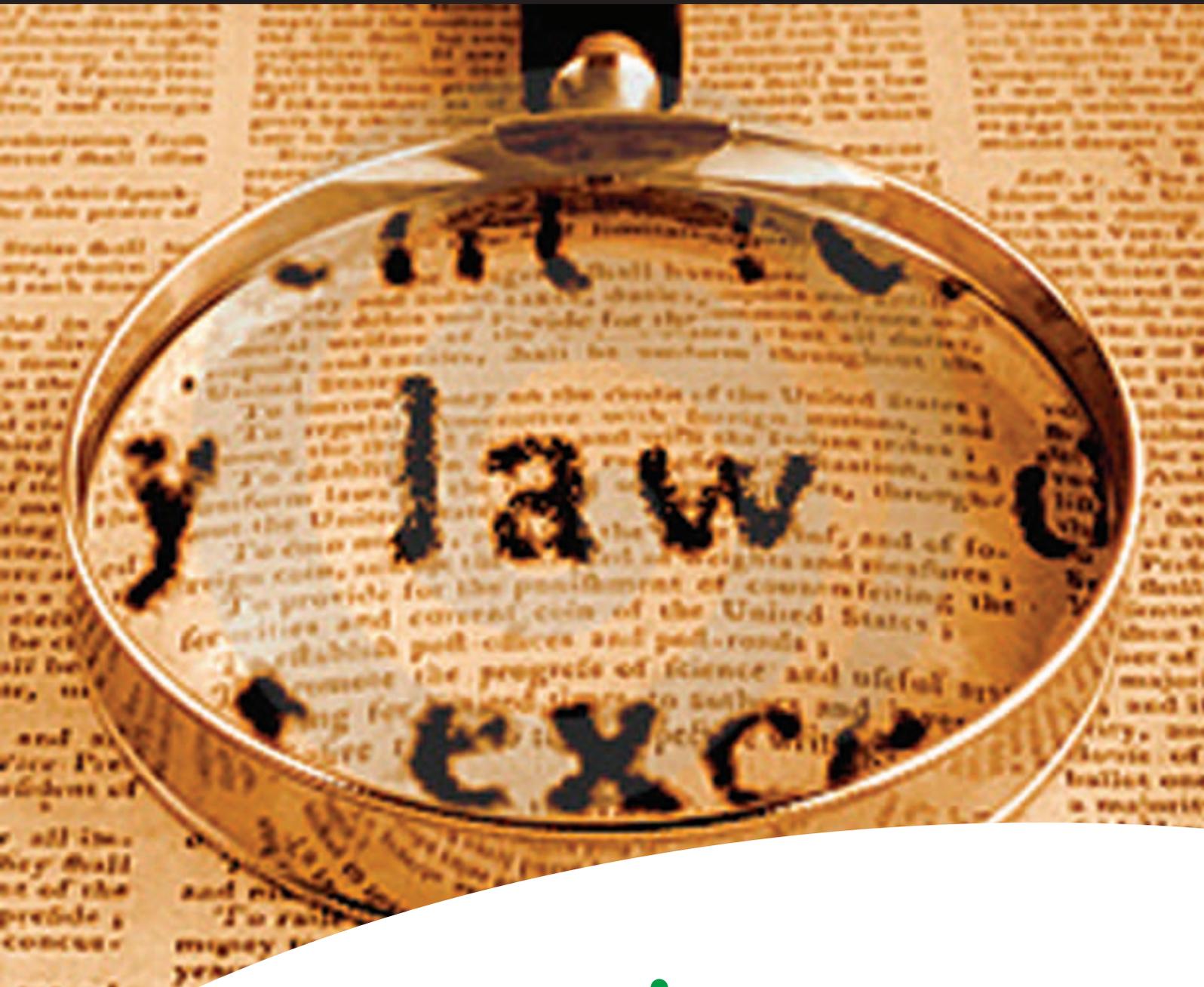


# The Victorian Charter of Human Rights and Responsibilities

## Civil and political rights explained



Victorian Equal Opportunity  
& Human Rights Commission



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Authorised by the Victorian Equal Opportunity & Human Rights Commission.

# Summary of Rights under the Victorian Charter

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) came into full effect on 1st January 2008 and is an important step in fostering an inclusive human rights culture in Victoria.

Its importance, beyond simply identifying a range of human rights, is that it commits public authorities to actively respect and protect these rights and fulfil certain obligations. In operation, this means that all public authorities must give proper consideration to human rights in their decision making and to act compatibly with the rights contained in the Charter when providing services and making decisions.

Governments have a responsibility to protect, promote, respect and fulfil human rights and it is this premise that has driven the development of this resource. Furthermore, in order to develop a culture of human rights in Victoria, it is essential that all Victorians are aware of the requirements set out in the

Charter and the obligations on public authorities to act compatibly.

This document has been compiled to assist exploration of each of the substantive rights included in the Charter. This resource is not intended to be a static document. Rather, it will be periodically updated to reflect emerging domestic and international case law relevant to the application of the Victorian Charter.

Examples drawn largely from the UK have also been included to illustrate how human rights instruments can be used as an advocacy tool to improve outcomes for vulnerable groups outside the courtroom.

It will be vital to the success of the Victorian Charter that these opportunities are explored and understood. As further examples of non-legal advocacy successes are made available in the Victorian context, these will also be included in this resource, and you are invited to contact VEOHRC to provide stories of success.

## **Acknowledgement**

VEOHRC would like to acknowledge the work of the British Institute of Human Rights<sup>1</sup> and the Human Rights Law Resource Centre<sup>2</sup>. The advocacy examples referred to previously have been sourced from their work and that of the community advocates and private law practitioners that support them.

## **Disclaimer**

The information included in this document is intended to be used as a guide only and should not be considered a substitute for legal advice. VEOHRC accepts no liability for actions taken as a result of information communicated.

1. [www.bihhr.org](http://www.bihhr.org)  
2. [www.hrlrc.org.au](http://www.hrlrc.org.au)



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# Section 8 Recognition and equality before the law

- 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.**

(Modelled on articles 16 and 26 ICCPR)

## Key issues

- Section 8(1) protects the important but narrow right to be recognised as a person before the law.
- Section 8(2) prohibits both direct and indirect discrimination as defined in the Equal Opportunity Act (EOA) 1995.
- Note the meaning of 'equality before the law' in s.8(3).
- Note the meaning of 'equal protection of the law' in s.8(3).
- Section 8(3) includes right of protection from discrimination, perhaps in any walk of life (including the enjoyment of economic social and cultural rights).
- Section 8(4) ensures that some 'positive discrimination' measures are permissible. 'Positive discrimination' refers to special measures taken to assist or advance groups of persons disadvantaged because of the discrimination they face.

Section 8(1) protects one's right to be recognised as a person with legal rights before the law. Breaches of this right rarely arise. It relates only to those extreme situations where a person is simply not recognised by local law as a

person entitled to legal rights, for example when a person is not afforded rights due to their race or religion. The right does not apply simply because someone might be treated unfairly by the law [that situation is relevant to s.8(2) and 8(3)].

Section 8(2): every person has a right to enjoy his or her Charter rights without discrimination. Unlawful discrimination is the same as defined in the EOA 1995 and includes discrimination on the grounds of a number of personal characteristics including age, impairment, political belief or activity, race, religious belief or activity, sex and sexual orientation.

Discrimination in international law means a distinction on a prohibited ground which has the effect of damaging the recognition, enjoyment or exercise by all persons, on an equal footing, of any right or freedom.

Both direct and indirect discrimination are prohibited. Direct discrimination occurs when a distinction directly impacts on a particular group, whereas indirect discrimination arises when a rule seems neutral, but has a discriminatory impact on certain people. For example, a prohibition on the employment of women in a particular job would directly discriminate on the basis of sex. A minimum height requirement of 6 foot for a particular job might be applied equally to men and women, but would indirectly discriminate on the basis of sex, as women tend to be shorter than men. Please note that not all distinctions are outlawed. Please refer to the EOA 1995 for further information.

Section 8(3) guarantees, first, that everyone is equal before the law. This means that everyone should be treated equally by those who administer the law, such as police officers or judges. However, this part of the right does not relate to the law itself, which may in fact treat people unequally. Equality within the law itself is guaranteed by the right of 'equal

protection of the law', also contained within s.8(3). For example, in *Broeks v Netherlands* (1988), an international case, a Dutch lady was denied unemployment benefits because she was a married woman; a Dutch man in the same circumstances would have received the dole. She did not suffer from inequality before the law at the hands of the unemployment benefits agency, as it was merely applying the law in good faith; it could not simply disobey the law. However, she did suffer from unequal protection of the law, as the law itself was unfair to married women.

Finally, s.8(3) guarantees equal and effective protection against discrimination on the grounds of personal age, characteristics such as, impairment, political belief or activity, race, religious belief or activity, sex and sexual orientation, again as defined in the EOA 1995.

It seems that this part of s.8(3) prohibits discrimination in any walk of life, rather than just the enjoyment of the civil and political rights in the Charter [covered by s.8(2)], or those areas protected under other equal opportunity legislation such as employment, education, provision of goods and services and disposal of land, accommodation, clubs, sport and local government. For example, s.8(3) may guarantee non-discrimination in relation to social security benefits offered by the Victorian government. As with s.8(2), direct and indirect discrimination are prohibited unless distinctions are reasonable and objective – see EOA 1995.

Section 8(4) ensures that certain acts of 'positive discrimination' are not construed as breaching the Charter. This is in accordance with international law. It is permissible for measures to be taken which aim at redressing historical discrimination against an underprivileged group, such as a measure which aims at increasing the number of women or Indigenous people in managerial positions.

## Advocacy examples relevant to Section 8

### Provision of appropriate medical services to elderly persons (Victoria)

Support was provided to a middle-aged woman with an acquired brain injury who was in need of urgent therapy to treat severe contractures of her left hand. The condition caused the woman considerable pain and suffering, and without treatment would require radical surgery that may involve severing the tendons of her fingers or even amputation of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority because she was aged over 50. Citing her right to freedom from discrimination, as well as right to freedom from cruel, inhuman and degrading treatment, privacy and security, her advocates were able to obtain one-off funding for urgent treatment while options for a longer-term support package were investigated.<sup>1</sup>

### Freedom from discrimination in service provision (UK)

A service provider at a local authority providing services to people with physical disabilities had a policy of providing support to service users who wanted to participate in social activities. A gay man asked if a support worker would accompany him to a gay venue and his request was denied even though other heterosexual service users were regularly supported to attend pubs and clubs of their choice. This policy was successfully challenged on the grounds of right to freedom from discrimination as well as the right to privacy.<sup>2</sup>

## Cases of relevance to Section 8

### Broeks v Netherlands (Human Rights Committee, 1987)

**FACTS:** B was not eligible for certain unemployment benefits. B claimed she had been discriminated against on the basis of her sex and status as a married woman, and that a man in her position (married or unmarried) would have access to such benefits. She claimed a breach of article 26 ICCPR. The Netherlands argued that the ICCPR did not guarantee non-discrimination in relation to rights that were not civil and political rights. Social security rights are economic rights.

