It is with great pleasure that I introduce the Charter Guidelines, which will assist government departments with the development of policies and programs that are consistent with human rights standards.

The Charter was passed by Parliament in July 2006. It reflects the government's commitment to uphold the civil and political rights of Victorians and take those rights into consideration in decision making.

The Charter acknowledges that rights are not absolute and can be reasonably limited. The mechanisms in the Charter provide an open and transparent way for government to balance individual rights against each other as well as against other competing public interests.

The Charter Guidelines were developed through an extensive consultation and review process involving representatives from each government department, Chief Parliamentary Counsel, Victorian Government Solicitor's Office, the Solicitor-General and other human rights experts.

This important document explains the practical application of the Charter for legal and policy officers and identifies the content of the rights that are protected. I encourage policy officers and program managers to use the Charter Guidelines to help ensure that legislation, policies and programs are developed consistently with the Charter.

The Charter now plays a key role in policy development within government. Since 1 January 2007, all new legislation has been developed with regard to the rights set out in the Charter and new laws have required a statement of compatibility to advise Parliament on whether a Bill is compatible with the Charter rights.

Since 1 January 2008, the Charter has required courts and tribunals to interpret laws consistently with human rights as far as that is possible with their purpose. Public Authorities are also required to act in a way that is compatible with human rights.

Finally, I acknowledge the work of the Human Rights Unit in the Department of Justice in developing the Charter Guidelines, which I hope will make an important contribution to the development of a human rights culture across the public sector.

THE HON. ROB HULLS MP
DEPUTY PREMIER AND ATTORNEY-GENERAL
VICTORIA
INTRODUCTION

It has long been understood that

[i]n all developed legal systems there has been
a recognition of a fundamental requirement for
principles to govern the exercise by public
[officials] of their powers.1

This recognition has increased in part because
of the growth of government’s powers and activity.
No longer can it be said, as it was in the early
twentieth century that “a sensible law-abiding
[citizen] could pass through life and hardly notice
the existence of the state, beyond the post office
and the policeman.”2 This was unlikely to be true
even then. As the famous English administrative
lawyer, Sir William Wade, observed,

by 1914 there were already abundant signs
of the profound change in the conception of
government which was to mark the twentieth
century. The state schoolteacher, the national
insurance officer, the labour exchange, the
sanitary and factory inspectors, with their
necessary companion the tax collector, were
among the outward and visible signs of this
change. The modern administrative state was
already taking shape.3

There is no doubt that the State of Victoria in the
early stages of the twenty-first century is a modern
administrative state. There are few areas of activity
by citizens which are not now regulated by
legislation or affected by decisions or actions taken
by departmental officers, agencies, boards, or
specialist tribunals in the exercise of their statutory
powers and functions.

In 2006 the Parliament of Victoria passed the
Charter of Human Rights and Responsibilities
(the Charter)4. As Solicitor-General for Victoria,
I had been appointed Special Counsel to the
Human Rights Consultation Committee. That
Committee recommended the enactment of
the Charter.

The Charter is intended to assist in providing
principles to govern the exercise of power in the
context of public administration. In this way, the
Charter should improve the process of policy
development in government and encourage
consistent, fair and rational decision-making.
The Charter should contribute to good public
administration.

These Guidelines have been prepared for
legislation and policy officers in the State of
Victoria to assist them in the task of ensuring
that policy proposals, programs, legislation, and
statutory rules are compatible with the human
rights protected by the Charter.

Let me mention some of the important stages
in the history of the Charter in order to provide
a context for these Guidelines.

BACKGROUND TO THE CHARTER

Justice Statement

The Charter grew out of the Attorney-General’s
Justice Statement in May 2004. One of the key
initiatives of the Justice Statement was to establish
a process of discussion and consultation within
the Victorian community on how human rights
and obligations could best be promoted in Victoria.
The Justice Statement recognised that alternative
models for human rights protection existed in
different jurisdictions.

1 De Smith, Woolf and Jowell, Judicial Review of
Administrative Action (Sweet & Maxwell) (5th edition)
2 A.J.P. Taylor, English History, 1914-1945, 1, as
quoted by Sir William Wade, Administrative Law,
3 Sir William Wade, op. cit. 1.
4 The Bill passed the Legislative Assembly on 15 June 2006
and the Legislative Council on 20 July 2006. It was given
royal assent on 25 July 2006. It may be cited as the
Charter of Human Rights and Responsibilities: s 1(1).
Those models included a constitutionally entrenched charter, or “Bill of Rights” as exists in the United States, where legislation or executive action that infringes rights can be declared invalid by the courts. The rigidity of such a model was noted in the Justice Statement, as was the criticism that it allowed Judges to render inoperative and ineffective laws passed by the Parliament. Chapter 2 of the Constitution of the Republic of South Africa 1996 (Bill of Rights) reflects the same constitutionally entrenched model. The criticism was not significantly diminished by allowing the Parliament expressly to override rights in specific cases, as is reflected in the model adopted by the Canadian Charter of Rights and Freedoms. If the courts could declare a law invalid, the criticism remained.

The principal alternative model was that of a statutory charter of rights. A statutory charter:

is an ordinary piece of legislation of the Parliament. It is enacted in a manner that makes it no more difficult to change than other Acts of Parliament. It is subject to amendment or repeal in the same manner as all other legislation. A statutory charter creates a presumption that other legislation must be interpreted to give effect to the rights listed in that charter.

The model does not invalidate any provision or allow a court to refuse to apply another Act’s provisions because of inconsistency with one of the rights listed in the charter of rights instrument. This is the model of the Human Rights Act 1998 (U.K.) and the New Zealand Bill of Rights Act 1990. This is also the model adopted by the Australian Capital Territory in its Human Rights Act 2004.

A further alternative was that of an aspirational statement as reflected in Queensland’s Legislative Standards Act 1992.

Human Rights Consultation Committee

On 18 April 2005, the Attorney-General announced the establishment of the Human Rights Consultation Committee to report back by 30 November 2005. The Committee was chaired by Professor George Williams, and its other members were Professor Haddon Storey Q.C., Ms Rhonda Galbally and Mr Andrew Gaze. The Attorney-General also released the Victorian Government’s Statement of Intent to guide the Committee.


The Human Rights Consultation Committee released a Discussion Paper on 1 June 2005 in which it invited responses from the Victorian community about whether change was needed in Victoria to better protect human rights. The Discussion Paper discussed some of the existing ways in which rights are protected in Victoria and described the rights under the International Covenant on Civil and Political Rights (the ICCPR) which are primarily associated with individual human liberty. These were the rights which the Government had asked the Committee to look at in considering whether to adopt further measures to protect human rights in Victoria.

Australia is a party to the ICCPR (and the International Covenant on Economic, Social and Cultural Rights (the ICESCR)). Both were adopted by the United Nations in 1966 and signed by Australia in 1972. The ICESCR was ratified by Australia in 1975 and the ICCPR was ratified by Australia in 1980. However, international covenants are not binding in Australia unless they have been specifically incorporated into Australia law by legislation. There has also been a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see Coleman v Power (2004) 220 CLR 1 at 27-30 [17] –[24] (Gleeson CJ). See Spigelman AC, “Blackstone, Burke, Bentham and the Human Rights Act 2004” (2005) 26 Australian Bar Review 1, 7.
These rights include the right to vote; the right to freedom of thought, conscience and religion; the right to freedom of expression, peaceful assembly and association; the right to liberty and security of the person; the right to freedom of movement; the right to a fair trial; the right not to be held in slavery; the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment, or medical or scientific experimentation without consent; the right to life; the right to privacy; the right to equality before the law and non-discrimination; and the right of individuals belonging to ethnic, religious or linguistic minorities to enjoy their own culture.

Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee

After extensive community consultation, the Human Rights Consultation Committee delivered its report and made thirty-five specific recommendations to Government, including the recommendation that the Victorian Parliament enact a Charter of Human Rights and Responsibilities.7 It said:

This Charter would not be modelled on the United States Bill of Rights. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution. Instead, the Victorian Charter should be an ordinary Act of Parliament like the human rights law operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament. …

The Charter would also play an important role in policy development within government, in the preparation of legislation, in the way in which courts and tribunals interpret laws and in the manner in which public officials treat people within Victoria.8

Attached to the Committee’s Report was a draft Bill. The Charter reflects the fundamental features of that draft Bill.

OPERATION OF THE CHARTER

The principal impact of the Charter on the work of legislation and policy officers will continue to be the preparation of reasoned statements of compatibility to accompany new Bills9, amendments to legislation, most statutory rules10, and policy proposals to be submitted to Cabinet11. The obligation to prepare such statements began on 1 January 2007. The Guidelines indicate precisely when statements of compatibility are required and provide detailed guidance about the format and content of such statements.

The Guidelines encourage early attention to human rights issues in the policy development cycle so that statements of compatibility do not become merely an “add on”. This is to ensure that the impact that a policy or a legislative amendment may have upon the human rights protected by the Charter is not discovered too late – if it is, it may lead to a revisiting of the policy with the consequences of delay.

Legislation and policy officers need to be able to identify which rights a policy may have an impact upon. For example, the Firearms Amendment Bill 2007 was considered to interfere with, or have an impact upon, the rights to liberty and security.12 Other rights, such as the right to privacy and the right to freedom of expression, were also considered relevant.

8 Ibid ii.
9 The Charter, s 28.
10 See item 7 of Schedule 1 to the Charter.
11 This obligation does not arise from the Charter itself but is included in administrative directives within Government.
12 See the Statement of Compatibility, Parliamentary Debates, Legislative Assembly, 22 August 2007, 2866-2868.
The Guidelines provide a table which can be used to ensure all rights implications have been considered. The Guidelines also provide a detailed discussion of each of the rights protected by the Charter and offer case law from other jurisdictions, including from an international perspective, to show how those rights have been interpreted elsewhere. This comparative law on the nature of the rights is relevant even though the model adopted in Victoria may be different from other countries.13

Once the relevant rights have been identified, legislation and policy officers will need to consider whether the degree of interference with those rights is reasonably or rationally connected to the objective sought to be achieved.

The Charter sets out in s 7 a number of criteria to be considered when assessing whether an interference or limit on a right is reasonable and proportionate. These criteria reflect those set out in Chapter 2 of the Constitution of the Republic of South Africa14 and have been used informally by New Zealand legislation and policy officers in assessing whether a limit imposed on a right by legislation or policy is reasonable.15

Since 1 January 2008, the courts have been directed by the Charter to interpret all legislation compatibly with human rights, consistent with the purpose of the legislation.16 This is comparable to the interpretive direction under the United Kingdom Human Rights Act 1998.17 Somewhat similar provisions are to be found in the A.C.T.,18 New Zealand,19 and South Africa.20

Since that date all public authorities (including employees of the public service, Heads of government departments, and Ministers21) have been required to act compatibly with the Charter in their conduct and to give proper consideration to relevant human rights in their decision-making.22 Since 1 January 2007, all public officials have been required to consider, within the values which inform their work, the human rights set out in the Charter.23

The staggered commencement of the Charter has enabled training to occur within the public service and throughout the legal profession, including the judiciary. It has hopefully also enabled the community to gain an understanding of the effect of the Charter.

These Guidelines are intended to assist in building a “culture of tolerance and respect for human rights”.24 They should also assist in the process of developing the principled exercise by public officials of their powers and functions.

Dated: 27 June 2008

PAMELA TATE S.C.
SOLICITOR-GENERAL FOR VICTORIA

---

13 Section 32(2) of the Charter provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

14 Section 36.

15 Under s 5 of the New Zealand Bill of Rights Act 1990.

16 The Charter, s 32.

17 Section 3.


21 See the definition of “public authority” under s 4 of the Charter (see also the Human Rights Act 1998 (U.K.) s 6(3)(b), the New Zealand Bill of Rights Act 1990, s 3(b).

22 The Charter, s 38. (See also Human Rights Act 1998 (U.K.), s 6(1)).

23 See item 5 of the Schedule to the Charter.

1 INTRODUCTION
1.1 Introduction to the Charter Guidelines
What is the purpose of the Charter Guidelines? 17
Who are the Charter Guidelines for? 17
Structure of the Charter Guidelines 18
An important note … 19
Acknowledgments 19
1.2 The Charter of Human Rights and Responsibilities
Purpose 20
What rights are included? 20
What about rights that aren’t included in the Charter? 20
What sort of approach should I adopt? 21
Main features 21
2 LEGISLATION AND POLICY DEVELOPMENT
2.1 How the Charter will affect legal and policy officers
What you need to know about the Charter 25
Human rights impact assessments 26
Statements of compatibility 27
Override declaration 29
Human rights certificates and statutory rules 30
The obligation on public authorities to act compatibly with human rights 31
Checklist on what is a ‘public authority’ 37
All statutory provisions are subject to a new interpretation 38
Declarations of inconsistent interpretation 40
Where do I go if I am unsure? 41
2.2 Reasonable limitations
The General Limitations Clause 42
Summary 47
Flowchart A – Human Rights Impact Assessment 48
Flowchart B – When is a limitation reasonable and demonstrably justified? 49
Flowchart C – Process for developing compatible legislation 50
3 RIGHTS PROTECTED BY THE CHARTER
Section 8: Recognition and equality before the law
Policy triggers: Do I need to consider section 8? 53
Discussion 54
Reasonable limits 55
Key points to remember 56
Measures to improve compliance 56
Related rights and freedoms 57
History of the section 57
Bibliography 57
Section 9: Right to life
Policy triggers: Do I need to consider section 9? 58
Discussion 58
Reasonable limits 62
Key points to remember 62
Measures to improve compliance 63
Related rights and freedoms 64
History of the section 64
Bibliography 64
Section 10: Protection from torture and cruel, inhuman or degrading treatment
Policy triggers: Do I need to consider section 10? 65
Discussion 66
Reasonable limits 69
Key points to remember 70
Measures to improve compliance 70
Related rights and freedoms 71
History of the section 71
Bibliography 71
Section 11: Freedom from forced work
Policy triggers: Do I need to consider section 11? 72
Discussion 72
Reasonable limits 73
Key points to remember 75
Measures to improve compliance 75
Related rights and freedoms 75
History of the section 75
Bibliography 76
**Section 12: Freedom of movement**

Policy triggers: Do I need to consider section 12? 77
Discussion 78
Reasonable limits 79
Key points to remember 79
Measures to improve compliance 80
Related rights and freedoms 80
History of the section 80
Bibliography 80

**Section 13: Privacy and reputation**

Policy triggers: Do I need to consider section 13? 81
Discussion 83
Reasonable limits 87
Key points to remember 87
Measures to improve compliance 88
Related rights and freedoms 89
History of the section 89
Bibliography 90

**Section 14: Freedom of thought, conscience, religion and belief**

Policy triggers: Do I need to consider section 14? 91
Discussion 92
Reasonable limits 95
Key points to remember 96
Measures to improve compliance 96
Related rights and freedoms 97
History of the section 97
Bibliography 97

**Section 15: Freedom of expression**

Policy triggers: Do I need to consider section 15? 98
Discussion 99
Reasonable limits 100
Key points to remember 103
Measures to improve compliance 103
Related rights and freedoms 104
History of the section 104
Bibliography 104

**Section 16: Peaceful assembly and freedom of association**

Policy triggers: Do I need to consider section 16? 105
Discussion 105
Reasonable limits 106
Key points to remember 107
Measures to improve compliance 107
Related rights and freedoms 107
History of the section 108
Bibliography 108

**Section 17: Protection of families and children**

Policy triggers: Do I need to consider section 17? 109
Discussion 109
Reasonable limits 112
Key points to remember 112
Measures to improve compliance 112
Related rights and freedoms 112
History of the section 113
Bibliography 113

**Section 18: Taking part in public life**

Policy triggers: Do I need to consider section 18? 114
Discussion 114
Reasonable limits 117
Key points to remember 118
Measures to improve compliance 118
Related rights and freedoms 118
History of the section 118
Bibliography 119

**Section 19(1): Cultural rights**

Policy triggers: Do I need to consider section 19(1)? 120
Discussion 120
Reasonable limits 122
Key points to remember 122
Measures to improve compliance 123
Related rights and freedoms 123
History of the section 123
Bibliography 123
Section 19(2): Distinct cultural rights of Aboriginal persons 124
Policy triggers: Do I need to consider section 19(2)? 124
Discussion 124
Reasonable limits 126
Key points to remember 127
Measures to improve compliance 127
Related rights and freedoms 127
History of the section 127
Bibliography 127

Section 20: Property rights 128
Policy triggers: Do I need to consider section 20? 128
Discussion 128
Reasonable limits 130
Key points to remember 130
Measures to improve compliance 130
Related rights and freedoms 130
History of the section 130
Bibliography 130

Section 21: Right to liberty and security of the person 131
Policy triggers: Do I need to consider section 21? 131
Discussion 132
Reasonable limits 137
Key points to remember 137
Measures to improve compliance 138
Related rights and freedoms 139
History of the section 139
Bibliography 139

Section 22: Humane treatment when deprived of liberty 140
Policy triggers: Do I need to consider section 22? 140
Discussion 140
Reasonable limits 143
Key points to remember 144
Measures to improve compliance 144
Related rights and freedoms 144
History of the section 145
Bibliography 145

Section 23: Children in the criminal process 146
Policy triggers: Do I need to consider section 23? 146
Discussion 146
Reasonable limits 149
Key points to remember 149
Measures to improve compliance 149
Related rights and freedoms 150
History of the section 150
Bibliography 150

Section 24: Fair hearing 151
Policy triggers: Do I need to consider section 24? 151
Discussion 151
Reasonable limits 154
Key points to remember 155
Measures to improve compliance 155
Related rights and freedoms 156
History of the section 156
Bibliography 156

Section 25(1): The right to be presumed innocent 157
Policy triggers: Do I need to consider section 25(1)? 157
Discussion 157
Reasonable limits 159
Key points to remember 159
Measures to improve compliance 160
Related rights and freedoms 160
History of the section 160
Bibliography 161

Section 25(2): Minimum guarantees in criminal proceedings 162
Policy triggers: Do I need to consider section 25(2)? 162
Discussion 163
Reasonable limits 170
Key points to remember 170
Measures to improve compliance 171
Related rights and freedoms 172
History of the section 172
Bibliography 173
CHARTER:

CHARTER GUIDELINES:
Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria. The Charter Guidelines provide information for legislation and policy officers in Victoria on the Charter. They seek to explain the practical application of the Charter and to identify the content of the rights protected by it. The guidelines were prepared by the Human Rights Unit of the Victorian Department of Justice after extensive consultation and review.

CAT:
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). An international treaty which Australia has ratified. This Convention defines and prohibits torture and cruel, inhuman or degrading treatment or punishment.

DECLARATION OF INCONSISTENT INTERPRETATION:
A declaration by the Supreme Court that a statutory provision cannot be interpreted consistently with a human right (see s. 36 of the Charter). Certain procedures must be followed. A declaration does not affect the validity, operation or enforcement of the provision, or create any legal right or cause of action.

ECHR:
Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This Convention is commonly referred to as the European Convention on Human Rights. It is an international human rights treaty ratified by Council of Europe member states. The Convention has been amended by various protocols.

GENERAL COMMENT:
An authoritative statement made by the UN Human Rights Committee on the interpretation or meaning of a provision or part of a provision in the ICCPR. General Comments can be accessed from the UN Office of the Commissioner for Human Rights at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

HUMAN RIGHTS CERTIFICATE:
A certificate that must be prepared for most proposed statutory rules certifying whether the proposed rule limits human rights and, if so, provides information about the limitation. See the consequential amendments to the Subordinate Legislation Act 1994 in the Schedule to the Charter on p.41 of the Charter of Human Rights and Responsibilities Act 2006.

HUMAN RIGHTS:
The human rights set out in Part 2 of the Charter. These are primarily civil and political rights derived from the ICCPR. The Charter also includes cultural rights, including the distinct cultural rights of Aboriginal persons. The Charter does not seek to give effect to the ICESCR.

UN HUMAN RIGHTS COMMITTEE:
A United Nations treaty monitoring body established under the ICCPR to monitor the implementation of the ICCPR by member states in their territory. The UN Human Rights Committee issues General Comments and also hears individual complaints regarding ICCPR breaches. Complaints may be made by individuals against Australia in certain circumstances.
**ICCPR:**

**ICESCR:**

**OVERRIDE DECLARATION:**
An express declaration by the Parliament that an Act or provision of an Act has effect despite being incompatible with a right or anything else in the Charter (see s. 31). Such declarations will only be made in exceptional circumstances and the member introducing the Bill must explain the circumstances that justify overriding the Charter.

