurisdiction on planning applications. The Tribunal held that whilst the refusal of the application might arguably interfere with Swancom's broader property rights, section 20 of the Charter only provides that a person must not be deprived of property 'other than in accordance with law'. The Tribunal was of the opinion that the imposition of reasonable restrictions on the use or development of the land under the regulatory framework is in accordance with the law, and therefore is not unlawful or arbitrary.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 20 could be engaged by activities that:

- provide for acquisition, seizure or forfeiture of a person's property under civil or criminal law
- confer on a public authority a right of access to private property

- limit or terminate property rights (for example, by legislation which establishes a limitation period)
- restrict the use of private property (for example, under planning laws)
- restrict or regulate established patterns of access (especially for commercial or business purposes) to public property
- implement government control over its own property (for example, resumption of land)
- impound or suspend registration of a motor vehicle.

Section 20 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

A person must not be deprived of his or her property other than in accordance with law.

The property right in the Charter is modelled on Article 17 of the Universal Declaration of Human Rights.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 21

> Right to liberty and security of person

Scope of the right

The right to liberty means that persons must not be subject to arrest and detention, except as provided for by law. Their arrest and the detention must also not be arbitrary.

This right applies to all forms of detention where people are deprived of their liberty, not just criminal justice processes. This can be relevant any time a person is not free to leave a place by his or her own choice.

This right differs from the freedom of movement in section 12 of the Charter, because a person must be 'detained' to suffer a deprivation of liberty.

The right to security requires the State to provide reasonable measures to protect a person's physical security. The government does this, for example, through the work of the police and emergency services.

The rights in subsections 21(4)–(7) are relevant after a person has been arrested or detained. Some of these rights are also reflected in the criminal law of Victoria, such as the *Crimes Act 1958* and the *Bail Act 1977*. In practice, these guarantees mean that when arresting a person the police must immediately inform him or her of the reason for the arrest and arrange for them to be brought before a court for a preliminary hearing (usually to determine bail). Even if someone is detained without charges being laid, this should not take more than 24 hours. This helps to ensure that no one is detained on an unfounded suspicion or for an improper purpose.

Section 21(5), which provides that a person who has been charged with an offence must be brought to trial without unreasonable delay, overlaps with section 25(2)(c) of the Charter, because it is also an essential element of a fair trial.

Case examples

The following examples have been found to violate the right to liberty and security:

- A trial which was delayed to the extent that the accused's maximum potential sentence was less than time already served was said by the Victorian Supreme Court to be likely to breach the right to liberty (*Gray v DPP* [2008] VSC 4)
- When considering similar provisions under international law, the UN Human Rights Committee has found that detention of asylum-seekers under the *Migration Act 1958* (Cth) can become arbitrary if it is for a prolonged period and the State will not provide reasons to justify it. A refusal to allow appeals to the courts may also result in arbitrariness (see for example, *A v Australia* (Communication No 560/1993) and *Shams et al v Australia* (Communication No 1255-88/2004)).

On the other hand, no violation of the right to liberty and security was found in the following international cases:

- A person who was ordered by a court in New Zealand to stay in hospital took his case to the UN Human Rights Committee, but the Committee found that his record of aggressive behaviour and the availability of regular review of the order meant it was a reasonable measure (*A v NZ* (754/1997))
- The UK House of Lords has found 'stop and search' powers under anti-terror legislation to be reasonable because the search stopped people only for a brief period and did not involve restraining them with handcuffs or taking them away (*R (Gillan) v Commissioner of Police* [2006] UKHL 12).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 21 could be engaged by activities that:

- authorise a person with a mental illness to be detained for treatment in a mental health facility and facilitates review of their detention
- provide for the interim detention of a person whether or not he or she is suspected of committing an offence (for example, to prevent the spread of a contagious disease, or enable a person to 'sober up')
- provide for special powers of detention of people for purposes including national security
- make provision for granting of bail
- relate to the management of security of anyone in the care of public authorities, particularly those in involuntary care
- make it an offence for a person to fail to remain at a place (for example, for further questioning or to conduct a search or test by a police officer or other official)
- allow a public authority to cordon an area and control movement within that area
- grant a power of arrest.