**DECISION:** A violation was found. Article 26 guarantees non-discrimination in relation to the enjoyment of all rights, not just civil and political rights. Article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities. It stated that laws, such as those regulating social security must comply with article 26 of the Covenant. In this case the treatment of B violated article 26 because she was denied a social security benefit on an equal footing with men, and that distinction was not reasonable or objective.

### Young v Australia (Human Rights Committee, 2003)

**FACTS:** Y had been in a same-sex relationship with C for 38 years. C was a war veteran and after his death Y applied for a pension as a veteran's dependent, however under the Veterans Entitlement Act, pensions for a veteran's partner were only available where the partner was married or in a de facto relationship with a veteran of the opposite sex. Y complained that the legislation discriminated against him on the grounds of his sexuality.

**DECISION:** The HRC found that the legislation discriminated against Y on the basis of his sexual orientation in violation of article 26. The legislation failed to provide Y with equal protection of the law.

### Love v Australia (Human Rights Committee, 2003)

**FACTS:** L claimed that the compulsory retirement age of 60 for pilots discriminated against him on the basis of age.

**DECISION:** The HRC found that the legislation complied with international practice in the airline industry aimed at maximising flight safety. Furthermore, compulsory retirement ages served the purpose of protecting the rights of other potential workers by preventing life-long work and were complemented by social security rights for older people. The International Labor Organization (the main international body that deals with labour rights) does not prohibit mandatory retirement ages, and the HRC could not find the distinction to be unreasonable, so no violation was found.

1. Human Rights Law Resource Centre Bulletin, Number 20, December 2007, p.14

2. British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bihhr.org.uk](http://www.bihhr.org.uk)

# Section 9 Right to life

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

(Modelled on article 6 ICCPR)

## Key issues

- The right is clearly fundamental.
- However, it does have limits. One may be deprived of one's life if it is not *arbitrary* to do so (e.g. self defence to protect one's own life or the life of another).
- It has positive aspects – e.g. government must take measures to combat threats to life, including socio-economic threats, such as infant mortality or lethal epidemics.

This right is clearly of fundamental importance – one cannot enjoy other rights if one is not alive! It has no application to the issue of abortion (see s.48 of the Charter).

One may not be *arbitrarily* deprived of one's life (negative obligation). That means that one may be deprived of one's life if it is not arbitrary (unreasonable). For example, one may not be killed by police officers except in the most extreme of circumstances, such as posing an imminent threat to the life of another.

Government must also take active steps to ensure that the right to life is upheld in the highest manner possible (positive obligation). For example, governments should take measures to reduce maternal and infant mortality, malnutrition, diseases, and lethal workplace hazards. A government could not for example simply ignore a lethal threat to the community, such as an epidemic or a terrorist threat. The right has particular importance for individuals in detention, as they are especially vulnerable. Governments must ensure the life of a detainee is protected, including for example, providing access to appropriate medical treatment and taking measures to prevent suicide.

## Advocacy examples relevant to Section 9

### Securing accommodation for a victim of domestic violence (UK)

A social worker from a domestic violence team used human rights language to secure accommodation for a woman and her children who were at risk of serious harm from a violent ex-partner. When she had previously approached the housing department seeking emergency housing she was told there was nothing available, but when she explained that in her view the department had a positive obligation to protect the right to life of the women and her children, she was able to secure accommodation for them.<sup>1</sup>

### Cases of relevance to Section 9

#### Conjoined twins case (UK Court of Appeal, 2000)

**FACTS:** J and M were conjoined twins. If they were not separated, they would both die in a short amount of time. Any operation to separate them would permit J to have a reasonable quality of life, but would kill M almost immediately. The twins' parents would not consent to a separation operation due to their religious convictions, so the hospital sought a declaration from the Court that the operation could be lawfully carried out.

**DECISION:** The unique circumstances dictated the Court's decision that the operation would be lawful.

It is generally unlawful to actively terminate life, but it is permissible to let someone die. That is, actions are unlawful while omissions are not. Withdrawal of food and turning off a life support machine are omissions and therefore lawful in some circumstances. But here, there was no doubt the operation was an action not an omission.

'Necessity' was a problematic argument. One can kill another in self defence but one cannot kill an innocent, that is somebody who has not committed any wrong, to save one's self.

The Court fashioned a very narrow defence of necessity for the particular circumstances of the case. M was going to die anyway, and the operation averted the evil of the death of J. M's life was not worthless but was clearly outweighed by J's right to life.

Finally, the Court overrode the wishes of the parents in order to promote the best interests of a child, i.e. the parents' freedom of religion was outweighed by J's right to life.

#### McCann et al v UK (European Court of Human Rights, 1995)

**FACTS:** UK authorities shot and killed three IRA terrorists in Gibraltar who were planning to detonate a bomb, which was likely to kill many people. The terrorists' relatives claimed a breach of the right to life.



1. British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bihr.org.uk](http://www.bihr.org.uk)

## Cases of relevance to Section 9 continued

**DECISION:** By a narrow majority, the ECHR decided there was a breach of the right to life. The Court did not find that the killings were premeditated or 'in cold blood', however it found that the counterterrorism operation did not take sufficient care to protect the lives of the terrorists – effectively a finding of negligence. It noted that at numerous times during the operation, assumptions were wrongly made and decisions were taken which inevitably led to the suspects' deaths. For example, the authorities did not arrest the suspects upon entry to Gibraltar, even though their plans were suspected. The authorities assumed that the suspects could activate the bomb with a radio-controlled device, technology which at the time was unlikely to exist. The authorities assumed that a car parked in the centre of Gibraltar was a bomb, even though an expert could tell that it was very unlikely to be a bomb. The soldiers who 'apprehended' the suspects were given orders to shoot to kill. The cumulative effect of these assumptions and decisions was to render the deaths of the suspects virtually inevitable, and therefore breached their right to life.

A large minority in the Court gave the counterterrorism operation a much greater benefit of the doubt, saying that they could not afford to allow a bomb to explode and it was therefore reasonable for them to operate according to "worst case scenarios".

### **Olga Tellis v Bombay Municipal Corporation (Indian Supreme Court, 1985)**

**FACTS:** In the city of Mumbai hundreds of thousands of people live in squalid shelters as 'pavement dwellers' or in the city's slums, often driven from impoverished rural areas to live in areas closest to their place of work. Under threat of eviction, they petitioned the Court claiming that such evictions would violate their right to life, as their place of living is directly connected to their livelihood, and their right to life "cannot be exercised without the means of livelihood".

**DECISION:** The Court accepted that if the petitioners were evicted from their shelters they would be left without a job and deprived of their livelihood. It noted that "the right to life...is wide and far reaching" and includes the right to livelihood. It found that if you "deprive a person of his (sic) right to livelihood you shall have deprived him (sic) of his life." It acknowledged that "the State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But any person, who is deprived of his (sic) right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life".

In conclusion the Court directed that the pavement dwellers be relocated in such a way which would minimise the impact on livelihood. It further directed that certain programs aimed to improve conditions for slum and pavement dwellers be implemented without delay.

### **Thiagraj Soobramoney v Minister Of Health (Kwazulu-Natal) (Constitutional Court of South Africa, 1997)**

**FACTS:** S suffered from chronic kidney disease, and could not afford kidney dialysis. He claimed that the KwaZulu-Natal province's failure to provide him with free dialysis breached his right to life (as well as other rights relating to health), as he would die without access to such treatment.

**DECISION:** No breach was found. The rationing of free (taxpayer paid) dialysis in KwaZulu-Natal could not be found to be unreasonable. The Province could not afford to give dialysis to everyone who needed it. It was reasonable to restrict such access to those with acute (curable) conditions, as opposed to S who would need it for the rest of his life. The Court did not question the budgetary allocations of the Province, and recognised that S's death would be the likely outcome of its decision. However, the right to life does not always give someone a right to evade death.

### **Minister of Health and Others v Treatment Action Campaign and Others (1) (Constitutional Court of South Africa, 2002)**

**FACTS:** The Treatment Action Campaign [TAC] is an NGO that challenged the restricted public access in South Africa of a drug that effectively combated the transmission of HIV/AIDS from mothers to children. The drug had been available for free by the manufacturer yet it was only available at two sites per province. The government argued that the restricted access was justified, as even though the drug was free, the government still had to provide patient counselling on how to properly take the drug (to avoid drug resistance), and it argued, the effectiveness of the drug was not proven.

**DECISION:** The government's failure to extend its drug program breached the right to adequate standard of health care, however it could possibly have been argued regarding the right to life as well. The decision was influenced by the low cost of the drug and its effectiveness in a single dose. Regarding counselling costs, the Court said HIV-positive mothers also had to be counselled not to breastfeed their children after they were born, and the cost of providing counselling at more sites had to be weighed against the costs of not providing the drug (resulting in greater rates of HIV infection amongst infants and children). The government was also requested to roll out a more comprehensive program for combating mother-to-child transmission of HIV/AIDS, including appropriate counselling services.

# Section 10 Protection from torture and cruel, inhuman or degrading treatment or punishment

**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.**

(Modelled on article 7 ICCPR)

## Key issues

- In international law, this right is absolute. It may not be restricted in *any* circumstances.
- The right prohibits various forms of bad treatment. Torture is the worst of the prohibited treatments.
- All prohibited forms involve severe suffering or, in the case of degrading treatment, extreme humiliation.
- The right involves positive obligations, such as the taking of measures to prevent instances of torture, or to punish perpetrators when it occurs.
- Section 10(d) prohibits medical experimentation and treatment without consent. The prohibition on medical treatment is broader than the analogous provision in the ICCPR, and it remains to be seen how it will be interpreted.

The right to be free from torture or cruel, inhuman or degrading treatment or punishment is generally understood as an absolute right which may not be restricted in any circumstances.<sup>1</sup> The right protects both the physical and mental health and integrity of an individual.

Sections 10(a) and (b) prohibit various forms of bad treatment. Torture is the worst type of treatment, and involves a very high degree of suffering that is intentionally inflicted. Cruel and inhuman treatment also involves a high degree of suffering, but is not necessarily intentionally inflicted. Degrading treatment involves a high

degree of humiliation, and is not necessarily intentionally inflicted.

Whether an act or an omission (that is, a failure to act, such as a failure to feed someone) amounts to torture or one of the prohibited types of bad treatment is a question of degree. The following cases outlined are instructive.