**PUBLIC AUTHORITY:**
Defined in s. 4 of the Charter as a public official under the Public Administration Act 2004, an entity with functions of a public nature and which is established by statute, or an entity with public or some public functions when exercising those functions on behalf of the State of Victoria or a public authority (including under contract). It also includes Victoria Police, councils, ministers, members of parliamentary committees when acting in an administrative capacity and entities declared by regulations to be a public authority. The Charter lists factors that may assist in determining if a function is of a public nature, and gives examples (see s. 4). The Charter Guidelines contain further information to assist with the definition of public authorities.

**SARC:**
Scrutiny of Acts and Regulations Committee. A Parliamentary Committee established with functions including the scrutiny of bills and regulations introduced into Parliament.

**STATEMENT OF COMPATIBILITY:**
A statement laid before Parliament by a member introducing a Bill, which states his or her opinion on whether and how the Bill is compatible with human rights, and the nature and extent of any incompatibility (s. 28).

**STATUTORY PROVISION:**
An Act (including the Charter) or a subordinate instrument or a provision of an Act or subordinate instrument.

**UDHR:**
Universal Declaration of Human Rights (1948). A UN document which articulates the basic principles of human rights, developed following the Second World War. This document formed the basis for the ICCPR and the ICESCR.

**UN:**
United Nations.

**VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION:**
Replaces the Victorian Equal Opportunity Commission. The new commission will have an expanded role to include monitoring and review of the Charter, and providing education on the Charter and human rights in Victoria.
INTRODUCTION
WHAT IS THE PURPOSE OF THE CHARTER GUIDELINES?


The purpose of the Charter of Human Rights and Responsibilities: Guidelines for legislation and policy officers in Victoria (Charter Guidelines) is to assist legal and policy officers to identify the impact of this new framework on legislation and policy development across the Victorian Government. Specifically, the Charter Guidelines are designed to equip you with the necessary information to enable you to integrate human rights considerations into legislation and policy development. They are also intended to assist program managers to assess whether their programs are delivered in a way that is consistent with the Charter. Program managers who are uncertain about how the Charter applies should, in the first instance, consult with their relevant legal or policy officer for advice.

The Charter Guidelines will help you to:

• identify whether your department or agency’s existing and proposed legislation, policies and practices are likely to be compatible with the Charter;
• explore ways of achieving desired policy outcomes which are compatible with the Charter;
• improve your level of awareness and understanding of the Charter and of what it requires in the legal and policy development process; and
• identify areas of potential legal risk for your department.

The Charter Guidelines will assist you in:

• reviewing existing legislation by enabling you to identify whether your department’s existing legislation complies with the Charter, and, if it does not comply, by assisting you to prepare legislative amendments to ensure compliance.
• preparing new Bills and statutory rules by enabling you to prepare a statement of compatibility or human rights certificate which is required to be presented to Parliament for all new Bills and most statutory rules, respectively.
• program delivery by assisting you to identify whether a program is delivered in a way that is consistent with the Charter.

The ways in which the Charter impacts on existing and proposed legislation are discussed in Part 1.2. The Charter Guidelines are not intended to be a definitive legal text on the Charter. It will be necessary in many cases to supplement your knowledge of the areas covered in the Charter Guidelines with further research and reading.

WHO ARE THE CHARTER GUIDELINES FOR?

The Charter Guidelines have been written primarily for legal and policy officers in the Victorian public service. In particular, they have been written for those responsible for developing new policies and preparing drafting instructions for legislation, whether a Bill or an amendment to existing legislation. They have also been designed to be useful to those who draft legislation in the Office of Parliamentary Counsel.

Others may find them useful, including program managers, public sector managers and staff, and ministerial advisers and staff.

As the Charter imposes obligations on ‘public authorities’, these Charter Guidelines may also be useful to those individuals, agencies, organisations, local government and some private bodies who come within the ‘public authority’ definition. However, it is important to note that the Charter Guidelines have not been written for this audience.
1.1 INTRODUCTION TO THE CHARTER GUIDELINES

STRUCTURE OF THE CHARTER GUIDELINES

The Charter Guidelines are divided into three parts.

Part 1 introduces the Charter Guidelines and contains an overview of the Charter.

Part 2 relates specifically to legislation and policy development and discusses how the Charter will affect the work of legal and policy officers. It also discusses how to apply the Charter, and an important part of this is a discussion on how to apply s. 7, which outlines when human rights may be limited.

Part 3 contains the substantive discussion on each of the individual rights found in ss. 8 to 27 of the Charter. Each right is considered, section by section. After first setting out the terms of the section, the following headings appear:

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION —— ?

This section lists policy triggers. The purpose of the triggers is to draw your attention to the areas in which the right needs to be examined. They will help you work out whether the particular right is likely to be engaged by a particular legislative provision or policy. The triggers are provided by way of example of the areas in which the right has arisen in international human rights law and comparative law. The triggers provided are not exhaustive of all the areas in which the right needs to be examined. The triggers are not indicative of whether a particular legislative provision or policy infringes the right. They indicate whether that provision or policy is likely to have some impact on the right, whether it might ‘interfere’ with, or impose some limit on, a particular right. If a particular legislative provision or policy would interfere with a right, it will be necessary to consider whether the interference or limitation imposed on the right is reasonable or justified.

DISCUSSION

This section provides a referenced discussion of the scope and content of the human right in international human rights law and comparative law. It will guide you on the meaning of the right and also help you to work out if a particular legislative provision or policy may not be compatible with the right.

It is necessarily abbreviated and is not a legal textbook on human rights. As noted above, you are encouraged to supplement this discussion with wider reading about human rights.

REASONABLE LIMITS ——

This section provides some general guidance on the permissible limits that can be applied to the particular right. This guidance supplements the general guidance on s. 7 of the Charter in Part 2.2 of the Charter Guidelines. You will need to consult Part 2.2 when deciding how s. 7 applies to a particular right.

KEY POINTS TO REMEMBER

This contains a summary of the discussion of the right.

MEASURES TO IMPROVE COMPLIANCE

This section sets out options to guide you on how you might improve the degree of compliance with the right. These measures are not sufficient to guarantee compliance with the right. They are merely suggestions you may wish to consider. Departments are encouraged to develop their own measures to improve compliance with the rights in the Charter as these measures will in many cases be context specific.

RELATED RIGHTS AND FREEDOMS

This section alerts you to other related rights and freedoms contained in the Charter and to potential areas of overlap or inconsistency between them.
HISTORY OF THE SECTION
This section briefly outlines the background to the right by identifying what it was modelled on. In most cases this section refers to the International Covenant on Civil and Political Rights (ICCPR). It also reminds you that similar rights exist in legislation and constitutional instruments in other countries and suggests that you refer to the appendix for further information. In the appendices you will find a table outlining sources of human rights from comparable jurisdictions.

BIBLIOGRAPHY
Finally, a bibliography of articles/books/reports/case law and UN Human Rights Committee jurisprudence is provided. This should assist you to locate references mentioned in the Charter Guidelines.

AN IMPORTANT NOTE …
These Charter Guidelines discuss the meaning of the human rights protected in the Charter as at March 2008.

The primary source of this discussion is international human rights law and, in particular, commentary and jurisprudence on the ICCPR. Reference is also made to comparative law, particularly from the ACT, Canada, New Zealand, the United Kingdom and South Africa. Parliaments in each of these jurisdictions have enacted legislation bringing together a range of human rights. However, the comparative legislation differs between jurisdictions in significant respects – not just in name, but also in substance (for example, it may differ in the rights and freedoms protected, the permitted range of limitations, and the obligations of Parliament, the courts and the executive). The comparative legislation may also differ from the Charter in that the protection of human rights may be constitutionally entrenched. To guide you on the comparative material, Appendix H has been prepared, called ‘Sources of rights from comparable jurisdictions’. This table lists each Charter right and notes the comparable right in the ICCPR, the ACT Human Rights Act 2004, the New Zealand Bill of Rights Act 1990, the UK Human Rights Act 1998, the Canadian Charter of Human Rights and Fundamental Freedoms and Chapter 2 of the Constitution of the Republic of South Africa 1996 (Bill of Rights). As is the case in any legal system, both international and comparative law is constantly evolving. You should be mindful of this when using these Charter Guidelines.

As the Charter Guidelines give general guidance only, they cannot provide a definitive view on whether a particular Act, statutory rule, policy, practice or program is consistent with the Charter. If you are unsure about how the Charter applies in a particular context, you should refer to the section ‘Where do I go if I am unsure’ on page 41 for guidance.

ACKNOWLEDGMENTS
The Human Rights Unit in the Department of Justice has written these Charter Guidelines with assistance from a range of people. Writing them has been a truly collaborative effort involving legal and policy officers across government departments, the Victorian Government Solicitors Office, the Office of Chief Parliamentary Counsel Victoria and the Solicitor-General of Victoria. Dr Simon Evans and Dr Carolyn Evans of the University of Melbourne have also provided valuable assistance by reviewing this publication and making a number of useful suggestions on how it could be improved.
The Charter of Human Rights and Responsibilities

PURPOSE

The Charter was enacted in July 2006 with the purpose of protecting and promoting human rights in Victoria.

It is an ordinary Act of Parliament. Although it is an ‘Act’, s. 1(1) makes it clear that it can be referred to as ‘the Charter of Human Rights and Responsibilities’ (without including the word ‘Act’). This is the preferred mode of citation, or it can be shortened to ‘the Charter’.

The Charter came into operation in two stages, commencing on 1 January 2007 and 1 January 2008. Section 2 of the Charter outlines which provisions commenced on what date.

Section 1 sets out the purpose of the Charter. It provides that the Charter seeks to fulfil its purpose of protecting and promoting human rights by:

• setting out a range of human rights that Parliament specifically seeks to protect and promote;
• ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights;
• imposing an obligation on all public authorities to act in a way that is compatible with human rights;
• requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility;
• conferring jurisdiction on the Supreme Court of Victoria to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant minister to respond to that declaration.

WHAT RIGHTS ARE INCLUDED?

Whenever the reference to ‘human rights’ appears in the Charter, it refers to the human rights set out in Part 2 of the Charter.

The human rights set out in that part are primarily civil and political rights derived from the ICCPR. The Charter also includes cultural rights, including the distinct cultural rights of Aboriginal persons.

The Charter does not guarantee or seek to give effect to the International Covenant on Economic, Social and Cultural Rights.

The Charter recognises that the human rights are not absolute, but may be limited. Section 7 of the Charter outlines when a right may be limited.

WHAT ABOUT RIGHTS THAT ARE NOT INCLUDED IN THE CHARTER?

The Charter does not limit or abrogate the rights that are not contained in it.

If a human right is not included in the Charter, this does not mean that Victorians do not have the benefit of those rights. Rights and freedoms may be recognised under other laws, or arise under other laws, including international law, the common law, or a Commonwealth law (including the Commonwealth Constitution). The Charter does not remove or limit any extraneous rights. The Charter expressly states this in s. 5. All other rights are preserved.

However, the mechanisms set down by the Charter will not apply to these rights. This means, for example, that if legislation only affects a right that arises from some other instrument and is not protected by the Charter, you will not have to prepare a statement of compatibility with respect to that right for a Bill and the interpretative obligation in s. 32 will not apply with respect to the right.25

25 Courts and tribunals may, however, continue to take the human right into account under common law principles of interpretation, so as to construe legislation as not intended to compromise that right unless there is a clear and unequivocal manifestation of a parliamentary intention to do so.
WHAT SORT OF APPROACH SHOULD I ADOPT?

When construing the scope of any of the human rights protected by the Charter, you should note that human rights are generally given a broad, purposive interpretation. This means that you should give effect to the purpose behind the right in question, rather than adopting an overly technical approach to the wording of a right. The focus should be on the nature of the right and the object that a particular provision is designed to serve. However, you should take care to ensure that you still give effect to the text of the particular right. For example, when construing the scope of the right to privacy, you should note that the Charter only prohibits unlawful and arbitrary interferences with privacy.

The purpose of a provision can be determined from a number of matters, including

- The language of the provision itself
- The scheme within which the right is intended to operate
- The historical, social and legal context within which the right operates
- The meaning and application of equivalent rights provisions in the ICCPR and equivalent provisions from other jurisdictions.26

A purposive interpretation is consistent not only with the approach of overseas courts and the UN Human Rights Committee, but also with the general principles of statutory interpretation in the Interpretation of Legislation Act 1984 (Vic.).

MAIN FEATURES

The Charter is based on the idea that all arms of government should contribute to the protection and promotion of human rights in Victoria. It adopts a ‘dialogue’ model to achieve this purpose while preserving the sovereignty of the Victorian Parliament to make laws for the people of Victoria.

The features of this model are described below by reference to the operative date.

Since 1 January 2007:

- All Bills introduced into Parliament must be accompanied by a statement of compatibility. This statement must state if, in the Minister’s opinion, the Bill is compatible with human rights and if so, how. If the Bill is not compatible with human rights, it must state this and explain how it is incompatible. This is to be a reasoned statement and not merely an assertion of compatibility.
- In ‘exceptional circumstances’ a Bill or part of a Bill may contain an override declaration. The Bill must be accompanied by a statement explaining the exceptional circumstances that justify the inclusion of the declaration.
- Most new statutory rules (including amending statutory rules) must be accompanied by a human rights certificate.
- The functions of the Scrutiny of Acts and Regulations Committee (‘SARC’) include considering whether any Bill introduced is incompatible with human rights and whether any statutory rule is incompatible with human rights.
- The Ombudsman’s functions have been extended to include the power to enquire into or investigate whether any administrative action is incompatible with human rights.

26 A. Butler & P. Butler, The New Zealand Bill of Rights Act: A Commentary (Lexis Nexis, 2005), paras 4.2.2, 4.2.5.
• The Victorian Equal Opportunity Commission has been renamed the **Victorian Equal Opportunity and Human Rights Commission** and its functions have been expanded.

• The objects of the **Director, Police Integrity** now include ensuring that members of the police force have regard to the human rights set out in the Charter.

• The **public sector values** now include that public officials should respect and promote human rights by making decisions and providing advice consistent with human rights and by actively implementing, promoting and supporting human rights. The heads of public sector bodies must also establish employment processes that will ensure that human rights are upheld.

Since 1 January 2008:

• **All public authorities** have a duty to act compatibly with human rights and to give human rights proper consideration in decision-making.

• **Courts, tribunals and others who interpret and apply the law** (such as legal policy officers) are required to interpret all Acts and subordinate instruments (whether passed before or after the commencement of the Charter) in a way that is compatible with human rights. This obligation will only apply ‘so far as it possible to do so consistently with the purpose of the Act or regulations’. International law and the judgments of foreign and international courts relevant to human rights may be considered in interpreting a provision.

• In the course of an existing legal proceeding, if a question of law arises relating to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter, the question may be referred to the **Supreme Court of Victoria** if one party makes the application and the court or tribunal in which the question arose agrees.

• The **Supreme Court of Victoria** may in some circumstances issue a **declaration of inconsistent interpretation**. This declaration does not affect the validity of the statutory provision. The making of a declaration of inconsistent interpretation triggers a process of action under the Charter, discussed further below.

• Where a person is entitled to seek some form of **relief or remedy** in respect of an act or decision of a public authority, apart from the Charter, then that person may also seek that relief or remedy on a ground of unlawfulness arising because of the Charter.

After four years and eight years:

• The Charter is to be **reviewed** after the first four years of its operation, to consider a range of matters set out in the Charter. After the first eight years of its operation, a more general review is to take place.

The impact of these features of the Charter on your work is examined in Part 2.
2

LEGISLATION AND POLICY DEVELOPMENT
WHAT YOU NEED TO KNOW ABOUT THE CHARTER

You need to be aware that under the Charter:

- Policy and legislative Cabinet proposals must include an assessment of human rights impacts.
- All new Bills must be accompanied by a reasoned statement of compatibility.
- A Bill or part of a Bill may include an override declaration in 'exceptional circumstances'.
- Most new statutory rules must be accompanied by a human rights certificate.
- Public authorities are obliged to act compatibly with human rights.
- Statutory provisions are subject to a new interpretation.
- The Supreme Court of Victoria will be able to issue a declaration of inconsistent interpretation in some circumstances.
- There may be circumstances where you will need to consult or obtain advice about the application of the Charter.

HUMAN RIGHTS IMPACT ASSESSMENTS

The Charter is intended to be an integral part of policy development. Policy and legislative officers are required to consider the human rights impacts of policy proposals, legislative proposals, operational guidelines and other programs that are put before Cabinet. This is reflected in the Cabinet Handbook and templates.

The purpose of integrating a human rights framework into policy development is to improve government decision-making by ensuring that policy outcomes meet the standards set out in the Charter. It will also ensure that, if the government wants to restrict human rights, there is proper consideration and debate at the policy development stage within government about whether a proposal strikes the right balance between individual rights and the objective the government is seeking to achieve, as well as whether a proposal strikes the right balance between competing rights held by different groups of people.

Officers should identify the impact of the policy proposals upon Charter rights early in the process. This minimises the risk of developing policies that have unforeseen human rights implications which then need to be rectified, and may delay their consideration by Cabinet. For legislative proposals, it will also assist in preparing the statement of compatibility if Charter issues are worked through at an early stage.

The recommended process to employ in examining human rights impacts is outlined in the box on page 26. There are five steps you should undertake to ensure that rights impacts are not overlooked.
HUMAN RIGHTS IMPACT ASSESSMENT

The first step is to consider whether the policy proposal, draft regulation or Bill raises human rights. Identify each human right that the proposal might impact upon.

The second step is to consider the scope of each human right raised by the proposal. At this stage you should take into account any specific limitations or express exceptions that appear in the section providing for the right.

The third step is to consider whether the proposal limits, restricts or interferes with the scope of the right.

The fourth step is to consider whether that limitation or restriction is reasonable and demonstrably justified under s. 7 of the Charter (see Flowchart B on page 49). For example, consider whether there is another way to achieve the policy objective that impacts less on the right, whether a provision could be drafted more narrowly, or contain safeguards to better protect affected rights. You will need to identify all of the reasons why the limitation or restriction on the right is justified. These may be extensive. This information is required for the preparation of a Statement of Compatibility or Human Rights Certificate.

The fifth step is to modify the policy proposal, draft regulation or Bill if you find that the limitation or restriction on the right is not reasonable or demonstrably justified. On some occasions, which are likely to be rare, it may not be possible to modify the proposal. In these situations you will need to give reasons as to the nature and extent of the incompatibility.

A flowchart outlining the process for conducting a Human Rights Impact Assessment appears as Flowchart A on page 48 of these Charter Guidelines.

A human rights impact assessment table has also been prepared. Policy and legislative officers can use this to examine policy proposals and legislation. This table is provided in Appendix A to these Charter Guidelines. The first column is fixed and contains a list of the rights set out in the Charter. The second column requires you to identify the clause or clauses of the Bill that raise, limit, or have an impact on the right in the first column. The third column requires you to analyse whether the clause is compatible with the right, given the scope of the right. It is in this column that you should identify how the clause limits the right, or restricts or interferes with its operation, and articulate the reasons why that limitation or restriction or degree of interference is reasonable (for example, because of the importance of the objective to be achieved through the legislation). The criteria set out in s. 7 of the Charter (discussed on page 42) will assist you in this task. The fourth column requires you to identify whether or not you will discuss each issue in the statement of compatibility.

A completed human rights impact assessment table is included by way of an example in Appendix B. It was prepared for the ACT Government in support of its compatibility statement for the Terrorism (Extraordinary Temporary Powers) Bill 2006 and tabled in Parliament. The table demonstrates that the provisions of the Terrorism (Extraordinary Terrorism Powers) Bill 2006 were assessed against each of the human rights protected under the ACT Human Rights Act 2004 and the manner in which those provisions had an impact on each right assessed. Appendix B does not include all of the columns recommended in the table prepared for Victorian policy and legislative officers, but it may nevertheless assist you to develop a general sense of the analysis to be undertaken.
Cabinet submissions must contain sufficient information to enable Cabinet to be confident that the human rights implications of a proposal have been identified, assessed and addressed. The Cabinet template includes a new section dealing with the Charter under ‘Impact Assessments’. The nature and extent of the human rights impact assessment provided to Cabinet is likely to vary depending on the stage of the policy development cycle at which the submission goes to Cabinet.

Policy proposals: For non-legislative policies, strategies, operational guidelines and other programs that are provided to Cabinet for final approval, a thorough assessment of the human rights impacts should be included in the Cabinet submission. For legislative proposals, such as discussion papers prepared without a draft Bill, it may not be possible to provide a detailed analysis of all of the human rights issues if the discussion paper is prepared at an early stage of the policy development cycle. Nevertheless, the impact of the policy issues on human rights should be assessed as thoroughly as possible.