Section 21 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
- (5) A person who is arrested or detained on a criminal charge:
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear:

- (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must:
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds the detention is unlawful.
 - (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

The right to liberty and security of person is largely modelled on Articles 9 and 11 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 22

> Right to humane treatment when deprived of liberty

Scope of the right

Section 22 requires all public authorities (including police and correctional staff) to treat persons in detention with humanity and dignity. It also requires the segregation of persons accused of offences from persons who have already been convicted of offences.

The purpose of the right to humane treatment when deprived of liberty is to recognise the particular vulnerability of persons in detention and to ensure that they are treated with consideration of their rights and dignity as human beings.

This right complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment under section 10 of the Charter. However, it is engaged by less serious mistreatment or punishment than under section 10.

In the context of international human rights law, the UN Human Rights Committee has observed that this right applies not just to persons detained under the criminal law, but also to persons detained elsewhere (for example, in an approved mental health service) under the laws and authority of the government (see the Committee's General Comment 21).

The Committee has made it clear that this right applies to all detention facilities within a state's jurisdiction. It also applies to anyone detained, whether he or she is an adult or a child.

The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint in addition to that resulting from the deprivation of liberty. The Human Rights Committee has emphasised that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment.

Some rights are unavoidably restricted in a closed environment, for example: a person's freedom of movement; elements of freedom of expression and some elements of privacy; and interference with family life are inevitably affected.

The *UN Standard Minimum Rules for the Treatment of Prisoners* establish minimum standards on a range of matters, including conditions of: accommodation; food of adequate quality; facilities for personal hygiene; standard of clothing and bedding; opportunities for exercise and availability of medical services; contacts with the outside world; access to books and regulation of methods and procedures for discipline and punishment (including the prohibition of certain forms of punishment).

These rules are now complemented by a treaty Australia is currently considering ratifying – the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – which obliges States Parties to set up preventive monitoring mechanisms to maintain detention standards.

Section 22 grants additional rights to 'an accused person who is detained' and a 'person detained without charge'. These rights follow from the principle of the presumption of innocence in criminal law: a detainee who has not yet been tried is entitled to a different treatment regime than convicted detainees.

In particular, accused persons are entitled to be segregated from those serving their sentences. Section 21(2) provides, however, that the right applies 'except where reasonably necessary' – for example where separate facilities are unavailable.

The Supreme Court of Victoria noted in *Castles v Secretary to the Department of Justice* [2010] VSC 210 that the right to humane treatment in section 22 of the Charter ought not to be conflated with section 10(b) of the Charter:

Section 22(1) is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct. Section 10(b) prohibits 'bad conduct' towards any person; s 22(1) mandates 'good conduct' towards people who are detained.

Note: The Victorian Charter does not apply to the Commonwealth Government. For example, it does not apply to federal officials running immigration detention centres. Australia's obligations under international human rights law, the *Australian Human Rights Commission Act 1986*, and relevant criminal laws and procedures apply to the Commonwealth Government.

Case examples

A detainee's right to be treated humanely has been held to be violated in cases before the UN Human Rights Committee where detainees were:

- held in 'incommunicado' detention for any length of time (*Caldas v Uruguay*, UN Document Reference CCPR/C/19/D/43/1979)
- refused medical attention or there was a failure to address deteriorating mental health (*Mpandanjila v Zaire*, CCPR/C/27/D/138/1983)
- subjected to ridicule (*Francis v Jamaica*, CCPR/C/54/D/606/1994)
- denied reading facilities and not allowed to listen to the radio (*Nieto v Uruguay*, CCPR/C/19/D/92/198)
- confined to a cell for an unreasonably long period of time (*Cabreira v Uruguay*, CCPR/C/19/D/105/1981)
- required to prepare prison food in unsanitary conditions (*Matthews v Trinidad and Tobago*, CCPR/C/62/D/569/1993)
- subject to restricted correspondence with family (*Espinoza de Polay v Peru*, CCPR/C/61/D/577/1994)
- prevented from being present at the birth of a child (*Madafferi v Australia*, CCPR/C/81/D/1011/2001)
- held in a small cage awaiting court appearance (*Cabal & Passini v Australia*, CCPR/C/78/D/1020/2001).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 20 could be engaged by activities that:

- enable a public authority to detain individuals or relates to the conditions under which a person may be detained for example, in prisons, mental health services, prison transportation facilities
- concern standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to private shower and toilet facilities)
- authorise a person to be held in a place with limited facilities or services for the care and safety of detainees
- enable enforcement officers to undertake personal searches of those individuals detained in custody or detainee visitors.