This right also encompasses positive obligations. The government should adopt safeguards to ensure that torture, cruel, inhuman or degrading treatment or punishment does not occur, or at the least, that there are few or no opportunities for it to occur without detection. Safeguards include training for law enforcement officials regarding the content of the right, special measures to ensure health and safety of detainees, and provisions to ensure that any evidence obtained by torture is not admissible as evidence in a court of law. Perpetrators of torture or one of the other forms of bad treatment should be appropriately punished and allegations should be promptly investigated.

Under s.10(3), medical or scientific experimentation or treatment requires the consent of the individual involved. This consent must be given freely, without pressure or force of any kind and the person must be fully informed as to what they are consenting to. Provision may be made for consent to be given by others in circumstances where a person cannot give consent (e.g. parents may consent on behalf of infants), so long as the experimentation or treatment is likely to benefit that person. Indeed, this is probably the case for any person whose consent must be viewed as suspect, such as a prisoner or other detainee, as it is difficult to determine whether the consent of such a person is truly free.

<sup>1</sup> It is possible that s.10 may be restricted under s.7 of the Victorian Charter. It seems likely, however, that the right will be interpreted in accordance with international law, where no restrictions are ever allowed.

## Advocacy examples relevant to Section 10

### Treatment in a maximum security mental health facility (UK)

A man detained in a maximum security mental health hospital was placed in seclusion where he repeatedly soiled himself. Staff declined to clean up the faeces and urine or to move the man to another room, claiming that he would simply make the same mess again, and any intervention was therefore pointless. The man's advocate invoked human rights arguments to challenge this practice. He argued that this treatment breached the man's right not to be treated in an inhuman and degrading way, and his right to respect for private life. These arguments were successful and the next time he soiled himself, the man was cleaned and moved to a new room.<sup>2</sup>

<sup>2</sup> British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bih.org.uk](http://www.bih.org.uk)

## Cases of relevance to Section 10

### **A and others v Secretary of State for the Home Department (No 2) (UK House of Lords, 2006)**

**FACTS:** Eight detainees, held on suspicion of terrorism, appealed against a finding by the UK Court of Appeal that evidence obtained under torture by agents of another country, and with no involvement of the UK, could be used as evidence in court.

**DECISION:** Evidence that may have been obtained through torture cannot be used against anyone, including terror suspects.

### **Tomasi v France (European Court of Human Rights, 1993)**

**FACTS:** T alleged ill-treatment whilst in police custody, including being beaten by the police. T was examined by four doctors in the days immediately after his period in custody and these examinations confirmed that ill-treatment had occurred. T lodged a complaint against the police alleging that this treatment violated article 3 of the European Convention on Human Rights (the European equivalent of article 7 ICCPR).

T gave the following description of the treatment he was subjected to: "I was beaten for forty hours non-stop. I didn't have a moment's rest. I was left without food and drink. A police officer... held a loaded pistol to my temple and to my mouth, to make me talk. I was spat upon in the face several times. I was left undressed for a part of the night, in an office, with the doors and windows open. It was in March. I spent almost all the time in police custody standing, hands handcuffed behind the back. They knocked my head against the wall, hit me in the stomach using forearm blows and I was slapped and kicked continuously. When I fell to the ground I was kicked or slapped to make me get up. They also threatened to kill me... they also said that they would kill my parents. This lasted for a fortnight. I asked if I could see a specialist who told me that I had a perforated eardrum. I also realised afterwards that I had a broken tooth."

**DECISION:** The medical evidence supported the applicant's claim of ill-treatment and the "large number of blows of the intensity complained of by the applicant" was sufficiently serious to be regarded as inhuman and degrading. The Court further commented that "the physical integrity of individuals cannot be curtailed by the requirements and difficulties of investigating and fighting crime".

### **A v UK (European Court of Human Rights, 1999)**

**FACTS:** A, a child, was severely beaten by his stepfather with a garden cane. A's stepfather was acquitted of assault after he pleaded 'reasonable chastisement' at trial. A lodged a complaint, claiming degrading treatment in violation of article 3 of the European Convention (the equivalent of article 7 ICCPR).

**DECISION:** Ill-treatment requires a certain level of severity to fall within the scope of article 3. This should be assessed on a case-by-case basis, with reference to issues such as the nature and context of the treatment, its duration, its physical and mental effects and possibly the sex, age and state of health of the victim. In this case a paediatrician found that A had been beaten with considerable force on more than one occasion. This ill-treatment reached the required level of severity to fall under treatment prohibited by article 3.

The UK government was held responsible for the beating of the child, as its domestic law had failed to provide A with adequate and effective protection against corporal punishment, in violation of article 3. However the Court emphasised that this "does not mean that article 3 is to be interpreted as imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child".

### **Brough v Australia (Human Rights Committee, 2006)**

**FACTS:** B, a juvenile detainee, claimed he was given an anti-psychotic drug without his consent.

**DECISION:** The HRC found no breach of article 7 entailed in this claim, as the drug was administered to control B's self-destructive behaviour, and after a medical examination. That is, the drug was administered for B's own good.

It must be noted that the words of s.10 differ in this respect from those in article 7. Article 7 does not refer at all to medical 'treatment' (as opposed to 'experimentation'). It is fairly clear in *Brough* that there was no experimentation, and only treatment. It is uncertain as yet the impact that the different wording in the Charter will have, although it seems significantly broader than article 7 and may have dictated a different result in *Brough*.

# Section 11 Freedom from forced work

- 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 subsection (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.
  - d) In this section 'court order' includes an order made by a court of another jurisdiction.

(Modelled on article 8 ICCPR)

## Key issues

- The prohibitions on slavery and servitude are absolute in international law. No restrictions are allowed whatsoever.
- The prohibition on forced or compulsory labour may however be limited in certain circumstances, as outlined in s.11(3)(a)-(c).

This section protects two fundamental human rights, the right to be free from slavery and from servitude. Slavery arises where one person 'owns' another. Servitude is akin to slavery, and arises where one individual is exploited under the absolute control of another. In international law, these prohibitions are recognised as absolute; no restrictions are allowed in any circumstances.<sup>1</sup>

Section 11 also prohibits forced or compulsory labour. However the following are not classified as forced or compulsory labour:

- Where a lawfully detained person is required to perform work or service, for example a convicted person required to assist in the prison laundry for a certain number of hours each week. It is unlikely however that the same person could work for a private company without giving consent.
- Where an individual is required to perform community work under a court order.
- Where work or service is required in case of an emergency threatening all or part of the Victorian community, such as preparation for a bush fire.
- Where the work or service is part of normal civil obligations, for example jury duty.

<sup>1</sup> It is possible that s.11 may be restricted under s.7 of the Victorian Charter. It seems likely, however, that the right will be interpreted in accordance with international law, where no restrictions are ever allowed.

## Cases of relevance to Section 11

### Siliadin v France (European Court of Human Rights, 2005)

**FACTS:** S, a young Togolese woman, was taken from her home to Paris through an agreement between her father and D. The agreement was that S would act as a house keeper for D until the cost of her plane ticket was repaid. D would make arrangements for S's education and her immigration status. D did not fulfil her part of the agreement and kept S as an unpaid house servant and later 'lent' S to another couple, Mr and Mrs B. S worked for approximately 15 hours per day, 7 days per week, performing all the house duties of Mr and Mrs B. S was not paid for her work or taken care of. She was given old clothes to wear and slept on a mattress on the floor. Eventually the authorities were notified of S's situation and Mr and Mrs B were brought before the French courts.

S claimed that the French criminal law was in breach of article 4 of the European Convention on Human Rights (European equivalent of s.11), as it did not have criminal legislation which effectively addressed slavery, servitude and forced or compulsory labour.

**DECISION:** The Court found Mr and Mrs B had subjected S to both forced labour and servitude. The court noted that provisions in the French Code were "much more limited than article 4 as there was no clear prohibition of slavery and servitude... the provisions were neither concrete nor effective".<sup>2</sup> On this basis, France was found in breach of article 4.

### Faure v Australia (Human Rights Committee, 2005)

**FACTS:** F claimed that the Work for the Dole scheme amounted to 'forced labour' in violation of article 8 ICCPR as she either had to perform work against her will under the scheme, or her unemployment benefits would be cut.

**DECISION:** The HRC found that the Work for the Dole scheme classified as 'normal civic obligations' and thus did not breach article 8 ICCPR.

<sup>2</sup> (V. Mantouvalou, 'Human Rights of Domestic Workers' (35) *Industrial Law Journal* 2006, 404).

# Section 12 Freedom of movement

**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.**

(Modelled on article 12 ICCPR)

## Key issues

- This right protects the right of free movement within Victoria.
- This includes the right to enter and leave Victoria, and to choose where to live.
- Clearly, it is subject to the limitations in s.7. For example, a prisoner clearly does not have the right to move freely within Victoria.

This section protects the right of an individual to move without physical or procedural restraint within Victoria. This includes the right of individuals to enter and to leave Victoria freely and to choose where they wish to temporarily or permanently reside.

This right is qualified by the fact that the person must be lawfully within Victoria. A person who has absconded from prison or police custody or has entered Victoria without an appropriate visa would not enjoy the benefit of this right.

The government must not act in such a way as to unduly restrict freedom of movement. However, it is unlikely that it is required to take positive action to promote the freedom of movement in Victoria, such as by providing free public transport.<sup>1</sup>

This right may be limited in certain circumstances under s.7. An example could be where a court restraining order prevents one individual from going within a certain distance of a particular address, in order to protect people at that address. Where someone is lawfully detained, his or her freedom of movement may also be limited without violating s.12.

1. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p13.

## Cases of relevance to Section 12

### **Celepli v Sweden (Human Rights Committee, 1994)**

**FACTS:** C was a Turkish citizen residing in Sweden after fleeing political persecution in Turkey. After 9 years of living in Sweden an expulsion order was issued against him (and 8 other Kurds) on the basis of suspected involvement in terrorist activities. C was not deported as it was felt he might face ill-treatment upon his return to Turkey, but he was subjected to strict conditions in relation to his place of residence and movement. C claimed that the restrictions violated his rights under article 12 ICCPR.

**DECISION:** The HRC found in favour of Sweden, noting that the restrictions were reasonably necessary to protect national security.

# Section 13 Privacy and reputation

## 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**

(Modelled on article 17 ICCPR)

## Key issues

- 'Privacy' is a difficult concept to define. It relates to one's personal autonomy as well as one's personal space.
- The terms 'family' and 'home' are likely to be defined broadly.
- 'Correspondence' will include traditional and modern forms of correspondence.
- Non-arbitrary invasions of privacy are permitted, in accordance with s.13 and also s.7 (e.g. search warrants are permissible in appropriate circumstances).