Approval-in-principle: Submissions for approval-in-principle of a legislative proposal must include a detailed overview of the human rights impacts of the proposal. Officers should identify which human rights issues the proposed legislation raises; whether the Department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter.

Bill-at-Cabinet: Submissions for final approval of Bills must state whether or not the Bill is compatible with the Charter. A compatibility statement must be attached to the Cabinet Submission. The recommendations in the Submission must include a recommendation that Cabinet approve the statement of compatibility. The requirements for preparing compatibility statements are set out below. The Cabinet requirements for developing legislation compatibly with the Charter are set out in Flowchart C on page 50.

STATEMENTS OF COMPATIBILITY

A new Bill introduced into Parliament must be accompanied by a statement of compatibility in both Houses. It must be tabled in Parliament before the second reading speech.

A statement of compatibility must set out whether, in the opinion of the member who has introduced the Bill, the Bill is compatible or incompatible with the human rights set out in the Charter. In addition, reasons must be provided in the statement to demonstrate how a Bill is compatible or otherwise to explain the nature and extent of an incompatibility.

It is not anticipated that many Bills will be assessed as incompatible. This is because one of the purposes of the Charter is to protect and promote human rights. Legislation that is incompatible with any particular human right fails to achieve this purpose. If legislation cannot be interpreted by the Supreme Court to be compatible with the Charter, the court may issue a declaration of inconsistent interpretation which triggers an accountability mechanism under the Charter. In jurisdictions with comparable human rights frameworks, it has been unusual for legislation to be accompanied by a statement of incompatibility. In the ACT, for example, there have been no statements of incompatibility since the commencement of the Human Rights Act on 1 July 2004. In New Zealand, over the past 17 years since the Bill of Rights Act 1990 commenced, less than 4 per cent of Bills have been accompanied by a ‘section 7 report’ detailing inconsistency with the rights and freedoms in that Act. If a Bill is amended by Parliament and the amendments raise human rights issues, the statement of compatibility will need to be updated before the Bill is introduced into the next House.

27 Section 7 of the New Zealand Bill of Rights Act 1990 provides: ‘Where any Bill is introduced into the House of Representatives, the Attorney-General shall, (a) In the case of a Government Bill, on the introduction of that Bill; or (b) In any other case, as soon as practicable after the introduction of the Bill, bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms in this Bill of Rights.’
It is primarily the responsibility of the officer developing the legislative proposal to assess how the Charter is relevant to the proposal. This is because he or she is in the best position to understand the details of the proposal and how it may engage with Charter rights.

As mentioned above, Appendix A to these Charter Guidelines includes a human rights impact assessment table that legislative and policy officers should use before preparing a statement of compatibility. It will assist you to consider methodically the legislative proposal against each of the rights listed in Part 2 of the Charter and ensure that rights impacts are not overlooked.

Where Charter issues are identified and you are unsure about the scope of a right or applying the reasonable limits test, you should consult with a legal officer within your department, or with the Human Rights Unit in the Department of Justice. It is therefore best to consult with those officers early in the process, as well as at the time the proposal is being refined or during the drafting of the Bill when many of the human rights issues will emerge with greater clarity. If external legal advice on the compatibility of a Bill is sought, the matter should be referred to the Victorian Government Solicitor’s Office (see ‘Where to go if I am unsure’?).

The template for the statement of compatibility is provided in Appendix C. Further guidance on the information to be included in the template is set out in Appendix D. See also the information below.

The format of the statement of compatibility includes the following:

**Overview:** An overview of the Bill should be provided, including the policy basis for the Bill.

**Human Rights Issues:** This is the part of the statement of compatibility that provides the reasons for the compatibility.

1. **Identify the human right protected by the Charter that is relevant to the Bill**

   You need to identify each human right that is relevant to the Bill; that is, identify each human right that the Bill, or a provision of the Bill, will have an impact upon or will engage.

   In some circumstances it may be clear that the Bill will only have an impact upon a certain cluster of rights, for example, those relevant to criminal proceedings, and to no other rights. This could be shortly stated in the statement of compatibility. However, in preparing the statement of compatibility it is worth considering each right methodically, as the Bill may have an unexpected impact on a right.

   You will also need to identify the relevant clause or clauses of the Bill that will impact upon that right. You may find it helpful to use a separate heading to discuss each human right. For complex Bills with provisions that engage multiple rights, you may wish to discuss several rights under thematic headings that reflect key provisions of the Bill.

   You will need to analyse how the relevant clause interacts with the right, for example, the degree to which it will restrict the operation of the right or whether the scope of the right is unaffected.

   If the scope of the right is unaffected or indeed if the Bill promotes or further protects the right, there will be no need to consider the s. 7 criteria. It may be clear at this stage that the Bill, or a specific clause of the Bill, is compatible with the relevant right or rights it has an impact upon.
2. Consider reasonable limitations – s. 7(2)

If a clause of the Bill limits or restricts or interferes with the right, a detailed analysis must be provided of whether the limitation is reasonable and can be demonstrably justified in a free and democratic society in accordance with s. 7. All relevant factors must be taken into account in this analysis, including (but not limited to) the relevant factors listed in s. 7(2):

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

You should refer to the discussion in these Charter Guidelines on reasonable limitations to see how each of these factors can be assessed. Flowchart B, which appears on page 49, will also assist you in working through whether a limit is reasonable and demonstrably justified.

Conclusion: This section should contain the conclusion about why the Bill is compatible with human rights (or, in unusual circumstances, why it is incompatible).

An example of a statement of compatibility is included in Appendix E.

It is important that you follow these Charter Guidelines, including Appendix C when preparing a statement of compatibility.

OVERRIDE DECLARATION

The Charter provides that in ‘exceptional circumstances’ Parliament may override the Charter through the use of an express declaration in the relevant Act to that effect (s. 31). This provision is intended to operate when Parliament is introducing new legislation, and exceptional circumstances exist that require Parliament to depart from the Charter in a specific manner and for a fixed period of time.

Examples of ‘exceptional circumstances’ are threats to national security or a state of emergency that threatens the safety, security and welfare of the people of Victoria.

Overriding the Charter may occur either:

• in an Act which states that that Act or a provision of that Act has effect despite the Charter; or
• in an Act which states that another Act or a provision of another Act will operate notwithstanding the Charter.

If an override declaration is made, the declaration extends to any subordinate instrument made under or for the purpose of that Act or provision.

The Charter requires a member of Parliament introducing a Bill containing an override declaration to make a statement to the Legislative Council or the Legislative Assembly explaining the ‘exceptional circumstances’ that justify the inclusion of the override declaration. This will apply when the Bill is introduced into the first House of Parliament and again when the Bill progresses to introduction into the next House of Parliament.
The statement must be made during the second reading speech, or after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill, or with the leave of the Legislative Council or Legislative Assembly at any time before the third reading of the Bill: s. 31(5).

The effect of an override declaration is that to the extent of the declaration, the Charter will not apply to the Act or provision for which the override declaration has been made. This means that with respect to the Act or provision for which the override declaration has been made, none of the provisions of the Charter will apply, including:

• the interpretation clause (s. 32); and

• the ability of the Supreme Court to make declarations of inconsistent interpretation.

It will not be necessary to prepare a statement of compatibility with respect to an Act or provisions in an Act for which an override declaration has been made. Where the override declaration relates only to a particular provision there will be no need to discuss that provision in the statement of compatibility, but there will be a need to prepare a statement of compatibility for the balance of the Act. An override declaration is required only if it is intended that the Charter not apply to that Act (or a provision of that Act) at all.

An override is not required just because an Act is incompatible with the Charter.

Where a Bill, or a provision of a Bill, is incompatible with the Charter, the member introducing the Bill will provide a reasoned statement of incompatibility and indicate why he or she nonetheless wishes to proceed with the Bill. The ordinary Charter processes continue to apply to such a law, including the requirement that it be interpreted consistently with human rights (to the extent that this is possible) and the possibility that the Supreme Court will determine that it cannot be interpreted consistently with human rights.

HUMAN RIGHTS CERTIFICATES AND STATUTORY RULES

A human rights certificate must be prepared for proposed statutory rules, unless they are exempt under s. 12A(3) of the Subordinate Legislation Act 1994 (Vic). An example of an exemption is where you are extending statutory rules that would otherwise sunset under the Subordinate Legislation Act.

It is important to ensure that regulations are developed in a way that is compatible with the Charter, particularly as the operational matters detailed in regulations will often affect human rights. Further, if a regulation is inconsistent with the Charter, it may be found to be beyond the regulation making power conferred by the principal Act, and accordingly, under administrative law principles, may be invalid as ultra vires (beyond power).

It is primarily the responsibility of the officer developing the regulations to assess how the Charter is relevant to the proposal. This is because he or she will be in the best position to understand the details of the proposal and how it may engage Charter rights. Appendix A to this Guide includes a human rights impact assessment table that officers should use before preparing a human rights certificate. It will assist you to consider methodically the regulatory proposal against each of the rights listed in Part 2 of the Charter and ensure that rights impacts are not overlooked.

The statutory requirements for preparing a human rights certificate are set out in s. 12A of the Subordinate Legislation Act. The certificate must certify whether, in the opinion of the minister, the proposed statutory rule does or does not limit any human right set out in the Charter. If the statutory rule does limit a Charter right, the certificate must provide a detailed justification that the limit is reasonable using the same criteria as set out in s. 7 of the Charter. All relevant factors must be taken into account in this analysis, including (but not limited to):
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Appendix F to these Charter Guidelines provides the template to be used in preparing a human rights certificate. For more information, you should also refer to the Victorian Guide to Regulation. Appendix G provides the template for an exemption certificate under s. 12A(3)(b) of the Subordinate Legislation Act.

THE OBLIGATION ON PUBLIC AUTHORITIES TO ACT COMPATIBLY WITH HUMAN RIGHTS

The Charter imposes a direct obligation on public authorities to act compatibly with human rights. In particular, s. 38(1) makes it unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right. This also applies to a failure to act or a proposal to act in a way that is incompatible with human rights (see the definition of act in section 3).

What is a public authority?

Whether a person or other entity is a ‘public authority’ under the Charter is sometimes a difficult legal and factual question. It is expected that the courts will provide guidance on the meaning of ‘public authority’ over time. Regulations can also define an entity to be (or not to be) a public authority where otherwise there might be doubt as to whether or not it is one.

A checklist is provided at page 37 to assist you in working out whether a particular entity, person, organisation or body may be a public authority under the Charter.

Section 4 of the Charter defines what is meant by a public authority under the Charter. Some public authorities are bound by the Charter in relation to all their activities because they are a part of the structure of government. These public authorities are identified in s. 4(1)(a), (b), (d)–(g) (see below). They are bound in relation to all their activities because they are ‘core’ public authorities and all their functions will necessarily be of a public nature.

In contrast, some public authorities are bound by the Charter only when they are exercising certain functions, being functions of a public nature carried out on behalf of the State or, in turn, on behalf of another public authority. These ‘functional’ public authorities are identified in s. 4(1)(c). They may be private individuals or bodies. They are only bound by the Charter when and because they exercise public authority-like functions. Even though these public authorities are not officially a part of government, they are, in effect, acting as such when undertaking certain public activities.

The reason the Charter binds some private individuals or bodies as ‘functional’ public authorities is that modern governments utilise diverse organisational arrangements to manage and deliver government services, including the use of private companies under outsourcing arrangements. A service provider cannot escape the obligations of the Charter just because it is not a part of the structure of Government. If a service provider were able to escape the Charter obligations, recognition of people’s human rights would be contingent on whether the government personally delivers a service or whether the government relies on a private person or organisation to deliver that service under an outsourcing arrangement. Such a situation would be unsatisfactory as it would lead to inequality in rights protection.

Sections 4(1)(i)–(k) specifically provide that certain people and other entities are not ‘public authorities’. These are:

- Parliament or a person exercising functions in connection with proceedings in Parliament; or
- a court or tribunal except when it is acting in an administrative capacity; or
- an entity declared by the Regulations not to be a public authority for the purposes of the Charter.

Regulations may declare a person or other entity to be or not to be a public authority for the purposes of the Charter. It is therefore worth checking the Regulations (if any) as a starting point in cases where it is not immediately obvious whether a person or other entity is a public authority. If a person or other entity is declared to be a public authority by the Regulations, it will be regarded as a public authority and the Charter will apply to all its activities unless the Regulations provide that it is only to be regarded as a public authority in relation to certain of its activities.

Public authorities included in the Charter definition

The Charter provides a list of persons who are included as public authorities. You will first need to work out whether the particular person or entity comes within any of these categories listed in s. 4.

To work out whether a particular entity or person is a public authority, it will in each case be necessary to look at the legislation that establishes the entity or confers powers on the person or other entity.

Each of these categories is discussed below.

Section 4(1)(a): Public officials

Public officials within the meaning of the Public Administration Act 2004 (Vic.) are public authorities. You should examine the definition of ‘public official’ in the Public Administration Act. Under the Public Administration Act a public official includes public service employees, including the head of a government department or an administrative office, certain parliamentary officers, certain persons holding statutory and prerogative officers and directors of a ‘public entity’. The expression ‘public entity’ is defined in s. 5 of the Public Administration Act.

The term ‘public official’ does not include the Governor, Lieutenant-Governor, judges, magistrates, VCAT members, the Coroner, ministers, a parliamentary secretary, the President of the Legislative Council, the Speaker of the Legislative Assembly and certain ministerial officers.

Section 4(1)(b): Entities with public functions established by legislation

Many entities will be public authorities because they fall within this category of having public functions established by legislation. When a statute establishes an entity and confers on it functions that are of a public nature, that entity will be bound by the Charter. One example is the Legal Services Board established under Pt 6.2 of the Legal Profession Act 2004 (Vic.). The Legal Services Board is stated to be a public authority that does not represent the Crown. Its functions are of a public nature as it regulates the legal profession.

The factors to consider in deciding if a function is of a public nature are set out in s. 4(2), discussed on page 34.

Section 4(1)(d): Victoria Police

This section provides that ‘Victoria Police’ is a public authority. ‘Victoria Police’ is defined in s. 3 to have the same meaning as ‘the force’ has in the Police Regulation Act 1958 (Vic.). In that Act, ‘the force’ means officers and other members of the police force of Victoria whether employed on land or on water.
Section 4(1)(e): Councils

Local council, councillors and council staff under the Local Government Act 1989 (Vic.) are public authorities.

Section 4(1)(f): Ministers

Ministers are also public authorities. They are members of Parliament who have been appointed as ministers by the Governor in accordance with the advice of the Premier. They are also members of the Executive Government responsible for one or more portfolios. The Charter binds ministers as members of the Executive Government rather than as members of Parliament. This is because persons exercising functions in connection with proceedings in Parliament are not public authorities under s. 4(1)(i). A Minister’s private staff are not covered by s. 4(1)(a) and will not be public authorities under the Charter.

Section 4(1)(j): Courts and tribunals

The Charter provides that a public authority does not include ‘a court or tribunal except when it is acting in an administrative capacity.’

This means:

- When acting in an administrative capacity, courts and tribunals are public authorities under the Charter. A court or tribunal acts in an administrative capacity in its external dealings, for example, when it enters into contracts for office supplies. It also acts administratively in listing cases and adopting practices and procedures. Non-judicial, administrative functions of courts also include issuing warrants. This is because the issuing of a warrant involves the creation of a future right on the part of the officer exercising the warrant, and not the determination of a dispute resolving an existing right. Committal proceedings, which involve the determination of whether there is enough evidence to warrant a person charged with an offence to stand trial, are performed by courts in their administrative capacity.29

Section 4(1)(g): Members of parliamentary committees

Members of a parliamentary committee, when the committee is acting in an administrative capacity, are public authorities for the purpose of the Charter. Examples of parliamentary committees are the Scrutiny of Acts and Regulations Committee, the Law Reform Committee and specific purpose committees: see the Parliamentary Committees Act 2003 (Vic.) for a list of all Committees.

Note however that s. 4(1)(i) of the Charter provides that Parliament and persons exercising functions in connection with proceedings in Parliament are not public authorities. Parliament acting in its ordinary legislative capacity is thus not a public authority under the Charter.

Non-governmental entities as public authorities

Some private or non-governmental bodies will also be public authorities under the Charter by reason of s. 4(1)(c). They are sometimes referred to as ‘functional’ public authorities and are persons or entities whose functions are or include functions of a public nature. They will only be public authorities under the Charter when they are exercising functions on behalf of the State or a public authority. Including them in the definition of public authority means that non-government bodies discharging public functions must comply with the Charter when they are carrying out those functions. But they will not be bound by the Charter when discharging private functions unconnected with the discharge of their public functions.

29 Ammann v. Wegener (1972) 129 CLR 415.
In relation to these functional public authorities, the Charter only applies to acts that are of a public nature. For example, a private security company is bound by the Charter when it is operating a prison but not when it is providing security services to private clients, like hotels or supermarkets. This is because running a prison is a governmental responsibility performed in the broader public interest and it is done on behalf of the State.

There are two steps to determining whether, in the circumstances, a person or other entity is a public authority under s. 4(1)(c):

1. Is the function being exercised a function of a public nature?
2. Is the function being exercised on behalf of the state or, on behalf of a public authority?

In assessing whether a person or entity is a public authority under s. 4(1)(c), it will be necessary to look at the substance and nature of the function being performed, not the form or legal character of the person or other entity. In other words, focus on what is done rather than who is doing it.

**Functions of a public nature**

The factors that may be taken into account when determining if a function is of a public nature are set out in s. 4(2). These factors are relevant to assessing whether a person or other entity is a public authority under s. 4(1)(c). (They are also relevant to deciding whether an entity established under legislation has functions of a public nature and is therefore a public authority under s. 4(1)(b)).

The list of factors is not exhaustive and the presence of one or more of the factors does not mean the person or entity is necessarily a public authority (see s. 4(3)).

**Relevant to the question of whether a function is of a public nature are:**

- that the function is conferred on the entity by or under a statutory provision;
- that the function is connected to or generally identified with functions of government;
- that the function is of a regulatory nature;
- that the entity is publicly funded to perform the function;
- that the entity that performs the function is a company (within the meaning of the *Corporations Act 2001* (Cth)) all of the shares in which are held by or on behalf of the state.

These factors specifically listed in s. 4(2) of the Charter will be the primary factors to consider in determining whether a function is a function of a public nature. However, they are not an exhaustive list. Other factors may be relevant (and these may include factors identified in other jurisdictions, for example, New Zealand and the United Kingdom). For example, the New Zealand Guidelines list the following as factors relevant to the ‘public function test’:

- whether the organisation is acting in the public interest;
- whether the organisation is conferring a public benefit;
- whether the organisation is acting to implement, or in furtherance of, government policy or strategy;
- whether the organisation is under special obligations or responsibilities that other private bodies do not have.

The UK Joint Committee on Human Rights of the British Parliament has said that the ‘key test of whether a function is public is whether it is one for which the Government has taken responsibility in the public interest’.

---

Equally, the presence of one of these factors does not mean that the function is a function of a public nature. When all factors are taken into account, the overall conclusion may be that the function is not of a public nature.

Caution is needed in considering the New Zealand and United Kingdom cases on public functions and public authorities. Neither the New Zealand Bill of Rights Act 1990 nor the Human Rights Act 1998 (UK) spells out what is a public function or a function of a public nature. The starting point in Victoria by contrast will be the factors listed in s. 4(2) of the Charter.

**On behalf of the State or a public authority**

A private body may be a public authority when it exercises a public function ‘on behalf of’ the State or, in turn, on behalf of another public authority. The expression ‘on behalf of’ has a broad meaning under the Charter. At the very least it will cover situations where the private body acts as the agent of the state or public authority. The Charter makes clear, however, that it applies more broadly than this. The person or entity does not have to be in an agency relationship with the state or a relevant public authority (see s. 4(4)).

However, the provision of funding by the state or a public authority to a person or other entity for particular functions to be undertaken does not of itself mean that that person or other entity is acting on behalf of the state or public authority in carrying out those functions (see s. 4(5)).

There does not have to be a specific agreement for the person or other entity to act on the state or public authority’s behalf for it to qualify as a public authority. For example, it may be part of the existing practice for the person or other entity to act on behalf of the state or another public authority’s behalf. But it will often be the case that a function is delegated to the public authority under a contract.