Section 22 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.**
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.**
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.**

This right to humane treatment when deprived of liberty is modelled on Article 10 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 23

> Rights of children in the criminal process

Scope of the right

'Child', according to section 3 of the Charter, means a person under 18 years of age.

Right to be segregated from all detained adults

Any child who is deprived of his or her liberty must be segregated from adults, preferably in a separate juvenile facility. As with adults, accused children on remand must also be segregated from convicted prisoners serving their sentences (section 22(2)).

The law recognises that children, because of their age, are more vulnerable. When housed in adult prisons, or other adult facilities, children's basic safety and well-being may be compromised, along with their ability to reintegrate into society and avoid becoming involved in further criminal activity. That is why there must be separate facilities for children – including distinct, child-centred staff, personnel, policies and practices – to cater for the developmental needs of children.

The only permitted exception to the separation of children from adults is where it is not in the child's best interests. This would only be in exceptional circumstances. For example, the child's best interest may require greater priority for family contact than for separation which may lead to the child being detained with a parent or close to home, even if detention is in a facility shared with adults.

Right to be brought to trial as quickly as possible

Every child arrested and charged must be brought before a court as quickly as possible. This requirement is similar to that applying to all people (recognised in sections 21(5) and 25(2)(c) of the Charter), but is more onerous, reinforcing the critical nature of timing when a child is kept in detention.

It is not sufficient to cite the absence of proper resources as reason for any delay. A prosecuting authority has a responsibility to ensure that all

agencies are adequately supported and that proper consideration is given to the expedition of criminal charges involving children.

Right to be treated in a way that is appropriate to his or her age

This right must be applied, observed and respected throughout the entire process, from the first contact with the child by law enforcement agencies through to the implementation of any sentence.

Article 40(1) of the Convention on the Rights of the Child provides guidance in this area, stating that all criminal processes involving children must promote their rehabilitation and their ability to take on a constructive role in society.

Case examples

Ombudsman's Report on the Melbourne Youth Justice Precinct

In 2010, Ombudsman Victoria conducted an investigation into the Conditions at the Melbourne Youth Justice Precinct. This precinct consists of the Melbourne Youth Justice Centre, Melbourne Youth Residential Centre and Malmsbury Youth Justice Centre. Ombudsman Victoria found the precinct was non-compliant with the human rights principles in the Charter. It found:

- there was undesirable mixing of detainees of widely varying ages and different legal situations
- remanded detainees were being placed in units with sentenced offenders
- 39 per cent of former and current staff legally required to have a Working with Children Check (WWCC) to work at the precinct did not have a WWCC on their personal file

- the precinct was struggling to meet adequately the needs of children who were seriously mentally ill, including detainees who were suicidal or displaying self-harming behaviour
- in some instances, remanded detainees were placed in sentenced units during the day, which in one case resulted in a remanded detainee being severely assaulted by four sentenced detainees.
- Ombudsman Victoria found that these were human rights violations. It recommended that the precinct be replaced with a new facility, a review be carried out of all policies and practices relating to conditions to ensure they comply with human rights principles and that the performance of all current staff be reviewed.

Delay in trial – *Perovic v CW*, ACT Children's Court, Unreported (1 June 2006)

In this case, the court decided that under the ACT equivalent of section 23(2), a delay of 16 months between the alleged offence and trial for a child was too long, especially for a case that was not very complex. Lack of investigative resources was held to be no excuse.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 23 could be engaged by activities that:

- enable children to be detained for any length of time
- authorise the holding of children in amenities that have limited facilities or services for the care and safety of children
- enable people to undertake personal searches of a detained child
- impacts on the environmental design of detention centres or conditions under which children are detained
- establish or alter programs in prisons, youth training centres or residential centres
- affects the speed at which a child may be brought to trial
- create or amend procedures and the law of evidence applicable to children charged with criminal offences, including the investigation and prosecution of offences
- amend the law relating to children in criminal proceedings, including bail, adjournments and sentencing.

Section 23 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) An accused child who is detained or a child that is detained without charge must be segregated from all detained adults
- (2) An accused child must be brought to trial as quickly as possible; and
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

These rights are modelled on Articles 37 and 40 of the Convention on the Rights of the Child, a treaty to which Australia became a party in 1990.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 24

> Right to a fair hearing

Scope of the right

The right to a fair hearing under section 24 of the Charter is not confined to criminal cases. Whether a person is a defendant in a criminal case or a party to civil proceedings, they have the right to a fair hearing before a competent, independent and impartial court or tribunal established by law.