The exact meaning of privacy is not easy to pinpoint. It can most broadly be understood as the right to be left alone and more narrowly as the right to control information which relates to one's self, including information relating to one's physical and social identity. This includes information considered to fall within the personal sphere of an individual, such as name, sexual orientation and gender identity, sexual life, and health information. In Victoria this term is intended to be interpreted consistently with existing information privacy and health records frameworks.<sup>1</sup>

The terms 'family' and 'home' are likely to be interpreted broadly to ensure that the right may be effective and relevant for all individuals. 'Family' is likely to be interpreted broadly beyond the nuclear family to encompass differing cultural views of a family, including same-sex and extended families. 'Home' has been interpreted as including an individual's workplace. 'Correspondence' includes letters, telephone calls, faxes and emails.

The individual is to be protected from all interferences and attacks on his or her privacy, family, home, correspondence and reputation. Intrusions upon privacy, family, home or correspondence may only take place in cases where they are legally sanctioned and reasonable in the particular circumstances of that case. For example, a search warrant of a person's house is permitted if a person is reasonably suspected of having information or other evidence pertaining to a crime, and if proper legal procedures are followed. It is also reasonable to reveal information in the public interest about certain public figures, particularly politicians. For example, well-founded allegations of corruption may be considered permissible.

1. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p13.

## Advocacy examples relevant to Section 13

### Treatment in a residential care setting (UK)

A man with a learning disability residing in a residential care setting became very anxious about bathing after slipping in the bath and injuring himself. In order to reassure him and build his confidence, a carer, usually female, would sit in the room with him as he bathed. His female carers felt uncomfortable with the arrangement. Consideration of the right to privacy and broader dignity principles enabled the carers to develop solutions that would both protect the man's dignity, whilst also providing him with the support he needed. Also, a consideration of other rights, such as the right not to be treated in an inhuman and degrading way, and the right to respect for private life, led to the development of a new care assessment for the man.<sup>2</sup>

## Cases of relevance to Section 13

### Lopez Ostra v Spain (European Court of Human Rights, 1994)

**FACTS:** A waste-treatment plant was built close to LO's home in a town which had a heavy concentration of leather industries. The plant began to operate without a licence, releasing fumes into the atmosphere. LO alleged breaches of the Convention including of article 8 (the ECHR equivalent to s.13).

**DECISION:** The European Court determined that the national authorities had not taken necessary measures to protect LO's right to respect for her home and for her private and family life per article 8, and had not struck a reasonable balance between the economic interest of the town and LO's rights. The Court acknowledged that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, private and family lives without seriously endangering their health" and that in this case such a violation had occurred.

### Von Hannover v Germany (European Court of Human Rights, 2004)

**FACTS:** Princess Caroline of Monaco appealed to the Court on the basis of decisions made by the German courts in respect of her right to private and family life under article 8 of the ECHR. She had repeatedly sought injunctions from the Court relating to the publication of photographs of herself in German magazines. However the Federal Constitutional Court held that "as a figure of contemporary society, the Princess had to tolerate the publication of such images, even if they showed her in scenes from her daily life rather than engaged in official duties". The Court relied upon freedom of press and public interest to support its conclusion.

**DECISION:** The ECHR found that the domestic Court had failed to properly balance the protection of private life with freedom of expression. It noted that the images contained "very personal, even intimate information about an individual." The crucial consideration was the degree to which such photos offered a valuable contribution to a debate of general interest. The Court found that "the situation does not come within the sphere of any political or public debate. The publication of the photos and articles, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the applicant's private life, does not contribute to any debate of general interest even though she is known to the public. In these circumstances freedom of expression calls for a narrower interpretation." The Court therefore found a breach of article 8. Princess Caroline's right of privacy outweighed the freedom of expression of the press in this case.

### Hopu and Bessert v France (Human Rights Committee, 1997)

**FACTS:** A hotel development was to take place on a site which was a sacred burial ground of H and B's ancestors. H and B submitted that this was a breach of their right to privacy under article 17 ICCPR.

**DECISION:** The relationship of H and B to their ancestors constituted an important part of their identity, and as such the proposed development would violate their right to privacy under article 17.

2. British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bih.org.uk](http://www.bih.org.uk)

## Section 13 Privacy and reputation continued

### Cases of relevance to **Section 13** continued

#### **Toonen v Australia (Human Rights Committee, 1994)**

**FACTS:** T, a Tasmanian gay rights activist, challenged two provisions of the Tasmanian Criminal Code that criminalised ‘all forms of sexual contact between consenting adult homosexual men in private.’

**DECISION:** The provisions in the Code violated T’s rights under article 17. The concept of ‘privacy’ extends to sexual activity between consenting adults. It was of no consequence that the provisions had not been enforced for over a decade or that the (then) Tasmanian government had a policy of not prosecuting under those laws. T was nevertheless under continuous threat of arrest.

#### **Laskey, Jaggard and Brown v UK (European Court of Human Rights, 1997)**

**FACTS:** L, J and B were convicted of assault and wounding in relation to sado-masochistic acts which took place over a 10 year period. Although the acts in question took place between consenting adults and were conducted in private, they were prohibited from pleading consent as a defence at trial. They claimed that this conviction was an “unlawful and unjustifiable interference with their right to respect for private life, contrary to article 8” (article 8 is the European Convention equivalent of article 17 ICCPR).

**DECISION:** The ECHR acknowledged that sexual orientation and activity fell within the scope of private life. However, it noted that the government had been fulfilling its role of regulating “activities, sexual or otherwise, which involve the infliction of physical harm.” In regulating such activities the government had to balance ‘public health considerations and the deterrent effect of criminal law, with the personal autonomy of the individual.’ The practices under consideration involved a “significant degree of injury or wounding which could not be regarded as trifling or transient.” Furthermore the activities had the potential to inflict even greater harm than that which had already been inflicted; they were “unpredictably dangerous.” The Court therefore found that the State was entitled to intervene and this intervention did not violate article 8.

#### **Stanková v Slovakia (European Court of Human Rights, 2007)**

**FACTS:** S lived in a two-room flat with her father and two children since 1992. The flat was leased by S’s father and following his death in 1994, S sought registration as the tenant with the leasing municipality. Her application was refused. The municipality argued S could move into her son’s one-room flat, then obtained an eviction order and placed S on a public housing waiting list. S filed a petition with the Slovakian Constitutional Court, alleging her eviction was a violation of article 8(1) of the European Convention (the European equivalent of s.13 of the Charter).

**DECISION:** The Constitutional Court stated that in order for an interference with privacy and family life to be permissible, it was necessary to consider whether the interference was based on legitimate and pressing social need, and proportionate to the pursued aim, having regard to the particular circumstances of the case. The Court held that S’s eviction was lawfully pursued with the legitimate aim of protecting the rights of the Municipality. However it also found that the Municipality’s ownership rights “could not be dissociated from its obligation to assist S in having her basic needs satisfied”, and that the likely impact of evicting S and her children could not be regarded as necessary or proportionate. The eviction therefore amounted to a violation of article 8. Because the Court’s remedial powers are only declaratory, S took her case to the ECHR, which also found that the order “to leave the flat without alternative accommodation” produced effects amounting to a violation of article 8, and ordered payment of damages and just satisfaction.

# Section 14 Freedom of thought, conscience, religion and belief

**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.**

(Modelled on article 18 ICCPR)

## Key issues

- This right includes the right to adopt, replace, relinquish, or retain a religion or belief.
- It includes the right to manifest one's religion or belief.
- It includes the right to have no religion.
- The concepts of 'religion' and 'belief' are likely to be interpreted broadly.
- One cannot be coerced to adopt a certain religion or belief.
- Some religious practices may be legitimately restricted, in accordance with s.7.

Section 14 protects the fundamental right of every individual to enjoy freedom of thought, conscience, religion and belief. The section protects an individual's right to adopt, replace, relinquish, or retain one's religion or belief, and the right to manifest the religion or belief through worship, ritual, practice and teaching. The right may be exercised in public or private, by one's self or with others.

'Religion and belief' will probably be broadly interpreted so as to encompass both mainstream and alternative religions and beliefs. There is no requirement that the religion or belief have institutional characteristics or practices associated with traditional or well-known religions. The section also extends protection to those who do not wish to have, adopt or practice any religion or belief, including atheists and agnostics.

This right could be limited in certain circumstances, such as where the rituals associated with a particular religion compromised the health and safety of followers or others. For example, human sacrifice would certainly not be permitted, regardless of any religious premise, nor would the ingestion of illegal drugs.

# Section 14 Freedom of thought, conscience, religion and belief continued

## Cases of relevance to Section 14

### **Sahin v Turkey (European Court of Human Rights, Grand Chamber 2004)**

**FACTS:** The University of Istanbul decided to prohibit the wearing of an Islamic headscarf to the university. It issued a policy stating that students wearing such a headscarf should not be admitted to lectures, courses or tutorials. S, a student at the university, was a traditional Muslim who felt it her duty to wear a headscarf and continued to do so despite the policy issued by the university. She was subsequently prevented from entering two exams, and from attending numerous lectures. She contended that this policy violated her rights under article 9 of the European Convention (the European equivalent of s.14).

**DECISION:** The Court acknowledged the policy constituted an interference with S's freedom of religion. However, it noted "in a democratic society in which several religions co-exist, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs were respected".

In the context of Turkey the Court acknowledged that the "principle of secularism... was one of the fundamental principles of the State. According to the Constitutional Court, secularism in Turkey was the guarantor of democratic values, of the inviolability of freedom of religion and of the equality of all citizens before the law, and it protected the individual from external pressure". Considering the fundamental importance of secularism in Turkey the Court found that the "limitations imposed on S's freedom to manifest her religion could therefore be regarded as meeting a pressing social need by seeking to protect the 'rights and freedoms of others' and in order to maintain 'public order'". Therefore no violation of article 9 had occurred.

### **R on the application of Begum (by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School (UK House of Lords, 2006)**

**FACTS:** B, a secondary school student of Muslim faith, sought to wear full length Islamic dress (a Jilbab) to school. The school's uniform policy did not allow her to wear the Jilbab but did permit students to wear a shalwar kameez (another form of Islamic attire). The school argued its policy was reasonable in that it did consider cultural and religious concerns (by allowing the shalwar kameez), and further, had been developed through considerable consultation with staff, students, parents and Imans. S claimed that her freedom to manifest her religious belief by her dress had been infringed.

**DECISION:** The House of Lords found no breach of S's right to manifest her religious belief for two reasons. The first was that there were two other schools in the area which permitted the student to wear the Jilbab, and which she could attend. Secondly, the Court felt that the school's dress restrictions were justified as the uniform code was the product of considerable consultation with relevant groups, and appropriately balanced the rights and freedoms of others.