Contracts with private organisations

A person or other entity outsourcing their functions to the private sector should inform contractors and organisations whether they have obligations under the Charter, what they are and how they must be met.

Where applicable, clauses should be inserted into all government contracts and funding agreements requiring compliance with the Charter. Consideration should also be given to including mechanisms in the contract for the government to ensure (and assure itself of) compliance.

**What are the obligations on public authorities?**

Section 38 makes it unlawful for a public authority to act in a way that is incompatible with a human right. It also makes it unlawful for a public authority to fail to give proper consideration to a relevant human right in making a decision.

For the range of persons and entities specifically listed as public authorities in s. 4(1), this will mean that all of their conduct and decision-making will need to conform with the Charter. For non-governmental entities who are public authorities, it will mean that they will have to conform to the Charter when exercising functions of a public nature on behalf of the state or a public authority. The Charter does not apply to an act or a decision of a public authority that is of a private nature (see s. 38(3)). Therefore, a decision by a government official in his or her private capacity does not attract any obligations under the Charter.
Exceptions

The Charter provides two exceptions to this obligation on public authorities.

The first is a general express exception outlined in s. 38(2) of the Charter. The obligations on public authorities will not apply if ‘as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.’ This exception would extend to conduct undertaken, for example, because of a duty of care at common law.

This means that where a public authority is required by law to act in a particular way even though such action conflicts with a human right, it will not breach the Charter.

The exception does not apply if the public authority could, under law, have reasonably acted differently or made a different decision. The exception would not apply if the provision under which the public authority acted could have been interpreted in a manner that made it consistent with the Charter but this was not done. If the public authority instead exercised its discretion in a way that was incompatible with human rights, then the public authority would breach s. 38(1).

The second exception operates in the context of religious bodies. The obligations on public authorities will not require ‘a public authority to act in a way that is incompatible with a human right if to do otherwise would have the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.’

A definition of ‘religious body’ is provided in s. 38(5) of the Charter.

This exception is likely to arise both where the public authority is itself a religious body and where it is not. In both instances, the Charter will not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body from acting in conformity with the religious doctrines, beliefs and principles with which the religious body operates.
CHECKLIST ON WHAT IS A ‘PUBLIC AUTHORITY’?

1. DOES THE ENTITY FIT THE DESCRIPTION OF A PUBLIC AUTHORITY UNDER SECTION 4(1)?
   - Is it prescribed by the Regulations to be (or not be) a public authority?
   - Is it a public official? (Consult the definition in the Public Administration Act 2004.)
   - Is he or she a member of Victoria Police?
   - Is it a council or is he or she a councillor or member of council staff?
   - Is he or she a minister not exercising functions in connection with parliamentary proceedings?
   - Is he or she a member of a parliamentary committee when the committee is acting in an administrative capacity?
   - Is it a court or tribunal and acting in an administrative capacity?
   - If yes: They are captured by the Charter and obliged to act compatibly with human rights under s. 38.
   - If no: Go to Question 2.

2. DOES THE ENTITY HAVE FUNCTIONS OF A PUBLIC NATURE (PERHAPS AMONG OTHER FUNCTIONS)?
   - Consider, among other matters, whether:
     - the function is conferred on the entity by or under a statutory provision;
     - the function is connected to or generally identified with functions of government;
     - the function is of a regulatory nature;
     - the entity is publicly funded to perform the function;
     - the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the state.
   - If no: If the entity does not have functions of a public nature, then it is not a public authority for the purposes of the Charter and is not obliged to act compatibly with human rights under s. 38.
   - If yes: If the entity has functions of a public nature, go to Question 3.

3. IS THE ENTITY A STATUTORY BODY ESTABLISHED BY A STATUTORY PROVISION?
   - If yes: If the entity has functions of a public nature and is a statutory body, then it is a public authority and obliged to act compatibly with human rights under s. 38 of the Charter (in relation to its functions of a public nature and its other functions).
   - If no: If the entity has functions of a public nature but is not a statutory body, go to Question 4.

4. IS THE ENTITY EXERCISING THOSE FUNCTIONS ON BEHALF OF THE STATE OR A PUBLIC AUTHORITY?
   - If yes: If the entity is exercising functions of a public nature on behalf of the state or a public authority, then it is a public authority and obliged to act compatibly with human rights when it is exercising those functions on behalf of the state or a public authority.
   - If no: If the entity does have functions of a public nature but is not exercising them on behalf of the state or a public authority, then it is not a public authority for the purposes of the Charter and is not obliged to act compatibly with human rights under s. 38.
The Charter requires all statutory provisions to be interpreted compatibly with human rights. This means that all statutory provisions are subject to the interpretive rule in the Charter.

The scope of the obligation is outlined in s. 32 of the Charter. It is: ‘so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.’

Statutory provisions include an Act or a subordinate instrument or a provision of either, whether passed or made before or after the commencement of the Charter (see the definition of ‘statutory provision’ in s. 3 of the Charter and see s. 49(1)).

The Charter extends the usual range of materials that are relevant to statutory interpretation by providing that interpreters may refer to international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right. Views of the UN Human Rights Committee may sometimes be persuasive regarding the interpretation of the ICCPR, particularly given that Australia has ratified the ICCPR and the rights protected in the Charter are largely based on it.

Judgments and determinations made by courts and tribunals in the ACT, Canada, New Zealand, the United Kingdom and South Africa may also prove instructive. However, none of these materials will be binding and all should be approached with caution: they will often be dealing with rights that are defined in very different terms, they will usually be considering a very different factual and legal context so that limits on rights that are justified elsewhere are unjustified in Victoria (or vice versa), they operate in different constitutional and operational contexts, and the quality of their reasoning can be variable.

The interpretive obligation will apply to courts and tribunals and others who interpret and apply the law, including legal and policy officers and other public officials, such as the Ombudsman.

Note that this obligation does not extend to the common law. It is beyond the power of a State Parliament to direct that the common law in one state be developed differently from the common law in another state as the High Court has held that there is a single unified common law in Australia.

The aim of this obligation is to ensure that statutory provisions are interpreted in a manner that gives effect to human rights. It is, however, not a power to override legislation. The Charter makes clear that statutory provisions are still valid even if they are incompatible with a human right.

What does ‘so far as it is possible to do so in accordance with their purpose’ mean?

The obligation to interpret legislation compatibly with human rights is limited in the Charter by the inclusion of the words ‘so far as it is possible to do so in accordance with their purpose.’ These words mean that when interpreting legislation, courts and tribunals will need to examine the purpose of the statutory provision as well as examining whether it is compatible with human rights.

The purpose of including this reference in the Charter is to ensure that in interpreting statutory provisions compatibly with human rights, the meaning of the provision is not strained so as to displace Parliament’s intended purpose behind enacting the provision. It is also intended to prevent those applying the law from interpreting legislation in a manner which would have the consequence that the legislation failed to achieve its object.

31 Note that the obligation in s. 32 of the Charter applies in addition to requirements with respect to interpretation contained in the Interpretation of Legislation Act 1984.

32 For an example of a case in which the intention of the legislator was clearly defeated by a court exercising a similar interpretative mandate, see R v. A [2001] 3 All ER 1 (per Lord Steyn).
Significance of the new interpretative obligation

The obligation to interpret statutory provisions compatibly with human rights is a new obligation regarding statutory interpretation. It is significant in several respects. It is a mandate on those who interpret statutory provisions to do so in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. Whereas previously courts and tribunals usually only referred to international law if the statutory provision it was interpreting was ambiguous, the interpretative mandate in the Charter provides that international law may be considered at any time when interpreting a statutory provision, regardless of any ambiguity.

The extent to which this obligation will have a significant impact on the interpretation of legislation will only be seen once the provision commences and is applied, especially by courts and tribunals. In other international jurisdictions, courts have in some cases relied on similar interpretative provisions to unsettle established interpretations of some existing statutes.

For example, in the English case *R v. Offen* five life prisoners challenged provisions of the Crime (Sentences) Act 1997 requiring a court to impose an automatic life sentence on a person convicted of a serious offence when he or she had previously been convicted of a serious offence, unless special circumstances existed. The prisoners argued that the provisions were incompatible with two provisions in the Human Rights Act 1998 (UK): the prohibition on inhuman and degrading treatment and the right to liberty. The English Court of Appeal examined the policy and intention of Parliament when enacting the legislation and interpreted the legislation in a manner compatible with human rights. It found that Parliament’s intention when enacting the legislation was to protect the public from persons who had committed two serious offences.

The court held that the legislation would not contravene the Human Rights Act if it was interpreted such that it did not result in offenders being sentenced to life imprisonment when they did not constitute a public risk.33 However, as noted above, materials from other jurisdictions should be approached with caution. For example, the interpretive obligation in the UK Human Rights Act differs from the Victorian Charter. It does not include an express reference to statutory purpose.34 It also operates within a different constitutional and international law context.35

What section 32 means in the vetting context

You will need to consider the interpretative obligation when reviewing legislation or developing policy that may engage the obligation on public authorities to act compatibly with human rights. You should also be aware that legislation will have to be interpreted consistently in many different sets of circumstances. As far as possible, words in a statute will need to be given a constant and uniform meaning whether or not they apply in one set of circumstances or another. Provisions that intend to limit rights should be drafted in clear terms.

Some legislation will impose duties upon all ‘persons’ whether or not those persons might be public authorities or private individuals or corporations acting in an ordinary commercial context. It would be unlikely that statutory language would have a different meaning depending upon whether it applied to a public authority, a private individual or a corporation.

34 The UK Human Rights Act 1998, s. 3(1) reads: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’
35 For example, the New Zealand Court of Appeal took a different approach to reading down a statutory provision to comply with a right compared to the House of Lords’ approach in relation to the same issue: see Hansen v R [2007] NZSC 7, R v Lambert [2002] 2 AC 545 (HL).
To ensure that you have picked up all statutory provisions that might apply to public authorities, you will need to consider all those statutes that apply to ‘persons’ and assess whether they can be interpreted so as to be compatible with human rights. In doing so, you may need to consider how those statutory provisions, so interpreted, might affect, indirectly, the conduct of private individuals or corporations and determine whether this raises any new issues.

**DECLARATIONS OF INCONSISTENT INTERPRETATION**

The Charter empowers the Supreme Court to issue a declaration of inconsistent interpretation in some circumstances: s. 36.

The Supreme Court may make a declaration of inconsistent interpretation if it is of the opinion that a statutory provision cannot be interpreted consistently with a human right, no matter how much it has tried to comply with the interpretive obligation prescribed by Parliament under s. 32 of the Charter.

For a declaration of inconsistent interpretation to be made there must be either:

- a question of law relating to the application of the Charter; or
- a question with respect to the interpretation of a provision in accordance with the Charter.

This can occur either in a proceeding that has commenced in the Supreme Court or because the Supreme Court is hearing an appeal. Alternatively, the Supreme Court may have had a question referred to it from another court or tribunal where either:

- a question of law has arisen that relates to the application of the Charter; or
- a question has arisen with respect to the interpretation of a provision in accordance with the Charter.

Such a question can only be referred to the Supreme Court if a party has made an application for referral and the court or tribunal in which the question first arose has considered that it is appropriate for the question to be determined by the Supreme Court.

The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission may intervene as of right (without leave) in any proceeding before any court or tribunal involving the application of the Charter (s. 34), and notice must be given to the Attorney-General and the Commission if in a Supreme Court or County Court proceeding a question of law arises relating to the application of the Charter or an issue arises regarding the interpretation of a statutory provision in accordance with the Charter or if a question is referred to the Supreme Court.
A declaration of inconsistent interpretation will not affect the validity of the statutory provision, nor does it create in any person any legal right or give rise to any civil cause of action. Its purpose is to allow Parliament an opportunity to reconsider the particular statutory provision in light of the declaration of inconsistent interpretation. There is a complex accountability measure triggered as a result of the Supreme Court issuing a declaration of inconsistent interpretation. Given the efforts made to ensure that new legislation receives a statement of compatibility that is well founded, it is expected that declarations of inconsistent interpretation will be rare. The experience in the United Kingdom has reflected this expectation. In the first six years of operation, there have been only 14 declarations of incompatibility made under s. 4 of the Human Rights Act 1998 (in respect of provisions in primary legislation,) that have not been overturned on appeal.

The Supreme Court must send a copy of any declaration of inconsistent interpretation it makes to the Attorney-General. The Attorney-General must provide a copy of the declaration to the minister administering the statutory provision in relation to which the declaration has been made.

The Charter requires the notice of the declaration to be tabled in Parliament at the same time as the relevant minister’s formal response to the notice. This must be within six months of the relevant minister receiving a copy of the declaration. The notice and the response must also be published in the Victorian Government Gazette at this time.

WHERE DO I GO IF I AM UNSURE?

It is primarily the responsibility of the officer developing the policy or legislative proposal to assess how the Charter is relevant to the proposal. This is because he or she is in the best position to understand the details of the proposal and how it may engage Charter rights.

Where Charter issues are identified and you are unsure about the scope of a right or applying the reasonable limitations clause, you should consult with the legal branch within your department, or with the Human Rights Unit in the Department of Justice.

For legislative proposals, it is expected that the legal officer responsible for instructing Parliamentary Counsel or drafting regulations will be the person directly involved in drafting the compatibility statement or human rights certificate. If policy officers are working on legislative proposals, we recommend that you consult with a legal officer within your department about preparing a compatibility statement or human rights certificate. It is best to consult with those officers early in the process, as well as at the time when the proposal is being refined or during the drafting of the Bill when many of the human rights issues will emerge more clearly. If you require further advice you should contact the Victorian Government Solicitor’s Office or the Human Rights Unit of the Department of Justice.
2.2 REASONABLE LIMITATIONS

THE GENERAL LIMITATIONS CLAUSE

Section 7 may be referred to as a general limitations clause. All of the rights in the Charter are subject to s. 7. This means that the human rights protected by the Charter are not absolute. Section 7 provides a framework for determining when and how a human right may be limited. Human rights legislation in Canada, New Zealand and South Africa contains similar general limitation clauses.

While it may have parallels elsewhere in Australian law,36 this framework is unique. We suggest you approach s. 7 on its own terms by working through the test set out in this section.

How does a general limitations clause operate?

Legislative or policy proposals may limit or restrict human rights. The purpose of s. 7 is to identify which limits or restrictions of human rights are justified.

Under s. 7, a human right may be subject to a limit only if certain conditions are present:

• the limit must be provided under law;
• it must be reasonable; and
• its imposition on the human right must be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

You should consider in each case whether all three conditions are present.

What does ‘under law’ mean?

All action that limits rights must be authorised by law. The source of the limit may be an Act, a regulation or the common law. The European Court of Human Rights has said the requirement that a limit be prescribed by law means the law must be ‘adequately accessible’, that is, available to the public, and it must be expressed with ‘sufficient precision’, that is, clearly defined.37

What are ‘reasonable limits’?

The determination of whether a limit on a human right is reasonable and demonstrably justifiable involves a balancing exercise whereby the needs of the state are balanced against the rights of individuals. It has been said that a limit will be reasonable where the exercise of the human right would be ‘inimical to the realisation of collective goals of fundamental importance’.38 Issues that may be relevant to the question of reasonableness include social, legal, moral, economic, administrative and ethical considerations.

To be reasonable, the limit must impair the human right as little as is reasonably possible but still achieve the objective of the limitation as effectively. An excessive impairment will mean the limit is unlikely to be a reasonable one.

What does ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ mean?

It is up to the state or the agency that is seeking to subject a particular human right to a reasonable limit to demonstrate that the reasonable limit is justified in the circumstances. Material should be available that demonstrates a limit is justifiable, such as studies, reviews, inquiries and consultation findings. Assumptions will not be enough. Empirical data may be required.

---


37 Sunday Times v. United Kingdom (1979) 30 Eur Court HR (ser A) [49]; (1979) 2 E H R R 245 [49].

In the leading Canadian case of *R v. Oakes*, Dickson CJ said that the values of a free and democratic society include:\(^{39}\)

- respect for the inherent dignity of the human person;
- commitment to social justice and equality;
- accommodation of a wide variety of beliefs;
- respect for cultural and group identity; and
- faith in social and political institutions which enhance the participation of individuals and groups in society.

How do I take into account the ‘relevant factors’?

In determining whether a limit is reasonable, s. 7 directs us to take into account certain factors. Every factor in the list must be taken into account. Other relevant factors not listed in s. 7 should also be considered as s. 7 requires that all relevant factors are taken into account.

Each of the factors should be looked at in the context of what is required of a ‘free and democratic society based on human dignity, equality and freedom’. In other words, the values necessary for the maintenance of such a society, whether the values are reflected in a human right or an acknowledged and accepted limit on that right, should be privileged in the balancing exercise.

The nature of the right

To determine the nature of the right, look at its purpose and consider the values underlying the human right. Consider the strength of the right based on international and comparative law, Australian law (including the common law and the Commonwealth Constitution) and the values of a free and democratic society. Limiting some rights will require more justification than others. For example, limitations on freedom of expression (in particular, non-political expression) will be easier to justify than the right to be free from torture, or from retrospective penalties.

You should note that jurisdictions without a general limitation clause such as section 7 of the Charter (eg, the United Kingdom Human Rights Act) give a narrower scope to rights than is likely to occur in Victoria.

The importance of the purpose of the limitation

To counterbalance a right, the limitation, restriction or interference that flows from the legislation or policy proposal in question should reflect, at a minimum, societal concerns that are pressing and substantial in a free and democratic society. This means more than just that the common good must be strived for. A specific rather than general area of public or social concern should be addressed by the limit, and that area of concern should be important, not trivial. Economic considerations (such as limited resources) alone will not generally be sufficient to support a limit on rights. However, experience in other jurisdictions shows that courts will defer to Parliament regarding resource allocations in relation to social and economic policy but are less likely to do so in relation to criminal justice and other areas where peoples' liberty is at stake. In the context of a serious fiscal crisis, economic considerations reflecting broader social purposes may justify a limit on rights. For example, the Canadian Supreme Court has accepted that in the context of such a crisis, it was justifiable for the Government to resile from a commitment to introduce pay equity for female employees in the health sector: *‘The government … was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society’.*\(^ {40}\)

---


40 *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 38, [75].
Consider the values underlying the purpose of the limit restriction or interference in assessing the importance of that purpose. The more important that purpose, the more weight that should be given to the limit when it is being balanced against the human right. Consider also whether any competing rights are relevant.

In Canada, it has been said that one should identify and examine the purpose of the limit rather than the purpose of the law as a whole.

**Nature and extent of the limitation**

This requires you to consider the means or measure used to achieve the purpose for which the limit or restriction has been imposed. It is necessary to ascertain the precise way in which the limit constrains the right. To what extent does it limit the human right and interfere with its exercise?

**Relationship between the limitation and its purpose**

For a limitation, restriction or interference with a right to be reasonable, there should be a rational and proportionate connection between the nature and extent of the limitation restriction or interference and the purpose which that limitation seeks to achieve. If the limit is not designed to achieve the relevant purpose, or is not likely to be effective in achieving its purpose, or if it is arbitrary, unfair and based on irrational considerations, it is likely to be deemed an unreasonable limit. For example, in the Canadian case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, the court found that there was insufficient evidence to show that less intrusive regulation relating to tobacco advertising would not achieve its goals as effectively as an outright ban.

There should also be proportionality between the purpose of the limitation, restriction or interference with a right and the means employed to achieve that purpose. If the means used are severe, the purpose must be very important. On the other hand, if the purpose is not particularly important, the means should be moderate and as unobtrusive as possible. For example, in *R v A (No. 2)*, the House of Lords found that a total ban on relevant sexual history evidence between a sexual assault complainant and the accused was an unjustifiable limitation on the accused's right to a fair trial on the basis that the limitation was disproportionate to its purpose of protecting the privacy of the complainant.

**Is there a less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve?**

This will often be a decisive factor in the balancing process. If there is another available way that the purpose for which the limitation, restriction or interference has been imposed could be achieved which would have a lesser adverse impact on the human right, then the limit may be deemed to be unreasonable: for example, if the provision is overly broad, with the potential to capture cases not intended to be captured, you should check whether there is another way of drafting the provision that impacts less on the human right. Another option would be to add safeguards restricting the use of the limitation to defined circumstances, as long as such safeguards do not undermine the policy objectives. However, this factor should not be interpreted as to require the least restrictive means to be adopted in all circumstances as the Charter does not make such a requirement.
How to interpret rights in light of s. 7?
On page 26 of these Charter Guidelines is a recommended process for undertaking a human rights impact assessment. There are five steps you should undertake to ensure that rights impacts are not overlooked.