Section 24 provides that judgments and hearings must be public unless other laws (for example for child protection) provide otherwise.

Section 25 sets out more specific minimum guarantees in criminal trials.

This right can be relevant in areas such as:

- the creation of courts and tribunals, and the appointment of judges
- review jurisdiction
- rules of evidence
- whether a court is closed for the hearing of a particular matter
- media reporting.

Case examples

Production of evidence to an accused – *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1

In this case, the Supreme Court considered whether a police officer should have to produce certain documents relevant to the defendant's trial for tax evasion. The Court discussed the principle of 'equality of arms,' which requires that the defendant must not be at a significant disadvantage compared with the prosecution in terms of access to evidence or resources if there is to be a fair hearing.

While the right to disclosure of relevant evidence is not an absolute right, and may be balanced against competing interests such as national security or the need to protect witnesses, the rights

of the accused in the present case prevailed. The Supreme Court decided that the police officer had to produce the evidence requested by the defendant to ensure a fair trial. The Charter did not apply as the proceedings had begun before 2007, but the Court made its decision on the basis of common law and Article 14 of the ICCPR, and the reasoning is applicable to future decisions under section 24 of the Charter.

Open justice and limiting publication of police documents – *Inquest into the Death of Tyler Cassidy, Ruling on suppression application by the Chief Commissioner of Police pursuant to section 73(2)(b) of the Coroners Act 2008 (Vic)*

During the inquest into the fatal shooting of Tyler Cassidy by police, the Coroner had to consider evidence relating to the internal workings and procedures, training methods and protocols of the police. The Chief Commissioner applied to have these documents kept secret due to their sensitive nature. Among other things, the Coroner considered the principle of open justice set out in section 24(3) of the Charter. She noted that this is not an absolute principle and could be limited in certain circumstances. She concluded that allowing publication of most of the documents might place police and others at risk and ordered that they be kept secret. However, to ensure the integrity of the coronial process and the effectiveness of the investigation, she allowed police officers to be questioned about some of the matters in the documents where it was appropriate.

Nature of the proceedings – *Secretary to the Department of Human Services v Sanding* [2011] VSC 42

This case was an appeal from a decision of the Children's Court involving a welfare matter. The Children's Court had decided to return four children to the care of their grandmother without hearing any formal evidence. The Department of Human Services said this could not have been a

fair hearing within the meaning of section 24(1) of the Charter. There was a question in this case as to whether section 24 applied, because the original decision was neither a criminal trial nor civil litigation with opposing parties. The Supreme Court held that 'civil proceedings' should be interpreted broadly to include protection proceedings and other 'special' statutory proceedings. It concluded that the right to a fair hearing did not necessarily demand the admission of formal evidence, as long as the decision was made on a sound basis, using procedures that were appropriate in the circumstances.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 23 could be engaged by activities that:

- create or restrict review of administrative decision-making and appeals processes
- reverse the onus of proof
- regulate the rules of evidence in courts and tribunals or amends the way in which evidence is collected and presented
- regulate the procedures for challenging the impartiality and independence of courts and tribunals
- affect the way witnesses give evidence
- regulate the way the media may report on proceedings.

Section 24 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.
- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

The right to a fair and public hearing is modelled on Article 14 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 25

> Rights in criminal proceedings

Scope of this right

Many of these guarantees are self-explanatory, however, one important consideration is at what stage of the process they operate. Section 25 says anyone 'charged with a criminal offence' can benefit from the rights it contains, which has been interpreted to mean that it applies from the time the police first indicate that charges will be laid.

The rights in criminal proceedings can apply in a number of circumstances, including:

- if a person is charged with an offence but his or her trial is delayed for far longer than usual through no fault of their own, the guarantee against 'unreasonable delay' might stop the trial going ahead
- if the police or other investigatory bodies have powers to compel testimony, they must exercise the powers (if possible) compatibly with the right not to be compelled to incriminate oneself
- a person has the right to choose a lawyer under s 25(2)(d), but this is not an absolute right, and it will be balanced against considerations such as potential delays and availability of reasonable alternatives if the person's first choice of lawyer is unavailable. Additionally, it will not give someone the right to Legal Aid funding for an expensive private lawyer.