# Section 15 Freedom of expression

- 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.****

(Modelled on article 19 ICCPR)

## Key issues

- Freedom of opinion is a passive activity.
- Once an opinion is expressed, one is in the realm of 'freedom of expression'.
- The right protects verbal and non-verbal expression, in all contemporary mediums.
- It includes the right of freedom of information.
- The right may be limited in accordance with s.15(3) and s.7.

This section affirms the right of all persons to hold an opinion. Holding an opinion is a passive activity and does not involve any active element of expression. It is considered a fundamental right which cannot be restricted or limited in any form, even if one's opinions are offensive or dangerous.<sup>1</sup> Brainwashing is an example of a breach of this right.

The section also upholds the right to freedom of expression, protecting an individual's right to seek, receive and express information and ideas of all kinds. 'Expression' encompasses verbal and non-verbal forms of communication.

This right is extremely important in any democratic society and it plays a vital role in ensuring healthy social and political debate and a constructive exchange of ideas and opinions. However, freedom of expression may be limited in certain circumstances, as specified in s.7 and s.15(3).

Examples of permissible restrictions would include defamation laws (which protect undue attacks on reputation), contempt of court laws (which ensure fair trials), breach of confidence (publicly revealing confidential information, which might infringe the right to privacy), prohibitions on incitement to racial hatred, and copyright laws (which prohibit copying another's work and claiming it as one's own).

1. It is possible that s.15(1) may be restricted under s.7 of the Victorian Charter. It seems likely, however, that the right will be interpreted in accordance with international law, where no restrictions are ever allowed.

## Section 15 Freedom of expression continued

### Advocacy examples relevant to Section 15

#### Non-English speakers sectioned without an interpreter (UK)

A mental health hospital had a practice of sectioning asylum seekers who spoke little or no English without the use of an interpreter. Members of a user-led mental health befriending scheme used human rights language to successfully challenge this practice. They argued that it breached the asylum seekers' right to not be discriminated against on the basis of language and their right to liberty. It may also represent a breach of their right to freedom of expression, which includes the right to seek, receive and impart information of all kinds.<sup>2</sup>

### Cases of relevance to Section 15

#### Coleman v Australia (Human Rights Committee, 2006)

**FACTS:** C was fined for delivering public addresses without a permit in a Townsville mall. Upon non-payment of the fines, he was detained for five days. He claimed that his fine and detention breached article 19 of the ICCPR. The government argued that the permit system was designed to maximise public enjoyment of a small space, namely the mall.

**DECISION:** A breach of article 19 was found. The arrest and conviction of C was disproportionate to the end of promoting public order. After all, his address was not "threatening, unduly disruptive, or otherwise likely to jeopardise public order in the mall". An HRC minority agreed with the result, but stressed that permit systems, particularly for public assemblies, were generally permissible. However, the punitive reaction of the government in this circumstance was disproportionate and unnecessary.

#### Faurisson v France (Human Rights Committee, 1996)

**FACTS:** The French 'Gayssot Act' made it an offence to contest the existence of crimes against humanity as defined by the 1945 London Charter, used to try and convict Nazi leaders at Nuremberg. F expressed his view, in an interview for a French publication, that there were no homicidal gas chambers in Nazi concentration camps, and was convicted for violating the Gayssot Act. F, an academic and historian, claimed that his conviction breached article 19 of the ICCPR.

**DECISION:** The HRC acknowledged that the Gayssot Act "may lead... to decisions or measures incompatible with the Covenant". That is, it was concerned about the potential breadth of the law. However in F's case, the restriction on his freedom of expression was permissible, in consideration of the fact that the statements "were of a nature as to raise or strengthen anti-Semitic feelings". The limitation on F's speech "served to respect the Jewish community to live free from fear of an atmosphere of anti-Semitism."

#### Hagan v Australia (Committee on the Elimination of Racial Discrimination, 2003)

**FACTS:** H claimed that the naming of a sports ground, the 'Nigger Brown Stand' in Toowoomba breached several provisions of the International Convention on the Elimination of all Forms of Racial Discrimination. He claimed it affected his enjoyment of a public facility on racial grounds, and undermined the government's obligation to combat and educate about racial discrimination. He also argued it fostered racial hatred. The ground was named after a white man, whose nickname 'Nigger' was due to either his pale complexion and red hair, or his use of 'Nigger Brown' boot-polish.

**DECISION:** CERD recommended the removal of the offensive sign, and that Brown be commemorated in a way that was not racially offensive. The Committee confirmed by subsequent letter to the Australian government that the sign did in fact breach the Convention, but it did not clarify exactly how it did so. The decision is potentially problematic as freedom from offence is not itself a human right. Therefore, it is a shame that the Committee was not clearer in its reasoning.<sup>3</sup>

2. British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bihri.org.uk](http://www.bihri.org.uk)

3. Note that the Australian on 27 January 2007 reported that an English person is complaining to the UN about the use of the word 'Pom' in some advertisements.

## Cases of relevance to **Section 15** continued

### **RJR - MacDonald Inc. v. Canada (Supreme Court of Canada, 1995)**

**FACTS:** The Canadian Tobacco Products Control Act prohibited advertising and promotion of tobacco products and made the sale of such products conditional upon the package including certain health warnings and information. Two tobacco companies challenged the legislation, claiming it infringed on the right to freedom of expression under s.2(b) of the Canadian Charter of Rights and Freedoms.

**DECISION:** The Supreme Court of Canada held that the Charter right of freedom of expression extends to commercial expression. The object of reducing health risks through reducing advertising of tobacco was sufficiently important to justify overriding the right of free expression. However, the total ban on advertising did not constitute a minimal impairment to the freedom of expression; it was disproportionate. It was held that a total ban which encompassed information concerning for example, prices and tar content, was a disproportionate means of achieving a legitimate goal, thereby failing the 'minimal impairment' test. Therefore, a breach of freedom of expression was found.

Note that less restrictive bans on advertising have been found to be constitutional in Canada: see J.T.I. MacDonald Corp v Attorney-General of Canada (Court of Appeal of Quebec, 2005). However, note that this case is being appealed. Bans have also been upheld in other countries (e.g. UK, European Union).

*Note also that corporations do NOT have rights under the Victorian Charter (s.6(1)).*

### **Venables and Thompson v News Group Newspapers Ltd and others (Queens Bench Division, 2001)**

**FACTS:** In a widely publicised case two ten year old boys, V and T, were detained at her majesty's pleasure for the murder of a 2-year-old boy. Upon their release the boys sought a permanent prohibition on their appearance and new identities being released to the media. In requesting this injunction the two boys emphasised their fear of vigilante attacks and their inability to live normally should their identity be revealed. The media relied upon freedom of expression in opposing the injunction.

**DECISION:** The Court acknowledged that should the identities of the boys be revealed, they would have no chance of living a normal life. There was also a considerable risk that their lives would be at risk, or that vigilantes could subject them to inhuman treatment. It noted that in exceptional cases "it was necessary to place the right of confidence (i.e. confidential information, an aspect of privacy) above the right of the media to freely publish information about the claimants". Therefore, the injunction was granted.

# Section 16 Peaceful assembly and freedom of association

- 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.

(Modelled on articles 21 and 22 ICCPR)

## Key issues

- Article 16(1) protects the right of peaceful (rather than violent) assembly, including peaceful protests, demonstrations, and other meetings.
- Governments may stipulate procedural requirements for certain public marches to protect public order.
- Freedom of association includes the right to join organisations such as political parties, trade unions, or other groups with a common purpose.
- Section 16(2) may include the right not to associate with others
- Both rights may of course be limited in accordance with s.7.

Freedom of assembly upholds the right of individuals to gather together in order to exchange, give or receive information, to express views, and to conduct a protest or demonstration. The right is limited to assemblies that do not involve force or violence, such as a riot. This right could also impose a positive obligation on government to ensure that peaceful assemblies can occur, and that those expressing their views are protected from counter-protesters.

The right may also be limited where the purpose of the meeting could be damaging to the community, such as a meeting to exchange materials relating to child pornography.

It is permissible for governments to require certain procedures be followed, such as the giving of notice to the police before a public assembly may lawfully be held. For example, a march down a major road without notice would severely upset traffic flow and public order, and would not be protected under s.16(1).

Freedom of association protects the rights of individuals to join together with others to formally pursue a common interest. Such groups include political groups, sporting groups, non-government organisations, trade unions and corporations. This right is limited to groups who have a public purpose and would not protect individuals who meet to pursue a private interest, for example a meeting between family members (which may be protected under right to privacy).

The freedom is likely to include the right not to associate with others, so an individual cannot be forced to join a group, such as a political party, a trade union, or a 'neighbourhood watch' group.

This freedom may be limited in reasonable circumstances – for example in relation to groups with aims to harm others, such as terrorist or criminal organisations, or groups inciting hatred against people from particular racial backgrounds.

## Cases of relevance to Section 16

### JB et al v Canada (Human Rights Committee, 1986)

**FACTS:** The authors submitted a complaint arguing that the legislative prohibition in Alberta for provincial public employees to strike, constituted a breach by Canada of article 22 of the ICCPR. The authors contended that the right to freedom of association includes the right to strike.

**DECISION:** The HRC majority found that the right to strike was not protected under article 22 ICCPR.

### Young James and Webster v UK (European Court of Human Rights, 1981)

**FACTS:** The three applicants were employees of British Rail and were dismissed from their positions after refusing to join a trade union. The requirement to join a trade union had become compulsory after an agreement between British Rail and three trade unions.

**DECISION:** The Court found that their freedom of association had been violated. It stated "one of the purposes of the freedom is the protection of personal opinion, and the kind of pressure exerted on the applicants to compel them to join particular unions contrary to their convictions strikes at the very substance of [the freedom]". The Court further held that the circumstances did not engage any legitimate limitation on the right of freedom of association, as there was no special reason given by British Rail to explain the strict requirement, and the union could have fulfilled its duty to protect members without forcing employees to become members.

# Section 17 Protection of families and children

- 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.**

(Modelled on articles 23 and 24 ICCPR)

## Key issues

- Section 17(1) protects the family as the fundamental group unit of society.
- 'Family' is likely to be interpreted broadly.
- The government must provide appropriate institutions to facilitate protection of the family.
- Children are entitled to protection in their best interests.
- A child is a person under 18 years of age.

Section 17 recognises the fundamental importance of family in the social fabric of society and aims to protect and nurture the family unit. The concept of family should be broadly interpreted in order to accommodate and offer protection to the various social and cultural groups living within Victoria, whose understanding and definition of family may differ. However, a group could not conveniently claim to be a family for the purposes of benefiting from this right.