This process also outlines the way you should interpret rights in light of s. 7.

After identifying relevant rights (step 1), you should determine the scope of the right, taking into account any internal qualifications, specific limitations or express exceptions that appear in the section providing for the right (step 2). This requires close examination of the section that provides for the human right.

Then you should consider the operation of any limitation or restriction or interference with the right arising from the legislative or policy proposal in accordance with the criteria identified in s. 7 (steps 3 and 4). This requires an analysis based on the terms of s. 7.

Whether the legislation or policy proposal ‘breaches’ the human right can only be determined after this analysis has been completed, that is, after the scope of the human right has been determined, and after assessing whether the restriction or interference with the right which arises from the legislation or policy proposal can be demonstrably justified in a free and democratic society based on human dignity, in accordance with each of the five criteria set out in s. 7.43

This analysis must be completed before any assessment is made about whether the legislation or policy proposal is incompatible with the right.

How does s. 7 apply to rights that exist independently of the Charter?

Note that the Charter does not affect the common law or Commonwealth law.

Therefore, while s. 7 may permit a limitation on a human right that is protected by the Charter, if that right exists independently of the Charter, a person may still be able to rely on that right.

What about specific limitations in the Charter?

A number of the rights contain specific limitations or express exceptions that qualify the scope of the right. Such specific limitations or express exceptions operate as ‘internal qualifiers’ and should be regarded as defining part of the content of the right as protected by the Charter.

One example is freedom of expression. Section 15(3) provides that the right to freedom of expression may be subject to lawful restrictions reasonably necessary to respect the rights and reputations of other persons or for the protection of national security, public order, public health or public morality.

Yet a ‘definitional’ analysis would interpret that unqualified right as not including a right to engage in obscenity or child pornography or perjury or contempt (at the first stage). This is instead of seeing the right as unrestricted (at the first stage of ascertaining the scope of the right) and the prohibition on, for example, child pornography as a reasonable limitation (at the second stage). See for further discussion Andrew Butler and Petra Butler, The New Zealand Bill of Rights Act: A commentary (2005, LexisNexis) 120.

43 These Charter Guidelines recommend a two-stage approach because it is conceptually clear and likely to bring greater consistency of interpretation of the human rights. It is the favoured approach in overseas jurisdictions with general limitation clauses. An alternative to the two-stage approach is to read any limitations into the right so that a one-stage analysis only is undertaken. This is referred to as ‘definitional’ balancing. Rather than define the right first and then consider the application of the s. 7 limitation, the one-stage approach incorporates the different considerations incorporated into a single test. Limitations are addressed at the same time as the right is defined. For example, in New Zealand the right to freedom of expression is unqualified (that is, it has no internal restrictions or express exceptions, unlike the right in the Charter) but is subject to the general limitations test.
How do the specific limitations relate to the general limitation clause?

General limitations may be imposed on a human right in accordance with s. 7 in addition to any specific limitations to which the right is already subject. Specific limitations are applied to a human right when the scope and content of the human right is being considered, and therefore have a bearing on the minimum requirements of the human right. Where a right has been formulated in terms that contain a specific limitation or an express exception, we recommend you first consider the specific limitations before turning to s. 7. The general limitation clause only needs to be considered if the right remains relevant to the policy proposal or legislation even after the specific limitation has been applied.

What happens if rights conflict with each other?

In some cases, two or more of the human rights in the Charter may conflict with each other. Where this occurs, you should consider whether the relevant legislation or policy proposal you are working on or assessing limits, restricts or interferes with one of the rights because it is promoting the operation of the other conflicting right. This will be one of the relevant factors to be considered under s. 7 as s. 7 requires that all relevant factors be taken into account even if the factor is not separately identified under s. 7(2).

When legislation limits one right in order to promote or protect another right (for example, the legislation limits freedom of speech of one group in the community in order to advance the freedom of religion of another group), ‘the importance of the purpose of the limitation’ will involve identifying that the purpose of the limitation or restriction imposed by the legislation is to advance another human right. The weight of this factor will depend on additional factors such as how central to that right is the protection in question. This includes considering the extent to which the limitation or restriction advances that protection (for example, how central to the protection of freedom of religion is the restriction on the freedom of speech of other groups, for instance, to denigrate that religion. This will depend on social circumstances.) It will also be necessary to take into account all the other s. 7 factors (including, for example, the extent of the limitation, or degree of restriction or interference, on the other human right).

The effect of section 7(3)

Sub-section (3) of s. 7 prevents anything in the Charter, including s. 7, from being used to destroy or limit rights in a way that would be inconsistent with the spirit of the Charter. It is relevant to the issue of competing rights. It is modelled on article 5(1) of the ICCPR.

SUMMARY

- Section 7 provides that human rights may be subject to reasonable limits.
- The conditions that must be present for a human right to be limited, restricted or interfered with in accordance with s. 7 are that the limit, restriction or form and degree of interference has the force of law and is reasonable, and its imposition on the human right can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- In determining whether a limit is reasonable, s. 7 directs us to take into account certain relevant factors. These are (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
• A number of the rights contain internal qualifiers, specific limitations or express exceptions within the section that qualify the scope of the right, operating as an internal restriction on the right.

• General limitations may be imposed on a human right in accordance with s. 7 in addition to any specific limitations to which the right is subject.

• The approach to be used in determining whether a human right may be subject to a reasonable limit involves first determining the scope of the human right, taking into account any specific limitations or express exceptions that appear in the section providing for the right. Then you should consider the operation of any limitation or restriction or interference with the right. This requires an analysis based on the terms of section 7. It will then be possible to assess whether a policy proposal or the legislation in question is compatible with the human right in the circumstances.

• While s. 7 might permit a limitation or restriction on those human rights that are protected by the Charter, if that right exists independently of the Charter (for example, is sourced in Commonwealth law or is a common law right), a person may still be able to rely on that right independently of the Charter in the context of legal proceedings.

• Provisions of the Charter, including s. 7, should not be used to destroy or limit rights in a way that would be inconsistent with the spirit of the Charter.
**FLOWCHART A**
**HUMAN RIGHTS IMPACT ASSESSMENT**

1. **Does the policy proposal, draft regulation or Bill raise human rights?**
   - *The human rights are set out in Part 2 of the Charter.*
   - *These guidelines provide policy triggers that will assist you to identify rights issues.*

2. **Determine the scope of each human right**
   - *Consider the content of each human right, and apply any specific limitations or express exceptions that appear in the section setting out the right.*
   - *The guidelines provide a discussion on each right that will assist you to identify the scope of the right.*

3. **Does the policy proposal, draft regulation or Bill limit, restrict or interfere with the scope of the rights?**
   - **NO**
   - **YES**

4. **Are the limitations or restrictions reasonable and demonstrably justified under s. 7 of the Charter?**
   - **YES**
   - *Go to Flowchart B, ‘When is a limit reasonable and demonstrably justified?’*
   - *It is important to identify all of the reasons why a limitation or restriction on a right is justified.*
   - *This is required for the statement of compatibility and human rights certificate.*

   **NO**

5. **Modify policy proposal, draft regulation or Bill and reassess compatibility**
   - *If the policy proposal, draft regulation or Bill cannot be modified, you will need to give reasons as to the nature and extent of the incompatibility.*

6. **The policy proposal, draft regulation or Bill is compatible**
When is a limitation reasonable and demonstrably justified?

FLOWCHART B

When is a limitation reasonable and demonstrably justified?

1. Is the limitation provided in an Act, regulation or common law?
   - * Action that limits rights must be authorised by law.

2. Is the purpose of the limitation important?
   - * Clearly and precisely articulate the purpose of the limitation. Does it address a specific area of public or social concern that is pressing and substantial?

3. Is material available that demonstrates that the purpose of the limitation is important?
   - * Material may include research findings, consultation findings, reviews and empirical data.

4. Is the limitation on the right rationally and proportionately connected to the objective you are trying to achieve?
   - * Consider whether the limitation is likely to achieve the objective and whether the policy or legislation limits the right only to the extent necessary to achieve the objective.

5. Does the limitation fall within the range of reasonable solutions to the problem?
   - * Consider whether there are less restrictive means to achieve the purpose of the limitation.
   - * Incorporate safeguards where appropriate.

6. If the limit is imposed on the human right, does the weighing of the limit against the right strike the correct balance?
   - * Consider whether the balance accords with the values of a free and democratic society based on human dignity, equality and freedom.
   - * Pay particular attention to the nature of the human right and the importance of the values underlying that human right.

The limit contained in the policy proposal or legislation is probably not justifiable as a reasonable limit on the human right under s 7.

The limit contained in the policy, proposal or legislation is probably justifiable as a reasonable limit on the human right under s 7.

SECTION 2: LEGISLATION AND POLICY DEVELOPMENT

CHARTER GUIDELINES

S.12
The Charter Guidelines provide policy triggers to assist in identifying rights issues.

Legislative bid forms must identify whether the proposal is likely to have human rights implications.

Officers should use the human rights impact assessment table (Appendix A, Charter Guidelines). See also ch 2 and flowcharts A and B, Charter Guidelines.

Prepare a human rights impact assessment of the proposal.

The Human Rights Unit will advise on the impact of the Charter on the proposal and whether it is appropriate to seek external advice on compatibility. External advice may only be sought from the VSGO or a list of recommended barristers. Parliamentary Counsel may refer officers to the Human Rights Unit when reviewing drafting instructions.

When lodging drafting instructions, officers must provide their human rights impact assessment to Parliamentary Counsel and the Human Rights Unit if the proposal limits any right in the Charter.

AIP cabinet submissions must identify which human rights issues the proposed legislation raises; whether the Department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter.

The analysis to Cabinet is a summary of your human rights impact assessment. It should be made in the section of the Cabinet Submission marked ‘Charter of Human Rights and Responsibilities impacts’.

Officers must provide Parliamentary Counsel and the Human Rights Unit with a copy of the statement of compatibility for the Bill at least one week prior to lodging the BAC submission. Officers must also provide the Human Rights Unit with a copy of the Bill and the human rights impact assessment table.

See ch 2 and Appendices C and D, Charter Guidelines. The Human Rights Unit will advise on the compatibility of the proposal with the Charter. Parliamentary Counsel will review the form of the statement and identify any omissions.

BAC submissions must attach the statement of compatibility and include a recommendation that Cabinet approve the statement.

The ‘Charter of Human Rights and Responsibilities impacts’ section of the submission should state whether or not the Bill is compatible with the Charter and refer to the attached statement of compatibility.

If the Bill is amended in the 1st House of Parliament, the statement of compatibility may need to be updated before the Bill is introduced into the next House. SARC reports to Parliament on the compatibility of Bills. SARC will write to Ministers where a statement of compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe Charter rights.

Responses to adverse comments from SARC should be well prepared and based on an informed understanding of the Charter. Advice / assistance should be sought from the Human Rights Unit to ensure consistency across government.

If the Bill is amended in the 1st House of Parliament, the statement of compatibility may need to be updated before the Bill is introduced into the next House. SARC reports to Parliament on the compatibility of Bills. SARC will write to Ministers where a statement of compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe Charter rights.

Responses to adverse comments from SARC should be well prepared and based on an informed understanding of the Charter. Advice / assistance should be sought from the Human Rights Unit to ensure consistency across government.
3
RIGHTS PROTECTED BY THE CHARTER
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 8?

You will need to consider section 8 if you are preparing or assessing legislation, or a policy or a program that draws distinctions between people or groups based on one or more of the attributes in the *Equal Opportunity Act 1995*, where this may result in less favourable treatment to some people or groups. You will also need to consider section 8 if the legislation, policy or program would have a disproportionate impact on a person or group of people with a particular attribute even though no distinction is drawn overtly.

The attributes are currently age; breastfeeding; gender identity; impairment; industrial activity; employment activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes. As the protection against discrimination under the Charter is linked to the attributes set out in s. 6 of the Equal Opportunity Act, which may change over time, you should check the Equal Opportunity Act to see if any additional attributes have been included.

For example, consideration of s. 8 and the reasonableness of any proposal to limit it may be required if your legislation, policy or program:

- establishes eligibility criteria for payment plans (for example, under the *Infringements Act 2006*);
- contains measures that are attempting to assist persons who have been socially, culturally and/or economically disadvantaged;
- takes steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged;
- provides for the delivery of an entitlement or service to some sectors of society and not others;
- assists or recognises the interests of Aboriginal persons or members of other ethnic groups;
- is stated in neutral terms but has a disproportionate impact on a sector of the community whose members have one or more of the attributes listed above;
- deals with any of the human rights set out in the Charter in a discriminatory way: for example, if the legislation curtails freedom of expression if a person has engaged in industrial activity;

**SECTION 8
RECOGNITION AND EQUALITY BEFORE THE LAW**

Section 8

(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.
sets age bands that are expressed as protective measures (for example, for lawful consumption of alcohol); graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting);

• establishes eligibility requirements for access to legal aid.

These policy triggers are not comprehensive. 44

DISCUSSION

Section 8 establishes a series of recognition and equality rights.

Recognition before the law

The right to recognition as a person before the law means that the law must recognise that all people have legal rights. However, this right does not mean that persons who do not otherwise have legal capacity, for example, to enter a contract, have such capacity. Whether a person has legal capacity is determined by separate rules not contained in the Charter. In the same way, this right does not confer ‘standing’ upon a person to bring proceedings in a court; the rules relating to legal standing are not contained in the Charter.

Equal protection against discrimination

The right of every person to be equal before the law and to be entitled to the equal protection of the law without discrimination ‘prohibits discrimination in law or in fact in any field regulated and protected by public authorities.’ 45

44 Recall that the policy triggers listed in the Charter Guidelines are not indicative of whether a particular legislative provision infringes the right. Their purpose is rather to draw your attention to whether a provision is likely to have some impact on the right, or ‘interfere’ with, or impose some limit on, a particular right. If a provision does so, it will be necessary to consider whether the interference or limitation imposed on the right is reasonable and justified.

45 United Nations Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN\1\Rev.1 at 26 (1994) [12].

This means that the government ought not to discriminate against any person, and the content of all legislation ought not to be discriminatory. For example, when the government regulates the provision of education services it should legislate and deliver those services in a non-discriminatory way. It also means that public authorities must not discriminate against people when enforcing the law and they must not apply legislation in an arbitrary or discriminatory manner. However, this is not to say that the Charter guarantees or seeks to give effect to the International Covenant on Economic, Social and Cultural Rights, for it does not. Rather, the Charter requires that if a public authority decides to offer a social service or government program, it must not discriminate in the way the service is provided.

What is discrimination?

Discrimination is already prohibited under Victorian law. Discrimination, in relation to a person, is defined in s. 3 (1) of the Charter to mean: ‘discrimination (within the meaning of the Equal Opportunity Act) on the basis of an attribute set out in section 6 of that Act’. Legal and policy officers should apply this definition when examining s. 8, and, in particular, they should refer to ss. 7 – 9 of the Equal Opportunity Act for guidance.

Discrimination is an impermissible differential treatment that results in less favourable treatment, based on one or more of the attributes listed in the Act. The Equal Opportunity Act prohibits direct discrimination: that is, a law or policy that expressly treats people differently on the basis of a particular characteristic. It also prohibits indirect discrimination: for example, an apparently general law or policy that, although it appears neutral on its face, impacts differently on different groups in its effect. For example:

• a policy that requires a person to be over fifty years old to work as a judge. This is direct discrimination on the basis of age.

• a law that required all employees of a public authority to be clean shaven. This is an example of indirect discrimination on the basis of religious belief or activity. It discriminates against those men whose religion requires them to grow a beard.
The discrimination must relate to one of the attributes listed in the Equal Opportunity Act 1995. Differentiation will also be justified if the criteria for differentiation are reasonable and objective and the aim is to achieve a legitimate purpose. This is discussed further below.

The case law from other jurisdictions suggests that differentiation on the basis of inherent, immutable characteristics such as race, sex and sexual orientation will be especially difficult to justify.46

Enjoyment of rights without discrimination

This provision ensures that every person should be able to enjoy the human rights that are set out in the Charter, without discrimination. For example, as all people have the right to peaceful assembly, this right should not be restricted to only people who possess particular political beliefs. This section is limited to the right to enjoy the human rights that are set out in the Charter, as the term ‘human rights’ is defined in s. 3(1) to mean the civil and political rights set out in Part 2 of the Charter.

REASONABLE LIMITS

Not all differences in treatment are discriminatory – only those that treat one group less favourably and that have no objective and reasonable justification. If you think an aspect of your policy, program or legislative provision may not comply with s. 8, you will need to consider whether it is nonetheless permitted under the Charter. This may occur in two ways:

- the provision may come within the exception in s. 8(4) of the Charter;
- like all of the human rights protected in the Charter, s. 8 may also be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

Section 8(4): express exception

Human rights law recognises that formal equality can lead to unequal outcomes. To achieve substantive equality, differences of treatment may be necessary. Section 8(4) recognises this and provides that certain differential measures do not constitute discrimination, namely, measures ‘taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination’. This sub-section ensures that such measures do not breach the Charter.

Under this section, measures taken for the purpose of assisting or advancing persons or groups of persons who are disadvantaged because of prior discrimination do not themselves constitute discrimination.

For example, if you are able to demonstrate that a specific group within the community is in need of specific short-term assistance, which is unavailable to others, for the purposes of addressing or alleviating ongoing disadvantage related to their membership of that group, then it is unlikely that such a measure will amount to discrimination.

Note that s. 8(4) differs considerably from s. 82 of the Equal Opportunity Act which relates to welfare measures and special needs. If your policy or program does not comply with ss. 8(2) or 8(3) of the Charter, you will need to ensure it satisfies s. 8(4) (or section 7) and section 82 of the Equal Opportunity Act.

Section 7: general limitations clause

If the policy gives rise to a prima facie issue of discrimination under s. 8 but does not fall within s. 8(4), you will need to consider whether s. 7 applies. Discrimination will only occur if it cannot be demonstrated that the measures are justified under the general limitations clause outlined in s. 7 of the Charter. That is, if the measures are a ‘reasonable limit as can be demonstrably justified in a free and democratic society’ they will not constitute discrimination. You should refer to Part 2 of these Charter Guidelines for more information on s. 7.

---

KEY POINTS TO REMEMBER:

• The law must recognise that all people have legal rights, but this does not mean that persons who do not otherwise have legal capacity obtain that capacity because of s. 8.

• Public authorities must not discriminate against people when enforcing or applying the law and all people have the right to be protected against discrimination.

• Legislation must not be applied in an arbitrary or discriminatory manner.

• A policy or program will give rise to a *prima facie* issue of discrimination if it results in direct or indirect discrimination on the basis of one or more of the attributes in the Equal Opportunity Act.

• These attributes are currently: age, breastfeeding, gender identity, impairment, industrial activity, employment activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

• Discrimination can arise on more than one ground (for example, a policy refusing pregnant employees access to sick leave may involve discrimination on the basis of both sex and pregnancy) and an attribute may be broken up into sub-categories (for example, the provision of different services to people with disabilities based on the nature of their disability may constitute discrimination).

• Not every form of differential treatment is discriminatory.

Circumstances in which discrimination is permitted

• The prohibition on discrimination will not apply to:
  
  − measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination: s. 8(4). For example, if you are able to demonstrate that members of a specific group within the community are in need of specific short-term assistance, which is unavailable to others, for the purposes of addressing or alleviating ongoing disadvantage related to their membership of that group, then it is unlikely that such a measure will amount to discrimination.
  
  − measures that can be justified under the general limitations clause in s. 7 of the Charter. That is, if the measures are a ‘reasonable limit as can be demonstrably justified in a free and democratic society’.

MEASURES TO IMPROVE COMPLIANCE

The *Equal Opportunity Act* has been in operation for many years now in Victoria. Most departments and government agencies will have already developed policies covering issues around the prohibition of discrimination. An important initial step for legal and policy officers will be to consider the ways in which the Charter interacts with the Equal Opportunity Act.

There are a number of ways to increase compliance of your policy with s. 8 of the Charter:

• If your policy or program makes a distinction on the basis of one of the attributes listed in the Equal Opportunity Act, make sure it is inclusive and not exclusive in its effect. For example, if your policy or program is aimed at people living in relationships, it should be developed so that, where relevant, it applies equally to married couples, de facto couples, and same-sex couples.

---

47 Note though that any legislation, policy or program making intra-attribute distinctions will need to be carefully assessed under the Charter, in particular under s. 8(4) and s. 7.
If your policy or program appears to be discriminatory, consider the underlying purpose or reason for the distinction it relies on. Ask whether:

- the reason for the distinction is consistent with the objectives of the policy;
- the intention of the policy is to achieve an important policy objective and it is not designed to discriminate;
- the distinction is sufficiently clear to meet its purpose;
- there was no alternative means to achieve the policy objective without discrimination;
- the basis for the distinction can be supported by reliable information.