For example, the right to be presumed innocent under proven guilty has been limited in a number of Victorian laws:

- Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) provides that drugs will be deemed to be in a person's possession if it is on his/her property, and it is up to the defendant to satisfy the court otherwise.
- Victorians have to prove they did not know that information they provided on a First Home Owner Grant application was false or misleading, or they face a potential prison sentence (see section 47, *First Home Owner Grant Act 2000* (Vic)).

- There are similar reverse onus provisions in Victorian consumer protection, child services, gambling and animal protection legislation.

Case example

Delay in hearing – *Gray v DPP [2008] VSC 4*

In this matter, the Court had to consider the implications of a trial delay that could mean the accused would spend longer on remand than any sentence that might be imposed if he were convicted. The Court observed that the relevance of this at common law was not simply reinforced, but increased by the Charter and the rights contained in sections 21(3) and (5) and 25(2)(c). It was decided that Gray's continued incarceration was not justified because of the delay in the trial and he was released on bail (with strict conditions).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 24 could be engaged by activities that:

- impact on the right to be presumed innocent (including amendments to the law relating to self-incrimination)
- impact on the bringing of disciplinary actions
- impact on the treatment of children in complaint and disciplinary proceedings
- regulate aspects of criminal trial procedure for investigation and prosecution of offences, for example, establishing time limits on the lodging of complaints or appeals, or affects access of an accused to witnesses, information and evidence, filing and service charges
- establish guidelines or procedures for the provision of assistants, translators and interpreters

- amend any guidelines or procedures enabling the accused to represent him/herself personally or restricts the right of an accused to choose a support person or advisor of his/her choice
- regulate how an accused person may appear in court, for example, security measures associated with their appearance
- limit requirements on courts or tribunals to accord fair hearing rights for example, in relation to disclosure of evidence to an accused
- deal with the admissibility of evidence
- restrict access to information and material to be used as evidence
- affect the law of evidence governing examination of witnesses
- allow special procedures for examination of witnesses, for example, the manner in which they give evidence
- create or amend an offence that contains a presumption of fact or law and puts the legal or evidential burden on the accused to rebut the presumption
- alter the criteria or conditions under which a person may apply for or be released on bail
- amend or alter procedures under which a person is able to appeal against or review a decision
- amend the eligibility criteria for legal aid
- govern remedies available to people whose criminal convictions have been overturned or who have been pardoned in situations involving a miscarriage of justice
- affect the law regarding double jeopardy
- affect the capacity of investigators and prosecutors to prepare for trial and of courts to conduct trials through allocation of resources.

Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –
- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
 - (c) to be tried without unreasonable delay; and
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and

- (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
- (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
- (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
- (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
- (k) not to be compelled to testify against himself or herself or to confess guilt.

- (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.
- (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

The rights in criminal proceedings are modelled on Article 14 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 26

> Right not to be tried or punished more than once

Scope of the right

The purpose of this right is to ensure fairness to the accused, and to provide certainty in the criminal justice system.

The right will generally apply where a person is charged with exactly, or substantially and practically, the same offence for which he or she has been previously convicted or acquitted.

This principle, also known as 'double jeopardy' only applies to criminal offences. Sanctions and penalties imposed by professional disciplinary bodies are not usually considered a breach of the right.

In Victoria there are limitations on this right in the law. 'Fresh and compelling' evidence can now result in a second prosecution of an acquitted individual on the same facts for serious offences. The rule also applies where an acquittal is found to have been 'tainted' by perjury, corruption or perversion of the course of justice. Safeguards incorporated in these exceptions to the double jeopardy rule include that the retrial must be in the interests of justice; there must be a strong case for retrial and police may not start investigating an acquitted person without the permission of relevant authorities.

Case example

Professional disciplinary proceedings and the question of double punishment – *Psychology Board of Australia v Ildiri (Occupational and Business Regulation)* [2011] VCAT 1036

In this case, Ms Ildiri had been found guilty of numerous fraud offences under the *Crimes Act 1958* (Vic). The Psychology Board of Australia sought to rely on those findings of guilt to support the making of a decision that Ms Ildiri engaged in unprofessional conduct under the *Health Professions Registration Act 2005* (Vic). The Tribunal found that a finding of unprofessional conduct could not violate the right not to be tried or punished more than once

under section 26 of the Charter as the purpose of the disciplinary proceedings was 'primarily to protect the public, and not to punish the practitioner'. This case confirms that the right not to be tried or punished more than once was only relevant where the purpose of the penalty was punitive.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 26 could be engaged by activities that:

- allow a person to be punished a second time for the same offence
- amend any criminal procedure rules relating to previous convictions and acquittals
- create an overlap between an offence in regulations and an offence in the authorising legislation
- allow continued incarceration of people for example convicted sex offenders, following completion of sentence.