The responsibility to protect the family falls upon both society and the State. One way in which the State may protect the family is by supporting social institutions operating to promote and protect family life. A fundamental principle regarding family protection is the protection of family unity. In the Victorian context this could be especially relevant regarding the rights of prisoners to maintain consistent contact with their family. Other sections in the Charter also operate to protect the family, especially s13 which protects private and family life.

A limitation on this protection of families may occur when intervention is required in order to protect an individual within the family unit, for example a child in a situation of family violence.

The vulnerable status of children is also recognised in section 17, which affirms the right of all children to protection that is in their best interests. A child is a person under the age of 18 years old. This section operates to support other Charter rights which apply equally to children. 'Best interests' may be understood with reference to the Convention on the Rights of the Child. Therefore, as noted above, a child's right to protection will prevail over a family's right of unity in the case of family violence. Further, s.17 probably includes economic, social and cultural measures to protect children's best interests. Examples include actions to reduce infant mortality, eradicate child malnutrition, and increase access to education which fosters a child's ability to enjoy other rights.

### Advocacy examples relevant to Section 17

#### Parents banned from visiting son after complaining about bruising on his body (UK)

A young man with mental health illness was placed in residential care on a short-term basis. When his parents noticed bruising on his body they raised concerns with managers, but their concerns were dismissed, and they were told they were no longer permitted to visit their son. The parents invoked their son's right to not be treated in an inhuman and degrading way, and their right to respect for family life. As a result the ban on their visits was revoked and an investigation was conducted into the treatment of their son.<sup>1</sup>

#### Married woman denied double bed (UK)

A woman with a disability was told by her occupational therapy department that she needed a special bed. She was unable to leave her bed and this new arrangement would enable carers to give her bed baths. She requested a double bed so she could continue to sleep next to her husband, but the authority refused her request even though she offered to pay the difference in cost. After an 18-month stalemate, the woman was advised by a disability law advocate to invoke her right to respect for private and family life, and within three hours of putting this argument to the authority, it found the funds required to purchase the double bed in its entirety.<sup>2</sup>

### Cases of relevance to Section 17

#### Buckle v New Zealand (Human Rights Committee, 2000)

**FACTS:** B had her six children removed from her care under a court order. She argued these removals breached her rights as a mother, and her children's right to be in the care of their mother. The removal of the children did not happen suddenly, but was the final result of an ongoing process. The initial steps in that process had been aimed at improving the family situation without removing the children from their mother's care. The decision of the Court to remove the children was a decision of last resort which was made in the belief that "the interests of the child...be the first and paramount consideration," and because the mother was simply unable to care adequately for her children.

**DECISION:** The HRC acknowledged that the State had followed "extensive procedures". The HRC noted that "the situation is under regular review and B was given the opportunity to retain access to her children." It found that the actions of the State had not been arbitrary or unlawful, and that all actions taken were in consideration of the best interests of the children. No violation of the ICCPR was found.

1. British Institute of Human Rights – *The Human Rights Act – changing lives* [www.bihhr.org.uk](http://www.bihhr.org.uk)  
2. *ibid.*

# Section 18 Taking part in public life

- 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.**

(Modelled on article 25 ICCPR)

## Key issues

- Section 18 guarantees a right of meaningful participation in the political life of Victoria.
- This right includes the right to vote, for 'eligible people' to stand for public office, and the right of equal access to the Victorian public service. This relates to equal opportunity, rather than a right to a particular job.

Section 18 affirms the right of every person in Victoria to contribute to and exercise their voice in relation to the public life of the State. This ensures all people have the

opportunity to contribute to the political process and to the public institutions that govern various aspects of their lives. Participation in public affairs extends to all levels of public governance and policy making including legislative, executive and administrative powers, and matters which have international, regional and local impacts.

A central aspect of political participation is the right to vote and to be elected. This right is limited to 'eligible' persons but such eligibility criteria must be reasonable and could relate to age (e.g. it is reasonable that children cannot vote), residence (it is reasonable that non-Victorian residents cannot vote) and citizenship (it is reasonable that non-citizens cannot vote).

In order that these rights may be meaningfully exercised, genuine elections must be held at appropriate intervals, and positive measures should be taken to ensure an inclusive voting process which addresses potential barriers such as literacy, language, poverty and disability.

The right also guarantees equal access to the Victorian public service and public office. This relates to the opportunity for a job, rather than an actual job. In relation to this right, the process and criteria for appointment, promotion, suspension and dismissal should be objective and reasonable.

## Cases of relevance to Section 18

### **Mátyus v Slovakia (Human Rights Committee, 2002)**

**FACTS:** M was a candidate in council elections. At the relevant elections, he claimed that there were substantial population differences between voting districts. For example, in District 1, one representative was elected per 1000 voters, whereas in District 5, it was one representative per 200 voters. Thus, there was not equality of voting power: the votes of those in District 5 were worth five times those of voters in District 1.

**DECISION:** The significantly unequal distribution of voters in voting districts breached article 25, as voters were not treated equally, especially as no explanation for that unequal distribution was offered.

### **Roach v Australian Electoral Commissioner & Commonwealth of Australia (High Court of Australia, 2007)**

**FACTS:** R, an Aboriginal prisoner at a women's prison in Melbourne commenced legal action in the High Court to challenge the constitutionality of the *Commonwealth Electoral Act 1918*, that removed the right of all sentenced prisoners to vote in federal elections. The case raised major issues as to prisoners' rights, Indigenous rights, the right to vote, representative democracy and responsible government. The Act was challenged on several grounds including that it was contrary to sections of the Constitution requiring that government be 'directly chosen by the people', and was inconsistent with the implied rights to freedom of political participation.

**DECISION:** In a landmark decision, the High Court upheld the fundamental human right to vote, finding that the Government had acted unlawfully and unconstitutionally by imposing a blanket ban denying prisoners the vote, and that this right may only be limited for a 'substantial reason'. Furthermore, the limitation must be 'appropriate and adapted' (or 'proportionate') to that reason. The Court upheld the validity however, of the law providing that prisoners serving a sentence of three years or longer are not entitled to vote.

# Section 19 Cultural rights

- 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.**

(Modelled on article 27 of the ICCPR and should also be considered in conjunction with s4 of the Multicultural Victoria Act 2004 (Vic)<sup>1</sup>

Section 19 affirms the right of all persons to enjoy their culture, to practise or declare their religion, and to use their language, either alone or with others who share their background. These rights function to ensure not only the survival, but also the development of minority cultures and identity.

Section 19(2) acknowledges that Aboriginal persons possess distinct cultural rights, and affirms that they must not be denied the right to enjoy their identify and culture, including language, maintenance of kinship ties, and their spiritual, material and economic relationship with the lands and waters and other resources, with which they have a connection under traditional laws and customs.

The rights recognised under s.19 are specific rights for minority groups and Aboriginal persons, that function to support and supplement the other rights in the Charter (which also apply to these groups).

## Key issues

- Section 19 guarantees the right to enjoy one's culture (including language and religion) in community with others of the same culture
- This right is of special significance to Aboriginal persons, as detailed in s.19(2).

1. Human Rights Law Resource Centre, 'The Victorian Charter of Human Rights and Responsibilities' Chapter 5 in *Human Rights Law Resource Manual*, (2006), p31 available at [http://www.hrlrc.org.au/html/s02\\_article/default.asp?nav\\_top\\_id=62&nav\\_cat\\_id=143](http://www.hrlrc.org.au/html/s02_article/default.asp?nav_top_id=62&nav_cat_id=143)

## Cases of relevance to Section 19

### **Länsman v Finland (Human Rights Committee, 1994)**

**FACTS:** The government of Finland authorised quarrying works in a certain region. The complainants, members of the Sami Indigenous peoples, submitted that this quarrying interfered with their traditional practice of reindeer-herding, violating article 27 of the ICCPR.

**DECISION:** The HRC noted that the right to enjoy culture must be interpreted “in context”, and that article 27 may still be invoked where traditional practices have evolved through the use of technology and the passage of time. However the HRC found no violation of article 27, as the interests of the Sami peoples were considered by the government in granting and imposing conditions of the quarrying permit. The HRC also noted that the reindeer-herding did “not appear to have been adversely affected by such quarrying as has occurred.” In relation to future quarrying it noted that “if mining activities... were to be approved on a large scale... then this may constitute a violation under article 27, in particular the complainants’ right to enjoy their own culture.”

### **Länsman et al v Finland (Human Rights Committee, 1996)**

**FACTS:** The Finnish Forestry Board planned to approve logging and road construction in the winter herding grounds of the Moutkatunturi Herdsmen’s Committee (MHC). The complainants alleged that the logging which had already occurred, and that which was planned to take place, constituted a violation of their rights under article 27 of the ICCPR. Again, the complaint related to the impact of these commercial activities on reindeer-herding.

**DECISION:** The HRC again emphasised consultation with the MHC had occurred in the preparation of the logging plans and that, at that stage, the MHC did not react negatively to the plans. It found that the previous and proposed logging activities did not constitute a denial of the complainants’ right to enjoy their culture. However, it did warn that if expanded, such commercial activities could erode their cultural rights.

\* The two *Lansman* cases indicate that it is permissible for development activities to impact on indigenous activities, so long as they have been consulted in relation to the granting of relevant commercial development permits, and so long as the impact on cultural activities is not too extensive.

### **Diergaardt v Namibia (Human Rights Committee, 2000)**

**FACTS:** D and others were members of the Rehoboth Baster Community, who had lived on the land in question for 125 years. The community was granted self-government in 1976, however in 1989 ‘under extreme political pressure’ the Rehoboth people accepted transfer of their legislative and executive powers to the Administrator-General of South West Africa.<sup>2</sup> D argued that this transfer was temporary, and that full power was to be returned one day before Namibia gained independence, however this transfer did not occur. D contended that the Namibian government had “expropriated all communal land of the community”, which effectively destroyed their ability to survive as a community, and that “the confiscation of all property collectively owned by the community robbed it of its economic livelihood, which was the basis of its cultural, social and ethnic identity”, thereby violating their cultural rights.

**DECISION:** The HRC acknowledged that minority rights to enjoy culture includes “protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.” However it did not accept that the 125 year old connection to the land had produced a “distinctive culture” or that the economic gains produced through cattle grazing could be equated with cultural or spiritual activities. Two members of the HRC noted that “the authors had defined their culture almost solely in terms of the economic activity of grazing cattle... they cannot show that they enjoy a distinct culture which is intimately bound up with, or dependent on the use of these particular lands.”<sup>3</sup>

2. South West Africa was the colonial name of Namibia.

3. It seems likely that the HRC was influenced by the history of Namibia and South West Africa. The Rehoboth Basters had been granted self government by the apartheid South African government, when it was in illegal control of South West Africa.