When considering whether a provision in legislation, a policy or a program is a measure falling within the exception in s. 8(4), you will need to consider the following questions:

- Is the legislation, policy or program shaped this way because it is aimed at assisting or advancing persons or groups of persons who are disadvantaged?
- What is the nature of the disadvantage suffered by the person or group?
- Is there any evidence to support the existence of that disadvantage?
- How will your legislation, policy or program assist in addressing that disadvantage?
- Can you measure the results of your action? For example, can you currently determine or will you be able to determine in the future whether your action has been successful in assisting or advancing persons who have been disadvantaged by discrimination?48

If you can demonstrate that your legislation, policy or program is a measure falling within the exception in s. 8(4), it will not constitute discrimination under the Charter. However, any such programs should be regularly reviewed to ensure the justification still exists.

RELATED RIGHTS AND FREEDOMS

Section 8 requires policy officers to consider the impact of government policy on all sectors of society. It is consequently related to all of the other human rights protected in the Charter and is specifically related to:

- protection from torture and cruel, inhuman or degrading treatment (s. 10);
- freedom of movement (s. 12);
- the right to freedom of thought, conscience, religion and belief (s. 14);
- the right to freedom of expression (s. 15);
- protection of families and children (s. 17);
- cultural rights (s. 19).

HISTORY OF THE SECTION

Section 8(1) was modelled on article 16 of the ICCPR. Section 8(2) was modelled on article 2(1) of the ICCPR. Section 8(3) was modelled on article 26 of the ICCPR. Section 8(4) was modelled on section 19(2) of the New Zealand Bill of Rights Act 1990.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

1. United Nations Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 26 (1994).

Section 9

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

**POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 9?**

You will need to consider s. 9 in assessing legislation, a policy or a program where it:

- amends the law on withdrawal of medical treatment, including the processes and procedures in place for an enduring power of attorney;
- creates or amends policy or practices permitting law enforcement officers to use force, including the use of weapons in the course of their duties;
- amends the laws in relation to the use of deadly force and in particular the defences to homicide, or alters the operation of those laws;
- affects the delivery of medical resources for patients;
- impacts on the way in which essential medical or welfare services are provided to members of vulnerable groups within the community, including parental control over children’s lifesaving medical treatment;
- establishes procedures for the management of individuals held in state care;
- amends the law on suicide or euthanasia;
- establishes or amends the law on coronial inquests.

These policy triggers are not comprehensive.

**DISCUSSION**

The right to life is concerned with the protection and preservation of life. This is one of the most fundamental of all human rights. Under the Charter this right can be limited so long as the requirements of s. 7 have been complied with; however, it remains one of the most fundamental of all human rights.

In international human rights law, the right to life not only imposes a negative duty on states to refrain from the arbitrary deprivation of life, but in certain well-defined circumstances can also give rise to a positive obligation on a state. The scope of this positive duty is discussed immediately below.

The UN Human Rights Committee has taken the view that the right to life should not be interpreted narrowly.49

---

49 Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General.*
The positive duty

The right to life (together with s. 38) imposes certain positive obligations on public authorities. One of these obligations is to protect the lives of persons in their care. For example, there may be a breach of the right to life where a person dies in a state care facility, in prison or while in the custody of the police, unless the state can prove that it had no responsibility for the death. The extent of this obligation will depend on the facts of the case, the role of the particular public authority and the level of knowledge reasonably expected of that public authority. For example, police are at risk of breaching the right if they fail to take adequate care of a person whose life is known to be at a particular risk, and prison authorities need to take adequate measures to guard against detainee suicides.

Other aspects of the positive duty are examined below.

• Effective criminal law provisions and law enforcement

In international human rights law, the right to life requires a government to refrain not only from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

This means that the government is required to put in place a system for the administration of criminal law that aims to deter the commission of offences against the person. This must be supported by law enforcement machinery for the prevention and punishment of breaches of the criminal law. More specifically, the government has an obligation to take action where it is aware that someone’s life may be at risk.

According to the European Court of Human Rights, the scope of these obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the government, ‘bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.

A two-stage test has been formulated by the European Court of Human Rights in relation to the positive obligation to protect the right to life. The leading case is *Osman v. United Kingdom* in which the court said:

‘[I]t must be established … that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’

In other words, a public authority must take action to prevent a person’s death if it is aware, or it reasonably should be aware, that the person’s life is at risk.

---


• Effective official investigation into circumstances of death

The right to life has been interpreted in some international judgments as encompassing a positive, procedural obligation to undertake an ‘effective, official investigation’ into the circumstances of a death in certain circumstances. In international human rights law an investigation is required:

• where there is an allegation of use of lethal force by government authorities or (in some circumstances) by a private party;

• where a person dies in circumstances in which there was an obligation on a public authority to protect the person’s life (for example, where a person was in state custody or because the state knew or should have known that a person’s life was at risk); and

• where a person dies in circumstances in which government authorities are alleged to have been negligent.

This duty has also been held to apply in a case where no government agent was involved in the death but where there was reason to believe that an individual had sustained life-threatening injuries in suspicious circumstances.

The European Court of Human Rights has said that to be effective, each investigation must have the following characteristics:

• the persons responsible for carrying out the investigation must be independent from those implicated in the events;

• the investigation must be effective in the sense that it is capable of leading to a determination of whether the death was or was not justified and to the identification and punishment of those responsible. Where there has been a use of lethal force, an investigation should determine whether the use of lethal force was justified in the circumstances. Where it was not justified, the investigation should lead to the identification and punishment of those responsible;

• the investigation should be prompt; and

• the investigation should be open to public scrutiny and accessible to the victim’s family.

Note that the obligation to carry out an effective investigation is largely regarded as procedural. In other words, it is a requirement to carry out a procedure that has the characteristics listed above. International cases in which this obligation was breached typically involved numerous errors and inadequacies in relation to the investigation process undertaken. The effectiveness requirement does not require, for example, that a finding of the cause of death is made in every case; it rather requires that the process undertaken is sufficiently effective so as to enable such a determination to be made in an appropriate case.

The negative duty

When is there an ‘arbitrary deprivation of life’?

A decision to deprive someone of life is never to be made ‘arbitrarily’, that is, based on a decision unrelated to any test laid down by law or recognised at law (for example, not made in self-defence).


55 See for example Finucane v. United Kingdom (2003) VIII Eur Court HR 1; (2003) 37 ECHR 656, where the European Court of Human Rights found there to be a failure to provide a prompt and effective investigation into the allegations of collusion by security personnel.


57 Jordan v. United Kingdom, Application No 24746/94 (Unreported, European Court of Human Rights, Third Section, 4 May 2001); (2001) 37 ECHR 52.

58 See for example, Jordan v. United Kingdom, Application No 24746/94 (Unreported, European Court of Human Rights, Third Section, 4 May 2001); (2001) 37 ECHR 52 where there was a failure to exercise control over the scene of the investigation and a failure to seek follow-up information from persons present at the scene of the incident.)
In international human rights law, the right to be free from an arbitrary deprivation of life may not be suspended under any circumstances, including an armed conflict or other state of emergency.

However, there are a limited number of circumstances where the use of force which may result in the deprivation of life is permitted; in those circumstances, the deprivation of life is not considered ‘arbitrary’.

The formulation of the test by the European Court of Human Rights is that a lawful use of force by, for example, the police in self-defence does not violate the right to life if the force is no more than ‘absolutely necessary’ to protect a police officer or other person from imminent threat of death or serious injury.

The right to life: particular issues

• Euthanasia and assisted suicide

The right to life has not been recognised as including (as a corollary) a right to die with the assistance of a third person or public authority.59

In jurisdictions with a comparable human rights instrument protecting the right to life, the right to life has not led to the legal recognition of assisted suicide by either a person or medical practitioner.60

• Rights of the unborn child: do foetuses and embryos have a right to life?

The Charter includes a savings provision which states that the Charter does not affect the law in relation to the offences of abortion or child destruction.

Section 48 reads:

‘Nothing in this Charter affects any law applicable to abortion or child destruction, whether made before or after the commencement of Part 2.’

As a result, it will not be necessary to vet legislation, or a policy or program on abortion or child destruction, for compliance with the Charter.

Section 6 of the Charter states that ‘[a]ll persons have the human rights set out in Part 2.’ Person is defined in section 3 as ‘a human being.’ However, the Charter does not say whether ‘human being’ includes embryos or foetuses.

The Charter’s silence on whether the right to life extends to foetuses and embryos is consistent with the government’s policy position that the Charter should not make any statement about when life begins.

• Medical treatment and access to therapeutic drugs

The right to life has particular relevance in the area of medical treatment, especially relating to the medical treatment of terminally ill patients.

Legal and policy officers should take care when developing policies regarding access to therapeutic drugs and other medical treatment.

The European Court of Human Rights has recognised that a public authority may be in breach of the right to life if it has undertaken to provide a particular form of treatment generally and has limited treatment on an arbitrary or discriminatory basis, putting an individual’s life at risk.61

---

59 In Victoria, assisted suicide is an offence pursuant to s. 6B (1A) of the Crimes Act 1958.

61 Nitecki v. Poland, Application No. 65653/01 (Unreported, European Court of Human Rights, Grand Chamber, 21 March 2002; Pentiacova v. Moldova (2005) I Eur Court. See also R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another [2006] EWCA Civ 392.
In a recent UK case, the Court of Appeal held that the policy of the National Health Service (NHS) Primary Care Trust to fund a particular unlicensed drug treatment for early stage breast cancer only where ‘exceptional’ personal or clinical circumstances could be shown was irrational and unlawful. The court ordered the trust to reformulate its policy regarding the provision of the drug, but did not order it to be provided. 62

These cases illustrate that the right to life does not require a public authority to provide treatment that may preserve life in all instances, but that there should be clear and transparent criteria in the allocation of medical treatment.

**REASONABLE LIMITS**

Like all of the human rights protected in the Charter, the right to life may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

**KEY POINTS TO REMEMBER**

- The right to life has been interpreted broadly in international human rights law. It places both a positive and negative duty on public authorities. The scope of these duties may change over time.

- Presently, the positive duty requires public authorities to:
  - put in place a system for the administration of the criminal law aimed at safeguarding the lives of persons in Victoria supported by adequate law enforcement machinery;
  - undertake effective official investigations into the circumstances of some deaths;
  - protect the lives of persons in their care.

- The negative duty requires public authorities to refrain from the arbitrary deprivation of life. However, in some circumstances the use of force that may result in the deprivation of life is permitted.

- The right to life is also relevant in the context of access to medical treatment and therapeutic drugs.

- Pursuant to s. 48 of the Charter, it will not be necessary to vet legislation on abortion or child destruction for compliance with the Charter.

- The right to life has not been interpreted as including a right to die with the assistance of a third person or public authority.

---

62  R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another [2006] EWCA Civ 392.
MEASURES TO IMPROVE COMPLIANCE

Ensure that an effective official investigation takes place:

• where there is an allegation of the use of lethal force by government authorities or (in some circumstances) by a private party;

• where a person dies in circumstances that imposed an obligation on a public authority to protect the person’s life (for example, where a person was in state custody or because the state knew or should have known that a person’s life was at risk); and

• where a person dies in circumstances in which government authorities are alleged to have been negligent.

Refer to the discussion for what is required for there to be an ‘effective’ investigation.

When developing policy about law enforcement, provide:

• the appropriate level of training required to ensure only adequately trained and qualified law enforcement officers are authorised to use force that is appropriate for their powers;

• the type of training that is necessary to ensure that law enforcement officers are aware of a number of techniques that minimise the risk to another individual;

• clear procedural safeguards outlining to law enforcement officers what steps they are required to take before using lethal force.

If you are developing policies or programs relating to the management of persons in state care, establish:

• best practice guidelines that promote the health and safety of individuals in the care of state agencies, including best practice guidelines that will enable a timely response to medical emergencies;

• procedures that enable those responsible for the care of individuals to be able to respond to concerns about the health and safety of individuals promptly;

• clear procedural safeguards to ensure that decisions about the health and safety of individuals are made by staff at an appropriate level and that there is sufficient oversight of those decisions;

• regular reviews of these procedures.

When developing policy regarding access to medical treatment ensure that:

• the criteria for determining whether individual patients are able to access certain treatment are based on sound clinical reasons.

To comply with the Charter obligations specifically regarding the withdrawal of medical treatment, ensure that:

• there are non-arbitrary procedures in place regarding any decision to withdraw medical treatment;

• there are clear procedural safeguards to ensure that any decision to withdraw medical treatment is made at an appropriate level and that there is sufficient oversight of those decisions;

• there are safeguards to ensure that individuals and families affected by a decision to withdraw medical treatment are adequately informed and consulted over the decision.
RELATED RIGHTS AND FREEDOMS

When considering whether a policy proposal or program might give rise to an issue under s. 9, you should also consider whether it places restrictions on the following rights:

- protection from torture and cruel, inhuman or degrading treatment (s. 10);
- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22).

HISTORY OF THE SECTION

Section 9 is based on article 6(1) of the ICCPR. Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Cases
13. R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another [2006] 1 WLR 2649.

Legislation
18. Crimes Act (Vic.).

Other sources
19. United Nations Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 6 (1994).
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 10?

Section 10 prohibits torture; cruel, inhuman or degrading treatment; and involuntary medical experimentation or treatment.

Torture and cruel, inhuman and degrading treatment:
You will need to consider s. 10 in assessing legislation, a policy or a program where it:

- affects the physical or mental well-being of a person in a manner that may:
  - cause serious physical or mental pain or suffering, or
  - humiliate or debase a person (albeit non-intentionally);
- creates new powers or increases existing powers of police, inspectors or authorised officers or other persons;
- removes the right to complain of mistreatment by a public authority or limits access by those with a role of independent scrutiny (for example, the Ombudsman) to places of detention;
- affects the operation of detention facilities and conditions under which individuals may be detained (including access to goods and services, such as medical treatment, while in detention);
- creates new types of penalties for offences or dramatically increases the size and/or range of penalties for offences or introduces minimum mandatory sentences;
- authorises changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals;
- introduces or permits corporal punishment by a public authority;
- authorises a person to be searched or puts in place procedures for conducting searches;
- regulates the treatment of persons located at any site for which a public authority is responsible, including, for example, a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service;
- allows for prolonged periods of solitary confinement or other particularly harsh prison regimes;
- involves crisis or crisis-incident intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint and/or physical restraint.

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.
Consent to medical experimentation or treatment

You will need to consider s. 10 in assessing legislation, a policy or a program where it:

• defines and regulates procedures for obtaining consent to medical treatment and experiments (especially procedures relating to a requirement of full disclosure of information about the treatment or experiment, and procedures for obtaining consent from or on behalf of children and other vulnerable people);
• regulates medical treatment of persons without their consent;
• regulates the conduct of medical or scientific research;
• allows for the approval of forms of medical experimentation or treatment that will involve the trialling of new medical or scientific techniques.

These policy triggers are not comprehensive.

DISCUSSION

The prohibition on torture and inhuman and degrading treatment is primarily a negative obligation, that is, it requires public officials to refrain from torture. It does, however, include some positive elements that require governments to take steps to prevent the occurrence of torture and inhuman and degrading treatment, and to make appropriate inquiries into claims that it has occurred. Some suggestions as to the types of steps that need to be taken to fulfil the positive obligation are outlined below in the section on Measures to Improve Compliance.

What is torture?

At the international level, torture is defined in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention) in the following terms:

‘...the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

As this definition makes clear, for an act to amount to torture, not only must there be a certain severity in pain and suffering; the treatment must also be intentionally inflicted for a prohibited purpose such as to obtain a confession, and must be inflicted ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’ to amount to torture.63

The purpose requirement is interpreted broadly – under most circumstances a public authority will be prohibited from inflicting severe pain or suffering on people. The few exceptions to this rule will generally involve the administration of medical or emergency treatment (for example, administering a very painful medical procedure or rescue carried out in difficult and dangerous circumstances, in which the pain is inflicted for the benefit of the person on whom it is inflicted). When the patient is capable of giving consent, the rules relevant to consent (see page 68) also apply to such treatment.

63 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987) article 1.
Importantly, the assessment of whether an act amounts to torture is relative, and depends on factors including the duration of the treatment, its physical or mental effects, and the age, sex, vulnerability and state of health of the victim.\(^64\)

In international jurisprudence, any evidence obtained through torture has been held to be inadmissible in court, even if that evidence was obtained in another jurisdiction without the complicity of the local government authorities.\(^65\)

What is the difference between torture and ‘cruel, inhuman or degrading treatment’?\(^66\)

In international human rights law there is a difference between conduct amounting to torture and conduct amounting to ‘cruel, inhuman or degrading treatment’.\(^66\)

Although any form of ‘cruel, inhuman or degrading treatment’ will violate s. 10, the special stigma of torture attaches only to deliberate ill treatment causing very serious physical or mental pain or suffering. In other words, the threshold of severity for torture is extremely high.\(^67\) Conduct not meeting this threshold may, however, amount to ‘cruel, inhuman or degrading treatment’ and breach human rights.

What is cruel, inhuman or degrading treatment or punishment?\(^68\)

No specific definitions of ‘cruel, inhuman or degrading’ treatment or punishment are present in either the ICCPR or the Torture Convention. However, the following principles have been established through international jurisprudence regarding the scope of this prohibition:

- This prohibition is directed at less severe forms of ill treatment than acts amounting to torture.
- Degrading treatment is treatment that humiliates or debases a person. In other words, it is treatment that shows a lack of respect for a person, or diminishes a person’s dignity and causes feelings of fear, anguish or inferiority capable of breaking a person’s moral and physical resistance.
- Ill treatment may involve both physical and mental pain or suffering, however there is no specific requirement that severe pain be inflicted.\(^68\)
- It is not necessary for the harm to be intentionally inflicted.
- To be within the scope of the prohibition, the harm must be carried out by a public official or other person acting in an official capacity; however, the purpose for which it was carried out is immaterial.

The assessment of whether an act amounts to ‘cruel, inhuman or degrading treatment’ or punishment is relative. The leading case from the ECtHR is Ireland v. UK, in which the Court held:

‘... ill treatment must attain a minimum level of severity if it is to fall within the scope of [the right]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.’\(^69\)

---

\(^{64}\) Ibid.

\(^{65}\) A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2005] 2 AC 68; A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent), [2005] UKHL 71.

\(^{66}\) Note though that within some jurisprudence, acts that were in the past characterised as cruel, inhuman or degrading treatment have been reclassified as torture. See for example A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent), [2005] UKHL 71 [53].

\(^{67}\) See for example the decision of the European Court of Human Rights in Ireland v. United Kingdom (1978) 25 Eur Court HR (ser A); (1979–80) 2 EHRR 25.

\(^{68}\) Report of the Special Rapporteur on the question of Torture to the Commission on Human Rights, UN Doc E/ CN.4/2006/6 (23 December 2005) [35].

\(^{69}\) Ireland v. United Kingdom (1978) 25 Eur Court HR (ser A) [162]; (1979–80) 2 EHRR 25 [162].
International courts have adopted a low threshold for the necessary minimum in the case of individuals who are assaulted while in detention.

Examples of ‘cruel, inhuman or degrading treatment’ may include:

- acts carried out pursuant to a disproportionate exercise of powers by police, inspectors or authorised officers, such as an unnecessary and unjustified physical assault;
- inhuman detention conditions (such as prolonged indefinite detention that causes mental illness70);
- a penalty (normally criminal, but potentially extending also to regulatory offences) that is arbitrary, excessive or inhuman; and
- corporal punishment.

Punishment

Section 10 also prohibits ‘cruel, inhuman or degrading’ punishment.

A form of punishment will generally breach this provision if it entails a degree of humiliation and debasement that attains a particular level above any usual level of humiliation involved in punishment.

Once again the assessment is relative and depends on all the circumstances of the case. In particular, it depends on the nature and context of the punishment itself and the manner and method of its execution.

Medical and scientific treatment and experimentation

The Charter prohibits medical and scientific experimentation and treatment without consent. This means that patients who are competent to give consent must be allowed to refuse medical treatment or refuse to participate in a medical experiment. Medical treatment should not be given unless consent is obtained. This requirement broadly reflects the current legal position in Victoria, where the duty to treat a patient does not extend to patients who refuse treatment.71

The meaning of consent is discussed immediately below. It must be ‘full, free and informed’. It must allow the patient to withdraw during the course of the experiment or treatment.