Section 26 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

The right not to be tried or punished more than once in the Charter is modelled on Article 14(7) of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

Section 27

> Right to protection from retrospective criminal laws

Scope of the right

The protection from retrospective criminal laws is a fundamental principle of our legal system and means that a person should be in a position to know in advance whether their conduct would be criminal or not.

Section 27(1) of the Charter does not prohibit the retrospective application of changes to criminal procedure, such as changes in the law of evidence or to the hearing of charges relating to events that occurred prior to the changes.

Section 27(2) and 27(3) of the Charter are concerned with penalties that may be imposed for criminal offences. These sections only apply where the 'penalty' imposed has a punitive objective (for example as opposed to a community safety objective).

When can the right be limited?

Under international law, the protection from retrospective criminal laws is a non-derogable right. This means that the government cannot suspend this right, even in a time of emergency.

The nature of the right is one factor that must be considered when determining if a limitation is justified. The fact that the right is non-derogable under international law is relevant, and suggests that it would be unlikely that the right could be reasonably limited under the Charter.

Section 27(4) of the Charter contains an exception to the protection against retrospective criminal laws. It explicitly allows for the trial or punishment of an act which is a criminal offence under international law (such as genocide or a crime against humanity), even if the act committed may not have been a criminal offence under Australian domestic law at the time it was committed. The Explanatory Memorandum to the Charter states that the rationale behind this limitation is 'to ensure that a person may still be tried and punished for crimes under international law, as long as the offences existed under international law at the time they were committed or omitted.'

Case examples

Changes to maximum penalties – *R v AMP* [2010] VSCA 48 (16 March 2010)

In this case, the Applicant wished to appeal against his sentence. When the Applicant committed count 1 in 1957, the maximum penalty was 10 years' imprisonment. The maximum penalty for the offending behaviour covered by count 1 was reduced to 5 years' imprisonment in 1967 but it was returned to 10 years' imprisonment in 1991. The Applicant submitted that he should have been sentenced on the basis that the later reduction of the maximum penalty for equivalent offences to 5 years' imprisonment should apply.

The Court relied, in part, on section 27(2) of the Charter and found that the sentencing judge was not required to sentence the Applicant based on the five-year maximum penalty that existed between 1967 and 1991. Since the maximum penalty at the time the offence was committed was 10 years, it was appropriate for the sentencing judge to impose a sentence reflecting that maximum.

This highlights that the right under section 27(2) of the Charter is only concerned with the penalty that may be imposed at the time the offence was committed and the possible penalty that may be imposed when the offender is being sentenced. Consideration does not need to be given to differences in maximum penalties during the period between committing the act and sentencing if there were amendments during that time.

Penalties must be punitive in nature – *ARS v Canada* (UN Human Rights Committee, Communication No 91/1981)

A prisoner claimed that the introduction of mandatory supervision requirements during parole constituted a heavier penalty in breach of Article 15 of the International Covenant on Civil and Political Rights (the international law equivalent of section 27), since the requirements did not exist at the time the prisoner was convicted and sentenced. The Human Rights Committee stated that the mandatory supervision requirements were not a 'penalty' within the meaning of Article 15 as they were intended to provide for the rehabilitation of the convicted person in his own interest.

Similarly in Victoria a 'penalty' for the purposes of sections 27(2) and 27(3) of the Charter will likely have to be punitive in nature.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 27 could be engaged by activities that:

- seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken
- apply more severe penalties for conduct by a person than those that existed at the time the conduct was undertaken
- fail to apply less severe penalties for conduct by a person if penalties have decreased since the conduct was undertaken
- expand the range of activities that are covered by an existing criminal offence
- amend criminal law procedure that applies to trials for acts done before the legislation commences or introduces new sentencing options to apply to acts done before the legislation was operative
- change parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

Section 27 of the *Charter of Human Rights and Responsibilities Act 2006* says that:

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
- (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

The protection from retrospective criminal laws in the Charter is modelled on Article 15 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.



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