# Section 20 Property rights

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

## Key issues

- This right is not drawn from the ICCPR.
- It is uncertain what it means for the right to be limited by 'law'. Further analysis will determine whether one may be deprived of their property, no matter how unreasonable the law.
- The most relevant international provision is article 1, protocol 1 of the European Convention on Human Rights, but that right seems to be written in broader language than s.20.
- Property rights may be protected under other rights, such as the right to privacy.

This right protects a person from having his or her property removed by unlawful means. A government can only expropriate a person's property if authorised by law, but a crucial aspect of this right will be how the word, 'law', is interpreted. There are two possibilities:

- a) 'law' is simply interpreted to mean the law as it is in Victoria, OR
- b) that there is also an additional requirement that the law has to be reasonable.

If there is no requirement that the law be reasonable, s.20 would not protect people from the removal of their property under an unreasonable and arbitrary law.

The most relevant international right is that in article 1 of protocol 1 of the European Convention on Human Rights, which states that:

'No one shall be deprived of his (sic) possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

However, the European right is clearly broader, given its reference to 'general principles of international law'.

Property rights are also protected under other rights, such as the right to protection of one's home in s.13.

Examples of laws in this regard are the anti-hoon laws, as well as laws mandating the destruction of dangerous dogs.

## Cases of relevance to Section 20

### **Sporrong and Lonnroth v Sweden (European Court of Human Rights, 1982)**

**FACTS:** S and L owned property which was subject to redevelopment plans by the government. These plans imposed both expropriation permits and a prohibition on construction on their property. These expropriation permits were extended for a period of 23 years, and the prohibition lasted for 8 years. Both the permits and the prohibition were eventually cancelled. Nevertheless, S and L claimed a breach of their property rights under the ECHR due to the inconvenience caused by the extreme interference with their property rights.

**DECISION:** The Court acknowledged that the application of article 1 requires a balancing act, between the "protection of the right to property and the requirements of the general interest". It found the permits' prolonged nature reduced the owners' ability to use and dispose of their possession, and made their ownership precarious. This was further exacerbated by the prohibition on construction. The Court found an interference with the applicants' rights under article 1 that may have been avoided if S and L had been able to appeal the time limits or claim compensation for the burden. In the absence of these options and in light of the extended time over which the permits applied, a violation of article 1 had occurred.

# Section 21 Right to liberty and security of person

- 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 that the detention is unlawful.
- 8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

## Key issues

- The right to security of the person is separate to the right to liberty. In international law, it refers to one's personal safety, or perceptions of safety.
- Most of s.21 concerns the right to liberty, as in freedom from arbitrary (unreasonable) or unlawful arrest or detention.
- The right to liberty applies in all detention contexts, not just prisons (e.g. it applies to psychiatric institutions).
- Sections 21(4)-(8) contain very specific procedural rights for those arrested on a criminal charge.

Section 21 affirms each individual's right to liberty and security. It particularly addresses issues arising in the context of arrest and detention, which includes detention in a prison, a psychiatric institution, or any other type of detention facility.<sup>1</sup>

Although most of the sub-sections focus on an individual's right to liberty, the right to security applies to free individuals in their everyday life, and includes protection from harassment and threats.<sup>2</sup>

Section 21 states that no person should be deprived of their liberty, unless on lawful grounds and through procedures established by law. Further, no individual may be subjected to arrest or detention without sound reason. That is, detention is only allowed if necessary and appropriate in the circumstances.

Where an individual is arrested or detained, that person must be told immediately of the reason for his or her arrest, and quickly informed about

any subsequent proceedings against them. If the person is detained on a criminal charge, that person must be brought promptly before a court, within approximately three days at the most.

An individual awaiting trial must not be automatically detained in custody and must be given the opportunity to apply for release on bail. Pre-trial detention should only be used in exceptional circumstances and should be as short as possible. A person should also be brought to trial without unreasonable delay. The reasonableness of any delay will depend on the complexity of the case.

All individuals who are arrested or detained have the right to challenge the lawfulness of the detention in a court. The court must then make a decision without delay and order the release of the person if the detention is found to be unlawful.

An individual cannot be imprisoned simply because he or she is unable to perform all or part of a contract.

1. Note that s.21 will not apply to immigration detention facilities in Australia, as they are run under federal law.  
2. The Explanatory Memorandum to the Charter states that s.21 is primarily concerned with the right to physical liberty and is not intended to extend to matters such as bodily integrity or personal autonomy. This desired limitation may be motivated by the extensive meaning given to the 'right to liberty' under the Canadian Charter of Rights and Freedoms see Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p16.

(Modelled on article 9 of the ICCPR; subsection (8) is based on article 11)<sup>1</sup>

## Section 21 **Right to liberty and security of person** continued

### Cases of relevance to **Section 21**

#### **Jayawardene v Sri Lanka (Human Rights Committee, 2002)**

**FACTS:** J claimed that comments by the Sri Lankan President which linked him to the separatist Tamil Tigers jeopardised his safety, and constituted harassment. He further claimed that the government failed to provide him with appropriate security after he later received death threats, and that it failed to properly investigate those threats.

**DECISION:** The facts amounted to a breach of article 9(1) ICCPR, as the right to security of the person was violated.

#### **A v Australia (Human Rights Committee, 1997)**

**FACTS:** A was a Cambodian refugee, who was detained in an immigration detention centre under Australia's mandatory detention laws while his application for asylum was determined. He was detained for nearly four years. He claimed his detention breached article 9 ICCPR.

**DECISION:** The HRC found that immigration detention could be compatible with the ICCPR. However, Australia's system of mandatory detention, that fails to give consideration to the circumstances of individual detainees (e.g. their risk of absconding), was arbitrary and unreasonable, and was in breach of article 9 of the ICCPR. The HRC has upheld this decision in numerous subsequent cases against Australia regarding its mandatory detention system.

# Section 22 Humane treatment when deprived of liberty

- 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.**

(Modelled on article 10 ICCPR)<sup>1</sup>

## Key issues

- This right provides detainees with extra protection from ill-treatment, due to their inherently vulnerable status.
- Accused persons must be separated from convicted persons.
- Accused persons must be treated in accordance with their status as unconvicted persons.
- The interpretation of this right may be influenced by international standards on prisoners' rights, such as the *Standard Minimum Rules for the Treatment of Prisoners*.<sup>1</sup>

This section reinforces the need to protect detainees, as a group particularly vulnerable to abuse of their human rights. Such individuals must be treated with humanity and respect for their inherent dignity as human beings. It supplements the rights detainees otherwise have under s.10. The right applies to those detained under the law and authority of the state, including in prisons and psychiatric institutions. The government and all detention authorities have obligations under this right, for example to avoid overcrowding.

Accused individuals, or those detained without having been charged with an offence, must be separated from convicted persons, although incidental contact is allowed. For example, it might be possible for convicted persons to work in a prison kitchen and, for example, serve food to people on remand. Also, people not convicted of committing any crime must be treated in a way which is appropriate in light of their status; they must not be treated as guilty of committing an offence.

Violations of this right may arise where detainees are denied adequate bedding, food, exercise or medical attention; are subjected to physical, psychological and verbal abuse; are exposed to unsanitary food/water/living conditions; are subject to extended periods of isolation without good reason, or are not provided with educational opportunities, work or reading material. In general, treatment should comply with relevant UN standards, such as the *Standard Minimum Rules for the Treatment of Prisoners*.

1. See [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm)

# Section 22 Humane treatment when deprived of liberty

continued

## Advocacy examples relevant to Section 22

### **Inpatient treatment at Thomas Embling Hospital (Victoria)**

Assistance was provided to an inpatient of Thomas Embling Hospital who was seeking access to medical treatment in relation to a liver condition. The Centre claimed that the Hospital's failure to arrange for the provision of appropriate medical treatment raised issues in relation to the inpatient's right to humane treatment while deprived of liberty, as well as the right to life, right to privacy, and the right to protection from cruel, inhuman or degrading treatment. Advocates were able to successfully negotiate with the Thomas Embling Hospital and the Austin Hospital to arrange for a medical appointment for the inpatient.<sup>2</sup>

## Cases of relevance to Section 22

### **Cabal and Pasini Bertran v Australia (Human Rights Committee, 2003)**

**FACTS:** C and P complained about various aspects of their treatment as detainees in a Port Philip prison facility under the control of the private company Group 4.

**DECISION:** The HRC found that the government of Australia (as the party to the ICCPR rather than the State of Victoria) was responsible for the treatment of inmates at private prisons and that this principle also applies to core State activities involving the use of force and detention, when contracted out to the private commercial sector.

Regarding the treatment of C and P, the HRC found a violation, as they had been held in a triangular cage for one hour, which was so small that they could not sit down at the same time.

### **Zheludkov v Ukraine (Human Rights Committee, 2002)**

**FACTS:** Z was a detainee who received medical treatment in prison. He claimed a breach of article 10 of the ICCPR as he was consistently denied access to his own medical records.

**DECISION:** The unexplained denial of access to his own medical records breached article 10(1) ICCPR. This was so even though there was no suggestion that the relevant medical treatment was inadequate. Detainees generally have a right of access to their own personal information, except in exceptional circumstances (which did not arise in Z's case).

2. Human Right Law Resource Centre Bulletin, Number 19 – November 2007, p.14

# Section 23 Children in the criminal process

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

(Modelled on article 10(2)(b) and 10(3) ICCPR)<sup>1</sup>

## Key issues

- Children detained within the criminal process must be separated from detained adults.
- Such children should be brought to trial as quickly as possible.
- Such children should be treated in accordance with their young and vulnerable age.
- The interpretation of s.23 will be influenced by international standards.

Section 23 protects the rights of children who become involved in the criminal process. Under the Charter, a child is defined as a person under the age of 18.

It ensures that all children who are detained are separated from detained adults, that all children who are accused of a criminal offence are brought to trial as quickly as possible, and that a child convicted of an offence is treated in a way which is appropriate for his or her age. Appropriate treatment may relate to shorter working hours and increased rights of contact with relatives.

The practice of s.23 may be informed by international guidelines such as the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* and *United Nations Guidelines for the Prevention of Juvenile Delinquency*.<sup>1</sup>

## Cases of relevance to Section 23

### **Brough v Australia (Human Rights Committee, 2006)**

**FACTS:** B was a juvenile Aboriginal boy with a mild mental disability who was transferred to an adult prison after causing disturbances at a juvenile detention facility. For his own safety, he was kept in solitary confinement. Later some of his clothing and blankets were removed, and the light was kept on in his cell. The government justified B's treatment as necessary to protect B from self harm, to protect other inmates, and to safeguard the security of the facility.