What is ‘full, free and informed consent’?

Section 10 imposes a requirement that any consent to medical or scientific experimentation or treatment must be full, free and informed.

Under international human rights law, the requirement for consent is usually expressed as needing to be ‘free’. For example, Article 7 of the ICCPR requires that a person must not be subjected to medical or scientific experimentation ‘without his free consent’. In respect of experimentation, the UN Human Rights Committee has observed that vulnerable persons, such as prisoners and persons in detention, should not be subject to any medical or scientific experimentation that may be detrimental to their health, as such persons may not be capable of giving valid consent.72


71 Medical Treatment Act 1988; Re BWV; Ex parte Gardner (2003) 7 VR 487.

72 United Nations Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994), [7].
The Charter however requires that consent be ‘full, free and informed’. The requirements for ‘full’ and ‘informed’ consent were inserted into the Charter to reflect the present requirements for consent outlined in section 5(1) of the Medical Treatment Act 1988 (Vic.).

The Charter requirements mean that consent must be voluntary and the person concerned must have been given sufficient information for an informed decision to be made. This would include information such as the nature of the person’s condition and the treatment options available, including explanations of possible risks, side-effects and benefits of the treatment.

In certain circumstances, patients will be unable to consent. For example, a person who is rendered unconscious in a car accident may need urgent medical attention and will not be able to consent to medical treatment. Undertaking emergency medical treatment in such circumstances is not a breach of the Charter.

In certain circumstances, patients will be unconscious in a car accident may need urgent medical attention and will not be able to consent to medical treatment. Undertaking emergency medical treatment in such circumstances is not a breach of the Charter.

Note that the prohibition on medical treatment without consent is unique to Victoria, the ACT and New Zealand human rights legislation. It is not a right contained in the ICCPR and might not be regarded as a human right in international law.

If you are vetting legislation or developing a policy or program that provides for medical or scientific treatment to be administered without consent, you will need to review it against s. 7 of the Charter. You should consult Part 2 of these Charter Guidelines for more guidance on s. 7.

### REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s. 10 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these guidelines for further information on s. 7. However, it will be extremely difficult to justify reasonable limitations on the right not to be subjected to torture, as this right is regarded as absolute in international human rights law. An absolute right is one that in international human rights law must be respected at all times and cannot be limited.

Victorian law currently provides for medical treatment to occur without consent in a number of situations. For example:

- consent provided by a substitute decision-maker such as a medical practitioner, where there is an emergency or where a person is incapable of giving consent (for example, administering a blood transfusion to a child without the consent of a parent under s.24 of the Human Tissue Act 1982 (Vic.));
- procedures permitted without consent in accordance with Divisions 4 and 6 of Part 4A of the Guardianship and Administration Act 1986 (Vic.);
- involuntary treatment of people with a mental illness under the Mental Health Act 1986 (Vic.).

Legal and policy officers reviewing policy proposals that provide for medical treatment without consent should ensure that the legislation meets the standard for acceptable limitations in s. 7.
KEY POINTS TO REMEMBER

- Section 10 protects an individual’s bodily and psychological integrity from:
  - torture;
  - ‘cruel, inhuman or degrading’ treatment;
  - ‘cruel, inhuman or degrading’ punishment;
  - medical or scientific experimentation without consent; and
  - medical or scientific treatment without consent.
- **Torture** is an act by which severe pain or suffering is inflicted by a public authority for a prohibited purpose.
- The threshold of the severity of conduct amounting to torture is extremely high. Less severe forms of ill treatment may amount to ‘cruel, inhuman or degrading’ treatment.
- The assessment of whether an act falls foul of this section is relative. It will depend on factors including the duration of the treatment; its physical or mental effects and the age, sex, vulnerability and state of health of the victim.
- A punishment involving a high level of humiliation and debasement may breach s. 10.
- Public authorities must not subject persons to medical and scientific experimentation or treatment without their consent. Consent must be ‘full, free and informed’. This means that consent must be both voluntary and that the person must have been given sufficient information for an informed decision to be made.
- Torture is regarded as absolute in international human rights law, and therefore non-derogable.
- The other rights protected in s. 10 may be subject under law to reasonable limitations in accordance with s. 7 of the Charter.

MEASURES TO IMPROVE COMPLIANCE

- Limit the range of persons who can exercise coercive powers to those classes of individuals who possess the required skills, training, experience and authority to exercise the powers.
- Ensure that searches (particularly intrusive methods such as strip-searches and cavity searches) are only carried out in circumstances of necessity and with due respect for the dignity of the person being searched.
- Have procedures in place to monitor the treatment of those being held in detention.
- Ensure that the legislation, policy or program provides for the needs and individual circumstances of persons under the control of a public authority so that some individuals are not more seriously affected or disadvantaged by a policy.
- Institute clear practices and procedures for obtaining and recording consent to experimentation and treatment.
- Review legislation that authorises treatment without consent to determine whether it meets the standard required by s. 7.
- Ensure that there is an appropriate mechanism in place for receiving and dealing with complaints about ill treatment by public authorities.

Offences and penalties:

- Consider whether the offence and level of penalty are proportionate.
- Tailor the penalty level to the type of conduct that you are seeking to prohibit.
RELATED RIGHTS AND FREEDOMS

When considering whether legislation or policy gives rise to an issue under s. 10, you should also consider whether it places restrictions on the following rights and freedoms:

- the right to life (s. 9);
- the right to privacy and reputation (s. 13);
- the right to liberty and security (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- rights in criminal proceedings (s. 25).

HISTORY OF THE SECTION

This section was modelled on article 7 of the ICCPR. This section modifies the ICCPR provision by providing additional requirements in relation to consent.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

2. A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2005] 2 AC 68.
3. A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) [2005] UKHL 71.

Treaties

6. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987).

United Nations Human Rights Committee Jurisprudence


Other Sources

8. United Nations Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI
gen\r
Rev.1 at 30 (1994).

**SECTION 11**

**FREEDOM FROM FORCED WORK**

**Section 11**

(1) A person must not be held in slavery or servitude.

(2) A person must not be made to perform forced or compulsory labour.

(3) For the purposes of sub-section (2) ‘forced or compulsory labour’ does not include—

(a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or

(b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or

(c) work or service that forms part of normal civil obligations.

(4) In this section ‘court order’ includes an order made by a court of another jurisdiction.

**POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 11?**

You will need to consider s. 11 in assessing legislation, a policy or a program where it:

- compels the provision of any labour or the performance of any service under threat of a penalty;
- gives a minister or public authority the power to employ or direct people to perform work in a vital industry or during a state of emergency.

These policy triggers are not comprehensive.

**DISCUSSION**

Rights to be free from slavery, servitude and forced work are important rights in international human rights law. These rights were included in the ICCPR in part as a response to the aftermath of the Second World War during which forced labour was widespread. Thus, the particular premise behind protecting these rights is that persons should not be subject to conditions that violate individual dignity and exploit human productivity.

**Slavery and servitude**

Slavery is defined in article 1 of the Slavery Convention 1926 to mean ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’

This definition encompasses the notion of effective ownership of a person by someone else, as if the person were a piece of property.

Servitude is not ownership despite the fact that a person under servitude may be directed where to live and may be unable to leave. The prohibition on servitude has been considered in the following cases:

- An applicant who was placed ‘at the disposal of the state’ for 10 years following the completion of a prison sentence was not held in servitude, nor did his situation violate the right to liberty and security of the person.73
- Obliging a soldier to serve out a minimum enlistment period in the armed forces, contrary to his wishes, did not constitute slavery or servitude.74

73 Van Droogenbroeck v. Belgium (1982) 50 Eur Court HR (ser A).
74 W, X, Y and Z v. United Kingdom 11 YB 562 (1968), E Com HR.
Forced or compulsory labour

The UN Human Rights Committee recently considered the meaning of the expression ‘forced or compulsory labour’ in a case against Australia. It said:

“… forced or compulsory labour” covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed."75

Forced or compulsory labour refers to work exacted from a person under the threat of a penalty, which he or she has not voluntarily offered to do.76 The expression ‘forced labour’ suggests physical or mental constraint.

An example of a penalty might be a threat of punishment if the person does not perform the work. ‘Work’ is to be given a broad meaning and can cover all kinds of work or service, not just physical work.

Forced labour typically has two characteristics: (a) involuntariness; and (b) injustice, oppression or avoidable hardship.77 In relation to the second requirement, in other jurisdictions with a comparable prohibition, the following factors have been relevant:

• the threat of a penalty;

• the nature of the work required; for example, whether the work is required in the general interest of the community; and

• whether the burden on the applicant is a proportionate one.78

If work required by law was ‘for a short period, provided favourable remuneration and did not involve any discriminatory, arbitrary or punitive application’ it may not contravene this provision.79

Similarly, an arrangement which, in practice, means that a person is prevented from working in his or her chosen environment, or continuing a preferred vocation, is unlikely without more to violate this section.80

REASONABLE LIMITS ON SECTION 11

As with all of the human rights protected in the Charter, the rights in s. 11 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

The right to freedom from forced or compulsory labour is also subject to a number of permissible exceptions outlined in s. 11(3).

Detainee labour

Any work required to be done by 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, is exempt from the prohibition on forced labour. This provision applies to prisoners, including prisoners on remand, who are detained because of a lawful court order. It also applies to other persons who are detained under a lawful court order.

The position is not altered by a subsequent quashing of a conviction.

---

77 Van der Mussele v. Belgium (1983) 70 Eur Court HR (ser A) [37]; (1984) 6 EHRR 63 [37].
78 Reitmayr v. Austria (1995) 20 EHRR CD 89.
79 Iverson v. Norway (1963) 6 YbK 278.
Note also:

- If the conditions for detention specified in the provision are not met (for example, the detention was not lawful and court-ordered), forced detainee labour may not be permitted.\(^81\)
- The qualification pertaining to detainees may cover forced work performed by prisoners on behalf of private firms under contracts concluded with the prison administration.\(^82\)

Paragraph (4) of s. 13 clarifies that the reference to ‘court order’ in sub-clause (3)(a) includes an order made by a court of another jurisdiction. This ensures that the exception would cover the interstate transfer of prisoners to Victoria.

**Emergencies**

Work or service required because of an emergency threatening the Victorian community or a part of the Victorian community is exempt from the prohibition on forced labour. A similarly worded exception appears in Article 8(3)(c)(iii) of the ICCPR.

‘Work or service that forms part of normal civil obligations’

Work or service forming part of normal civil obligations is exempt from the prohibition on forced labour.

The expression ‘work or service that forms part of normal civil obligations’ is not specifically defined in the Charter. The UN Human Rights Committee has said that it should be interpreted against the backdrop of the minimum standards contained in ILO Convention No. 29.\(^83\) That Convention, in article 2, paragraph 2(e) excludes from the definition of the term “forced or compulsory labour”:

‘…minor communal services of a kind which, being performed by the members of the community in the direct interests of the said community, can therefore be considered as normal civic obligations incumbent on members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

… In the Committee's view, to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant.’\(^84\)

Examples of normal civil obligations may be:

- jury service;
- a lessor’s obligation to maintain his or her building;
- both compulsory fire service and a financial contribution in lieu of such service;
- performing community labour pursuant to a ‘Work for the Dole’ program.\(^85\)

---

\(^{81}\) De Wilde, Ooms and Versyp v. Belgium (1972) 14 Eur Court HR (ser A); (1979–80) 1 ECHR 438.

\(^{82}\) Twenty one Detained Persons v. Federal Republic of Germany (1968) 11 YbK 528.


\(^{84}\) Ibid [7.5].

\(^{85}\) Ibid. The ‘Work for the Dole’ program is a Commonwealth, rather than Victorian, scheme.
KEY POINTS TO REMEMBER

- Slavery means effective ownership of a person by someone else, as if the person were a piece of property.
- Servitude is not ownership, despite the fact that a person under servitude may be directed where to live and may be unable to leave.
- Forced or compulsory labour is work exacted from a person under the threat of a penalty which he or she has not voluntarily offered to do.
- ‘Work’ has a broad meaning covering all kinds of work or service, not just physical work.
- Prison labour is exempt from the prohibition on forced labour. However, if the conditions for the exception for lawful detention are not met (for example, the detention was not court-ordered), forced detainee labour may not be permitted.
- Work required to meet conditions of a community correctional order is also exempt.
- Also exempt from the prohibition on forced labour is work or service required because of an emergency threatening the Victorian community or a part of the Victorian community, and work or labour forming part of ‘normal civil obligations’.
- The term ‘normal civil obligations’ encompasses work such as jury and fire service.

MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 11(2):

- Ensure that any policy, program or piece of legislation does not compel work or service from a person under the threat of what might be construed as a ‘penalty’. If it does, ensure that he or she has voluntarily offered to do the work or perform the service. This measure will be unnecessary if the work or service falls within one of the exceptions in s. 11(3).

- If your policy, program or legislation requires work to be done by persons who are currently detained, ensure that they are being detained pursuant to a ‘lawful court order’. Also pay particular attention to ensuring that the conditions of detention required by the Charter are met. You should refer to ss. 21 and 22 in particular.

- If your policy, program or legislation involves work that you consider to amount to ‘normal civil obligations’, consider whether it is of the type considered to be ‘normal civil obligations’ under the ICCPR. Examples are discussed above.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy proposal or practice might give rise to an issue under s. 11, you should also consider the following additional rights and freedoms:

- recognition and equality before the law (s. 8);
- right to liberty and security (s. 21).

HISTORY OF THE SECTION

Section 11 is modelled on article 8 of the ICCPR Covenant. The Charter omits article 8(3)(c)(ii), which provides an exception to the right to be free from forced or compulsory labour for military service or national service that is required to be performed by conscientious objectors, as these are considered matters within the Commonwealth’s jurisdiction.

Similar rights exist in comparative law. Refer to Appendix H for further information.
BIBLIOGRAPHY

Case Law
1. De Wilde, Ooms and Versyp v. Belgium (1972) 14 Eur Court HR (ser A).
2. Iverson v. Norway (1963) 6 YbK 278.
8. W, X, Y and Z v. United Kingdom 11 YB 562 (1968), E Com HR.

Treaties

United Nations Human Rights Committee Jurisprudence
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 12?

You will need to consider s. 12 in assessing legislation, a policy or a program where it:

Residence and occupation
• places conditions on the ability of a person to live within Victoria;
• limits the ability of a person to choose where to live in Victoria (including their ability to move their residence);
• requires people to fulfil certain requirements before they are able to leave and enter Victoria at will;
• requires a person released on licence from detention to work in certain locations within Victoria.

Detention and restrictions on movement or activities
• allows for an intervention order against a person;
• restricts the movement of persons who are subject to a lawful order restricting their movement or where they may live;
• imposes bail conditions regarding where a person may go or not go, or requiring him or her to remain within Victoria or to surrender of his or her passport;
• restricts movement or a person's place of residence pursuant to an order of the Adult Parole Board or other lawful order, such as a family violence intervention order.

Regulation of public land, land use, land titles and entry onto land
• establishes eligibility requirements for entering Crown land;
• limits the ability of individuals to move through, remain in, or enter or depart from areas of public space;
• authorises the making of orders excluding persons from licensed premises (such as a casino or racecourse);
• seeks to amend the law of trespass, which limits the right of an individual to enter private property;
• regulates planning controls that identify permitted residential locations;
• deals with rights of way, easements, roads and road closures, public reservation of land and sale of public land (for example, land locking);

Emergency management and public order
• limits or regulates public demonstrations;
• regulates quarantine and agricultural practices (such as measures to contain the spread of infectious diseases in farming practices);

Section 12

• 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.
• gives a minister or a public authority the power to direct people’s movement or to carry out some activity, for example, during a state of emergency or in the context of essential services.

These policy triggers are not comprehensive.

DISCUSSION

Section 12 protects various rights in relation to freedom of movement.

The following rights are recognised in s. 12:
• the right to move freely within Victoria;
• the right to choose where to live within Victoria; and
• the right to be free to enter and leave Victoria.

Who do these rights apply to?

The rights conferred by s. 12 apply only to persons who are ‘lawfully’ within Victoria.

A person may not be lawfully in Victoria:
• where legislation made in another state or territory, or a court order made in another state or territory, prohibits a person from leaving that state or territory or prohibits a person from travelling to Victoria.
• if they are unlawful non-citizens in breach of the Migration Act 1958 (Cth).

Positive or negative obligations?

The rights protected by s. 12 impose both positive and negative obligations on public authorities. The negative obligation is that public authorities must refrain from interfering with a person’s freedom of movement. The positive obligation is that they must also ensure that a person’s freedom of movement is not unduly restricted by other persons, who may be either public or private persons.

Scope of the obligations

In international human rights law, freedom of movement has been described as ‘an indispensable condition for the free development of a person’.

The right is closely related to the right to liberty, and is also considered to be necessary for access to economic and social rights such as health and social services.

The right to move freely within Victoria

The right to move freely within Victoria is not dependent on any particular purpose or reason for a person wanting to move or to stay in a particular place. It encompasses a right not be forced to move to, or from, a particular location.

The right includes freedom from physical barriers and procedural impediments, such as a requirement of prior notification or authorisation from a local council before entering a public park or participating in a public demonstration in a public space. However, the right does not just apply to public spaces such as a public park.

The right may also be invoked where the government actively curtails a person’s freedom of movement or subjects a person to strict private surveillance or reporting obligations before or when moving. These examples are not exhaustive of the scope of the right, which applies generally to a person’s movement within Victoria.

The right to choose where to live within Victoria

Under the Charter a person has the right to choose where to live within Victoria. This right may be interfered with, or impacted upon, by a legislative provision that authorises courts and others to direct where those people on bail or under supervised release may live. These provisions will need to be assessed.

---

86 Human Rights Committee, General Comment 27, Freedom of movement (Art.12), (Sixty-seventh session, 1999).

87 In Raimondo v. Italy (1994) 281 Eur Ct Hr (ser A); (1994) 18 EHRR 237 the European Court of Human Rights held that restrictions requiring a person to report to authorities, remain at home between set hours, and otherwise inform the authorities that they were leaving their home, were a breach of the person’s freedom of movement.
The right to be free to enter and leave Victoria

The Charter provides that a person has the right to be free to enter and leave Victoria.

Section 92 of the Commonwealth Constitution guarantees freedom of interstate intercourse. This aspect of the right largely duplicates this constitutional guarantee.

It means that any restrictions on the right to enter and leave Victoria must be proportionate to a legitimate government aim. If they are not, they are likely to be unconstitutional and also breach the Charter. As noted above, the Charter does not limit or abrogate any right or freedom not included in the Charter.

**REASONABLE LIMITS**

As with all of the human rights protected in the Charter, the right to freedom of movement may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

If you are assisting with the preparation of a policy or a program in which freedom of movement may be limited, you should examine whether the restriction would be permitted under s. 7. The restriction must be a reasonable limit and demonstrably justified.

If you are responsible for vetting legislation in a relevant context, it is important that you carefully examine whether the limitation on the right to freedom of movement can be justified under s. 7. For example, the operation of s. 7 may arise where there are:

- restrictions imposed on the freedom of movement of persons lawfully detained, such as prisoners;
- restrictions imposed on the movement of persons who are subject to a lawful order restricting their movement or where they may live, such as persons for whom a guardian has been appointed under the Guardianship and Administration Act 1986 (Vic);
- restrictions of movement or place of residence imposed on persons pursuant to orders of the Adult Parole Board;
- restrictions of movement or place of residence imposed on persons pursuant to orders made under the Mental Health Act 1986 (Vic);
- other lawful orders imposed on persons restricting movement, such as family violence intervention orders;
- planning controls imposed which zone residential locations away from commercial, industrial or agricultural areas.

**KEY POINTS TO REMEMBER**

- Section 12 establishes the following rights:
  - the right to move freely within Victoria;
  - the right to choose a place of residence within Victoria; and
  - the right to be free to enter and leave Victoria.
- Section 12 applies only to persons who are lawfully in Victoria;
- Section 12 includes the right not be forced to move to, or from, a particular location. It also includes freedom from physical barriers and procedural impediments, such as a requirement for prior notification or authorisation from a public authority before entering a public park or participating in a public demonstration in a public space;
- Like all of the rights in the Charter, the rights in s. 12 are subject to reasonable limitations under s. 7.

---

88 Cole v. Whitfield (1988) 165 CLR 360, 393 (the Court), citing Gratwick v. Johnson (1945) 70 CLR 1, 17; See also AMS v. AIF (1999) 199 CLR 160 [153] (Kirby J), [221] (Hayne J).
MEASURES TO IMPROVE COMPLIANCE

If you are reviewing legislation or developing a new policy that may restrict a person’s right:

• to move freely within Victoria;
• to choose where to live within Victoria; or
• to be free to enter and leave Victoria.