**DECISION:** The humanity of a person's detention depends on subjective factors, such as the person's 'sex, age, state of health, or other status'. B's treatment was found to be a breach of article 10 (humane treatment of detainees) in conjunction with article 24 (protection of children). The HRC noted B's Aboriginal status, and greater deleterious effects caused to Aborigines by isolation, as a relevant factor in its decision, as well as his age.

1. See [http://www.unhchr.ch/html/menu3/b/h\\_comp47.htm](http://www.unhchr.ch/html/menu3/b/h_comp47.htm)

# Section 24 Fair hearing

- 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 sub-section (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.**

Note: For example, s.19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also s.80AA of the County Court Act 1958 and s.126 of the Magistrates' Court Act 1989.

(Modelled on article 14 (1) ICCPR)<sup>1</sup>

## Key issues

- Section 24 provides for a right to a fair trial in both criminal and civil hearings.
- Trials must be conducted by impartial and independent courts.
- All aspects of a trial should be public, except in rare circumstances.

Section 24 affirms the right of all individuals to a fair procedure when they come before a court

or tribunal. It applies to both criminal and civil hearings, and guarantees that such matters be decided by a competent, impartial and independent court or tribunal. These rights must also be upheld in military and special courts.

There must be a clear separation between the courts and other parts of the government (e.g. Ministers, Parliament) to ensure the independence and impartiality of the judicial process. Judicial tenure is a fundamental ingredient in ensuring the independence of the courts. That is, judges should not be at risk of termination of their contracts except in extreme circumstances. Otherwise, judges might be tempted to make decisions that 'please' the government.

Equal treatment of all parties, fair rules of evidence, equal access to the courts, control of proceedings by independent and impartial judges, and access to appeals in appropriate situations are all essential elements of this right.

Generally, all aspects of a trial should be public. However, the right to a public hearing may be limited in accordance with other Victorian laws, which allow for the court or tribunal to exclude people for all or parts of the hearing. For example, exclusions may occur for reasons relating to morality or national security.

All decisions made by a court or tribunal must be made public, unless such publication would not be in the best interests of a child or where another Victorian law dictates. This section also gives rise to a right to obtain the reasons for a court or tribunal decision.

## Advocacy examples relevant to Section 24

### Access to court and the right to a fair hearing (Victoria)

A prisoner who was taking civil action against prison officers of the Fulham Correctional Centre when property was lost during his transfer to Port Phillip Prison, was required to attend an arbitration hearing at the Magistrates' Court in Sale. He was advised by the Department of Justice that while GSL Custodial Services (the private prison operator at Port Phillip Prison) was able to facilitate his escort to Sale, it would be at a cost of \$1,380 to the prisoner.

Advocates were concerned that this extraordinarily high cost was a significant impediment to the prisoner's access to justice and his right to a fair hearing, as enshrined in s.24 of the Victorian Charter. The prisoner had no means to pay the amount requested by GSL. Advocates were able to successfully negotiate with GSL, the Department of Justice and the Sale Magistrates' Court to transfer the arbitration hearing to the Melbourne Magistrates' Court, and for GSL to escort him at its own cost.<sup>1</sup>

## Cases of relevance to Section 24

### Äärelä and Näkkäljärvi v Finland (Human Rights Committee, 2001)

**FACTS:** A and N had taken and lost a case regarding indigenous cultural rights in the Finnish courts. As the losers, A and N had to pay for their own legal costs as well as the legal costs of the winner. They argued that this award of costs breached their right to a fair hearing.

**DECISION:** A violation was found. The inflexible regime, whereby costs were automatically awarded against losing parties acted as a substantial disincentive to people pursuing legal claims. The practice had in fact changed since the time of the decision such that costs in Finnish cases were now determined on a case by case basis.

1. Human Right Law Resource Centre Bulletin, Number 19 – November 2007, p.14

# Section 25 Rights in criminal proceedings

## Summary

- 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.

(Modelled on articles 14(2)-(6) ICCPR)

## Key issues

- Section 25 provides for very specific rights for accused persons in criminal trials. It is fairly self explanatory.

Section 25 complements s.24, affirming further rights at trial in relation to criminal proceedings. All individuals charged with an offence must be presumed innocent until proven guilty. Section 25(2) guarantees the following rights for individuals charged with a criminal offence including:

- Detailed information regarding the type and reasons for the charge must be given without delay and in

a language the accused person understands.

- Provision of suitable time and facilities to prepare his or her defence and communicate with a freely chosen lawyer or adviser.
- Trial without unreasonable delay. The unreasonableness of a delay will depend on the complexity of a case.
- The opportunity to be present at the trial and to defend one's self or be defended by a lawyer.
- To be informed about the right to legal aid (where the individual is not represented), and to enjoy the provision of legal aid without cost, if he or she meets the eligibility requirements under the *Legal Aid Act 1978*.
- To examine or have examined prosecution witnesses, unless prohibited by another law.
- To obtain the attendance of witnesses on one's behalf, on the same conditions as the prosecution.
- The provision of the free assistance of an interpreter if the accused cannot otherwise understand the proceedings.
- The provision of free communication technologies if necessary for the accused to communicate to the court.
- The right against self-incrimination (i.e. to refuse to give information which may be used to prove one's guilt).

Where a child is charged with a criminal offence the trial process must take into account the age of the child and also ensure that the rehabilitation of the child is promoted.<sup>1</sup>

Any person convicted of an offence has a right to appeal his or her conviction and sentence to a higher court.

1. Section 23 is also relevant here.

## Section 25 Rights in criminal proceedings continued

### Cases of relevance to Section 25

#### **Sánchez López v Spain (Human Rights Committee, 1999)**

**FACTS:** SL was caught by a speed camera and was required by law, as the owner of the car, to identify the driver or be subjected to a fine. SL lied by saying he did not know who the driver was, and was fined for non-cooperation. He argued that the law compelled him to incriminate himself, as he had been the driver of the car.

**DECISION:** The HRC found no violation. The decision turned on the technical point that SL was fined for non-cooperation rather than convicted of the driving offence. It found that the failure to cooperate fell outside the scope of the right of self-incrimination.

The reasoning in this case is not helpful. It seems that the HRC was influenced by the fact that the law regarding owner-identification of drivers was the only way of identifying drivers caught on camera, even though it occasionally forced an owner to incriminate him or herself. The case raises interesting issues regarding the impact of s.25 rights on new technologies, such as speed cameras and DNA testing. The HRC's reasoning is not helpful in resolving those issues.

#### **Gray v DPP (Victorian Supreme Court, 2008)**

**FACTS:** G was charged with a number of offences, including aggravated burglary in November 2007, and was remanded in custody. He was refused bail by a magistrate in December 2007, pursuant to the Bail Act, which provides that under the relevant charge, a person is to be refused bail unless the Court can be satisfied the continued detention is not justified. G applied for bail to the Supreme Court and argued that his continued detention was not justified considering the relative seriousness of the offence and that his trial was unlikely to conclude by the end of 2008. He contended there was a risk he would spend more time on remand than under any subsequent sentence if he was found guilty.

**DECISION:** Although neither party raised the Charter in their submissions, the Court considered various Charter provisions to be highly relevant to the question of bail, including s.21(5)(c) that a person must be released if not promptly brought before a court and must be tried without reasonable delay (also s.25(2)). This was the first decision by a Victorian court to substantively consider the Charter in its decision, and it concluded that G's continued detention was not justified and that he should therefore be released on bail.

# Section 26 Right not to be tried or punished more than once

**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.**

(Modelled on article 14(7) of the ICCPR)<sup>1</sup>

## Key issues

- This right protects against a person being tried twice for the same crime.
- This is the rule against double jeopardy, and is fairly self explanatory.

This section upholds the rule against double jeopardy: a person should not be taken to court or punished more than once for an offence which they have already been convicted of, or for which they have been acquitted (found not guilty). This section applies to all criminal offences, no matter how serious, but does not apply to civil proceedings.

## Cases of relevance to Section 26

### **A.P.v Italy (Human Rights Committee, 1987)**

**FACTS:** A was convicted and sentenced in Switzerland of a crime of kidnapping. He was also convicted for the same crime in Italy and claimed that this breached his freedom from double jeopardy.

**DECISION:** The rule against double jeopardy does not apply as between nation States. This means that Victoria could try a person for a crime for which that person had already been tried in another country. It is unlikely that the A.P. principle would apply as between two Australian States, given that they are not parts of different countries.

# Section 27 Retrospective criminal laws

- 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.**

(Modelled on article 15 ICCPR<sup>1</sup>)

## Key issues

- Section 27 protects against the retrospective application of criminal laws.
- One cannot be convicted of a crime unless one's actions were criminal at the time they were committed.
- This rule applies to penalties as well (one should not receive a harsher penalty than that applicable at the time a crime was committed).
- The right also requires that laws be reasonably clear, so that one is able to know the extent of one's duties under the criminal law.
- This right does not apply if the relevant crime is a crime under international law. Such crimes are grave and rare (e.g. genocide, crimes against humanity).

This section aims to protect individuals from being unfairly and harshly penalised in situations where criminal legislation has changed since the time they committed an offence.

It protects individuals from being found guilty of a criminal offence for an action which was not a criminal offence at the time it was committed. For example, if smoking was made a criminal offence as of 1 January 2008, s.27 would prevent people from being charged with that offence if they had smoked tobacco prior to that date.

The section also prohibits punishment more severe than that which existed at the time of an offence, and further, if the punishment for an offence is reduced after the offence is committed, but before the person is sentenced, that person is eligible for the reduced penalty.

This right also guarantees that the criminal law be sufficiently clear and precise so that individuals can know whether their actions are criminal or not. International bodies have expressed concern about certain modern anti-terrorism laws in this respect.

This section will not impact on the trial or punishment of a person for any act or omission which was a criminal offence under international law at the time of that act or omission. Such offences include the crimes of genocide, grave war crimes, and crimes against humanity.

## Cases of relevance to Section 27

### **Baumgarten v Germany (Human Rights Committee, 2003)**

**FACTS:** B was convicted of homicide and attempted homicide in several cases occurring between 1980 and 1989. He had been the Deputy Minister of Defence and Head of Border Troops in the former German Democratic Republic (East Germany), and had issued numerous orders authorising the use of force, even lethal force, by border guards to prevent illegal border crossings between the GDR and FRG. These orders had resulted in a number of deaths and attempted killings during this time period. B claimed his conviction by a unified Germany violated article 15 of the ICCPR, as his acts did not constitute a criminal offence under GDR law.

**DECISION:** The HRC determined that the killings and attempted killings were, at that time, criminal offences under GDR law. It was irrelevant that the law was not enforced during the relevant time period. It is quite possible that had another conclusion been reached on the state of the GDR law in the 1980s, that the crimes would have been found to be contrary to international law, anyway, in which case there still would have been no breach of article 15.





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