Ask yourself:

1. Does the right protected under s. 12 apply? Is the person lawfully in Victoria?
2. If so, can the restriction be justified under s. 7? The restriction should be rational and proportionate. For example, if you are considering restricting access to a public space for reasons of public order, consider the period of time during which the restriction is likely to remain in place, the criteria under which persons are to be granted or denied access, and the extent of the area covered by the restriction.
3. Does the legislation or policy also restrict one or more of the rights in s. 18 (the right to participate in public life)?
4. Does the limit on the right regulate individuals’ access to educational, health or social services, or restrict their ability to exercise their cultural rights?

RELATED RIGHTS AND FREEDOMS

The right to freedom of movement has some overlap with the right to participate in public life (s. 18), the right to liberty and security (s. 21) and the right to freedom of peaceful assembly and association (s. 16). The prohibition on discrimination (s. 8) may also need to be examined in a relevant case.

HISTORY OF THE SECTION

Section 12 was modelled on article 12 of the ICCPR, although it does not reflect the limitations permitted under Article 12(3).

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

4. Raimondo v. Italy (1994) 281 Eur Court Hr (ser A).

Other Sources

SECTION 13
PRIVACY AND REPUTATION

Section 13

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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 13?

Privacy – general

In the context of privacy, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

• involves powers of entry, search, seizure, confiscation or forfeiture (including a strip-search for detention or entry into a controlled environment);

• involves surveillance of persons for any purpose (such as closed-circuit television, CCTV);

• allows publication of personal information (for example, results of surveillance, medical tests, electoral roll);

• provides for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced gynaecological or other medical examination; or corporal punishment;

• provides for treatment or testing of a patient without his or her consent;

• regulates the public acknowledgment of gender reassignment of transsexual persons;

• involves a professional duty of confidence;

• provides for mandatory disclosure or reporting of information (including disclosure of convictions, injury or illness);

• regulates a person's name, private sexual behaviour, sexual orientation or gender identification.

Information privacy

In the specific context of information privacy you will need to consider s. 13 in assessing legislation, a policy or a program where it:

• involves or authorises surveillance or other monitoring where recorded personal information is collected, accessed, used or disclosed;

• establishes or amends a public register;

• involves the collection of personal information, compulsorily or otherwise;

• envisages a new use for personal information that is already held;

• changes or creates a system of regular disclosure of personal information, whether to another part of state or local government, or to the private sector, or to the public at large;

• restricts access by individuals to their own personal information, for example by affecting the Freedom of Information Act 1982 (Vic.), Information Privacy Act 2000 (Vic.) or Health Records Act 2001 (Vic.);
• changes or creates any confidentiality provisions or secrecy provisions relating to personal information;
• creates new offences or amends existing offences relating to the misuse of personal information;
• creates new requirements or amends existing requirements to store, secure or retain particular personal information;
• creates an identification system;
• proposes to link or match personal information across or within agencies;
• involves the exchange or transfer of personal information outside Victoria, whether with another government or otherwise;
• relates to handling personal information for research or statistics;
• affects the exemptions or overrides the provisions of the Information Privacy Act (Vic.) or the Health Records Act (Vic.).

Unlawful and arbitrary interference with family

In the context of the right to freedom from unlawful and arbitrary interference with a person’s family, you will need to consider s. 13 in assessing legislation, a policy or a program where it:
• affects the ability to form and maintain close or enduring personal relationships;
• recognises or fails to give legal recognition to close or enduring personal relationships;
• may provide for the removal of children from a family unit by a public authority;
• provides for a family intervention order;
• regulates adoption, including any restrictions on eligibility and disclosure of information;
• regulates guardianship;
• regulates childcare or children remaining with their mothers in a prison;
• provides for mandatory reporting of injuries or illnesses.

Unlawful and arbitrary interference with a person’s home

In the context of the right to freedom from unlawful and arbitrary interference with a person’s home, you will need to consider s. 13 in assessing legislation, a policy or a program where it:
• provides for powers of entry into and search of a person’s home or workplace;
• provides for a power of arrest;
• regulates requisition, compulsory occupation, compulsory acquisition, destruction or removal of a home;
• regulates tenancy or eviction;
• regulates a state-run care facility or mental health service;
• regulates planning or environmental law;
• regulates the standards of public housing and the consultation and procedures operating in respect of public housing.

Unlawful and arbitrary interference with a person’s correspondence

In the context of the right to freedom from unlawful and arbitrary interference with a person’s correspondence, you will need to consider s. 13 in assessing legislation, a policy or a program where it:
• may involve the interception of postal articles or other communications (including communications from a prisoner or detainee);
• provides for the censorship of correspondence;
• monitors a person’s personal emails;
• regulates websites that provide for communication between people.
Right to reputation
To comply with a person’s right not to have his or her reputation unlawfully attacked, you will need to consider s. 13 in assessing legislation, a policy or a program where it:

- affects the law relating to defamation or any defences to defamation or injurious falsehood. This is particularly so if it restricts access to, or limits, remedies for attacks on a person’s reputation;
- affects the exemptions relating to disclosure of personal information in FOI legislation and legislation protecting confidential information.

These policy triggers are not comprehensive.

DISCUSSION
Section 13 confers a number of rights regarding privacy and reputation.
Specifically, a person has a right not to have his or her:

- privacy unlawfully or arbitrarily interfered with;
- family unlawfully or arbitrarily interfered with;
- home unlawfully or arbitrarily interfered with;
- correspondence unlawfully or arbitrarily interfered with; and
- reputation unlawfully attacked.

The scope of each of these rights is discussed below.

The right not to have his or her privacy unlawfully or arbitrarily interfered with

The meaning of ‘privacy’
The meaning of privacy has not been defined in international human rights law.

‘Privacy’ is a difficult concept to define. Privacy is bound up with conceptions of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty – a ‘private sphere’ free from government intervention and from excessive unsolicited intervention by other individuals.

Privacy has both a physical or geographical aspect (‘where is private’) and an informational aspect (‘what is private’).

In practical terms ‘privacy’ is often categorised as:

- Bodily privacy – protection of our physical selves against invasive procedures;
- Territorial privacy – setting limits on permissible intrusion into our domestic and other environments, such as unwanted surveillance;
- Communications privacy – privacy of mail, phone and electronic communications;
- Information privacy – privacy of information about us.

The specific area of information privacy is currently regulated in a number of Victorian statutes including the Information Privacy Act and the Health Records Act. In practice, information privacy will overlap with other aspects of privacy and the Information Privacy Act and the Health Records Act may apply whenever identifiable information is recorded or held.

The breadth of the right to privacy under the Charter is in some senses broader than that which is protected under the Victorian information and health privacy laws. For instance, the right to privacy in the Charter will encompass activities that do not involve recorded information, such as ‘strip-searches’. As the categories illustrate, privacy issues can arise in a number of areas. For example, in addition to the disclosure of private information, privacy issues are likely to arise in the context of the interception of correspondence, telephone tapping, search warrants and medical treatment and medical examination without consent. Whether an interference with privacy is permissible will depend on whether there is a reasonable expectation of privacy in the circumstances. For example, a person will have a greater expectation of privacy in relation to their home than in relation to their workplace.

Public authorities will need to consider s. 13 of the Charter when engaging in activities and when making decisions that might relevantly affect a person’s privacy, whether or not those activities and decisions are permitted under current privacy-specific legislation as being authorised under law.
What is an ‘unlawful or arbitrary interference’ with privacy?

To comply with s. 13 you must ensure that any ‘unlawful or arbitrary interference’ with privacy is avoided.

‘Unlawful’

‘Unlawful’ means that no interference with privacy can take place except if the law permits it. The UN Human Rights Committee has said that a law which authorises interference with privacy must be precise and circumscribed so that governments are not given broad discretions in authorising an interference with privacy.

This means:

• legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted; and
• a decision to interfere with privacy by a public authority in accordance with the law should be made on a case-by-case basis in accordance with the merits of each case.  

‘Arbitrary’

An ‘arbitrary’ interference is not the same as an unlawful interference. An interference with privacy may be arbitrary even though it is lawful.

The requirement that all interferences must not be arbitrary means that even interferences with privacy that are provided for by law should occur in accordance with the provisions, aims and objectives of the Charter and should be reasonable in the particular circumstances.

For example, in a case against the Canadian Government, a prisoner complained about the censorship of his letters. The governing legislation had provided that every letter to or from a prisoner should be read by a warden (or delegated responsible officer) who could censor any letter or part of a letter on grounds that ‘its contents were objectionable or that the letter was of excessive length’. Before the case reached the UN Human Rights Committee, the Canadian Government amended the legislation by inserting a new provision which circumscribed the reasons for censoring mail: a prisoner’s mail could be censored if it posed a threat to staff or to the operation of the prison. The revised legislation had the effect of minimising the warden’s power to censor mail. The UN Human Rights Committee found the terms of the pre-amended legislation to be too general but accepted that the amended legislation was sufficient to comply with the ICCPR.

‘Interference’

The Charter does not define what is meant by the term ‘interference’ and there is no general meaning for this term in international human rights law.

An interference in the context of s. 13 probably means a disturbance or an unwanted involvement.

The right not to have his or her family and home unlawfully or arbitrarily interfered with

Section 13 protects not only privacy, but also the family and home by providing a person with rights not to have his or her family or home unlawfully or arbitrarily interfered with. This right closely relates to s. 17 of the Charter (protection of families and children) and you should consult the section of these Charter Guidelines on s. 17 for more guidance in an appropriate case.

89 Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [3], [8].

90 Ibid.

91 Ibid [4].
These rights concerning the protection of a person’s family and home are dealt with together in this section of these Charter Guidelines; however, note that they are independent rights. Legislation or policy will be affected by s. 13 if it raises an issue with respect to both family and home, or just family or home.

The meaning of ‘family’ and ‘home’
The terms ‘family’ and ‘home’ are not defined in the Charter.

In international human rights law, the term ‘family’ is given a broad interpretation and includes a range of types of family.

The approach of the UN Human Rights Committee regarding ‘family’ is not to provide a definitive list of who is, or is not, included in the term, but to provide general guidance on the definition. Thus, the UN Human Rights Committee says:

‘Regarding the term ‘family’, the objectives of the Covenant require that for purposes of article 17, this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.’93

The meaning of ‘family’ in the ICCPR has evolved in the case law of the UN Human Rights Committee to reflect social developments that have occurred since the ICCPR commenced.94 For example, the UN Committee has said that family is not confined by marriage.95 A family may take various forms under this section and should be defined broadly.

The question under s. 13 of the Charter is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

Regarding the meaning of ‘home’, the UN Human Rights Committee has said that it means ‘where a person resides or carries out his usual occupation.’96 This is a liberal interpretation of ‘home’ which includes both where a person lives and where a person usually works. This interpretation may not necessarily be found to apply under the Charter.

What is an ‘unlawful or arbitrary interference’ with a person’s family or home?
The Charter requires that a public authority must not unlawfully or arbitrarily interfere with a person’s family or home. This means that any interventions by a public authority which may affect a person’s family and/or home will need to be carefully considered to ensure that they are lawful and that they are not arbitrary.

The meaning of the terms ‘unlawful’, ‘arbitrary’ and ‘interference’ are discussed above. You should consult this discussion to understand more about the scope of these rights.

Interference with home has arisen in international cases in two contexts:

- entry into a person’s home without consent, such as a forcible entry, search or arrest at home; and
- an interference directed at the home itself, such as a denial of a right of access to the home, requisition or compulsory occupation, compulsory acquisition, destruction or removal of the property, eviction or expulsion.


94 International Covenant on Civil and Political Rights, opened for signature, ratification and accession (all ways in which a state can agree to be bound by a Convention in international law) on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).


96 Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5].
The right not to have his or her correspondence unlawfully or arbitrarily interfered with

‘Correspondence’

The term ‘correspondence’ is not defined in the Charter. The UN Human Rights Committee has interpreted the term to refer to both written and verbal communications.97

What is an ‘unlawful or arbitrary interference’ with a person’s correspondence?

The Charter requires that a public authority must not unlawfully or arbitrarily interfere with a person’s correspondence. The purpose behind this requirement is to protect the confidentiality of correspondence.

The meaning of the terms ‘unlawful’, ‘arbitrary’ and ‘interference’ are discussed above. You should consult this discussion to understand more about the scope of this right.

Some examples of situations in which this right has arisen in international cases are:

• checking, intercepting, censoring or stopping a person’s mail;
• preventing or monitoring correspondence between categories of people;
• tapping, bugging or metering a person’s telephone;
• placing a person under surveillance;
• threatening to sell private correspondence, that is in the hands of a trustee in bankruptcy.

This list is not exhaustive. You will need to consider s. 13 if any of the policy triggers above are present.

Detainee correspondence

A particular application of this right involves the right of a person detained in prison to private correspondence.

The UN Human Rights Committee has held that persons detained in prison should be allowed, under necessary supervision, to correspond with their families and reputable friends on a regular basis without interference.98

The right not to have your reputation unlawfully attacked

Section 13(b) provides a person with a right not to have his or her reputation unlawfully attacked.

This provision was modelled on article 17(1) of the ICCPR. However, that instrument protects a person from unlawful attacks on a person’s ‘honour’ or ‘reputation’, whereas the Charter is confined to such attacks on a person’s reputation.

‘Reputation’

The term ‘reputation’ is not defined by the Charter and has not been defined by the UN Human Rights Committee. It refers to the beliefs or opinions that are generally held about someone.

‘Unlawfully attacked’

The Charter protects a person’s reputation from ‘unlawful attacks’. The right not to have your reputation unlawfully attacked is related to the right to freedom of expression protected by s.15 of the Charter. It is one of the bases for limiting a person’s right to freedom of expression under the Charter.99

The expression ‘unlawfully attacked’ is not defined in the Charter. The approach of the UN has been to interpret it to mean an attack that is unlawful under domestic law. This may be pursuant to the common law or by statute.

97 Ibid [8] which refers to the delivery, opening and reading of ‘correspondence’.


99 There are other ways in which freedom of expression may be limited. You should refer to section 15 of these Guidelines for guidance on the right to freedom of expression.
Taking this approach, an unlawful attack for the purpose of s. 13(b) would include a public attack involving untrue statements that are intended to harm the reputation of a person. The word ‘attack’ suggests something more than just comment on a person.

Expressing an opinion about a person that does not involve untrue statements intended to harm the person’s reputation is unlikely to be sufficient to trigger consideration of this right.

Note that unlike s. 13(a), s. 13(b) protects against attacks against a person’s reputation solely on the basis that it is unlawful, and does not protect against arbitrary attacks on a person’s reputation. This means that if there is lawful authority for a disclosure of information about someone else, s. 13(b) will not be breached, even if a particular attack may be unreasonable. For example, if the conduct is defensible under defamation law, the right will not be interfered with (see Defamation Act 2005 (Vic.)).

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s. 13 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter.

For example, the right to be free from unlawful or arbitrary interference with a person’s family and home may be reasonably limited by legislation that protects against child abuse. However, you will need to examine any proposed legislation, policy or program carefully to ensure that it meets the requirements for a reasonable limitation under the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

- Section 13 confers a number of rights regarding privacy and reputation.
- As with all of the human rights in the Charter, s. 13 is subject to reasonable limitations under s. 7.

Privacy

- Privacy issues arise in a broad range of contexts.
- While it is difficult to define privacy with precision, it is often categorised in the following terms: bodily privacy, territorial privacy, communications privacy and information privacy. These categories will often overlap.
- The right to privacy is generally regarded as imposing negative obligations on public authorities to refrain from interfering with privacy. The right has been interpreted broadly in international jurisprudence.
- An unlawful interference is one that does not take place in accordance with law. When authorising any interference with privacy, the law should specify in detail the precise circumstances in which an interference may be permitted.
- An arbitrary interference is one that is not in accordance with the provisions, aims and objectives of the Charter and is not reasonable. To ensure that an interference is not arbitrary, it must be more than lawful. The law should be drafted in accordance with the provisions, aims and objectives of the Charter and any interference with privacy should be reasonable in the particular circumstances.\(^\text{100}\)

---

\(^{100}\) Angel Estrella v. Uruguay, Human Rights Committee, Communication No. 74/1980, UN Doc. CCPR/C/18/D/74/1980 (23 March 1983) [4].
Family and home

- The prohibition on an unlawful and arbitrary interference with family is related to the right to protection of the family in s. 17.
- In international human rights law, ‘family’ has a broad meaning and includes a range of types of family.
- The Charter also prohibits any unlawful or arbitrary interference with a person’s home.
- In international law, ‘home’ means the place where a person resides and where a person works.
- Any intervention by a public authority that may affect a person’s family and home should be carefully considered to ensure that it is lawful and it is not arbitrary.

Correspondence

- ‘Correspondence’ refers to both written and verbal communications.
- The confidentiality of correspondence should be protected in legislation, policy and programs by refraining from unlawfully or arbitrarily interfering with private correspondence.

Reputation

- The Charter protects a person from an unlawful attack on his or her reputation. An unlawful attack is a public attack that is intended to harm the reputation of the person and is based on untrue statements.

MEASURES TO IMPROVE COMPLIANCE

Privacy

- Consider privacy issues early in the policy process to avoid and mitigate unintended potentially adverse impacts on privacy and to ensure appropriate safeguards are in place.
- When vetting legislation or a policy or program involving powers of investigating officers, you will need to consider whether a particular power breaches s. 13. You need to ensure both that the authorising power is reasonable and that the power is exercised in a manner that is also reasonable.
- When preparing legislative proposals that would require or authorise acts and practices that may be an interference with privacy or may adversely affect the privacy of an individual, consult with the Victorian Privacy Commissioner. Note that the Privacy Commissioner has a statutory function to examine and assess legislative proposals for adverse privacy impact and to advise the Attorney-General of his or her view: s. 581, Information Privacy Act (Vic.).
- For policy proposals, consider legislative and non-legislative ways to avoid or mitigate adverse impacts upon privacy and encourage the early consideration and adoption of privacy-enhancing amendments or policy alterations.
- In relation to information privacy:
  - understand how the Information Privacy Act (Vic.) and the Health Records Act (Vic.) interact with the existing privacy laws and the Charter;
  - utilise checklists and other guidance prepared by the Office of the Victorian Privacy Commissioner and the Office of the Health Services Commissioner to help identify privacy concerns. Information is available by contacting those offices;
  - you may wish to consult directly with one of the specialist government bodies on privacy:
    - Office of the Victorian Privacy Commissioner;
    - Office of the Health Services Commissioner (if the policy or the legislation involves issues
relating to health privacy).

Family and home

- If you are vetting legislation or a policy or program and wish to know if a certain collection of persons is a ‘family’ for the purposes of s.13, ask:
  - Are they regarded as a family under Victorian law?
  - Are they regarded as a family under international and comparative case law?
- Where the policy or legislation involves children, ensure that it takes into account the best interests of the child.101
- Also refer to the measures to achieve compliance on s. 17 of these Charter Guidelines (Protection of families and children).

Correspondence

- If you are reviewing legislation or developing a new policy or program that provides for the censorship, monitoring or interception of correspondence, ensure that:
  - there is a legislative power to censor, monitor or intercept correspondence;
  - the scope of the power is limited to doing so in situations where it is necessary to do so;
  - the reasons for censoring, monitoring or intercepting correspondence in a specific case are considered; and
  - censoring, monitoring or intercepting correspondence will be effective to achieve the policy goal.
- If you are developing a new policy or program that provides restrictions and controls on a person’s correspondence, ensure that the above considerations are taken into account.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy or legislation raises an issue under s. 13, you should also consider whether it raises an issue with respect to:

- freedom from discrimination (s. 8);
- freedom of movement (s. 12);
- the right to freedom of thought, conscience, religion and belief (s. 14);
- the right to freedom of expression (s. 15);
- freedom of assembly (s. 16);
- protection of families and children (s. 17);
- property rights (s. 20);
- the right to liberty and security (s. 21);
- the right to a fair hearing (s. 24);
- rights in criminal proceedings, in particular the right not to be compelled to testify against himself or herself or to confess guilt (s. 25).

If your policy, program or legislation relates to the possible censorship of a person’s correspondence during detention, you should also refer to s. 22 (humane treatment when deprived of liberty).

As with all rights protected under the Charter, the general limitations clause in s. 7 of the Charter may also be relevant.

HISTORY OF THE SECTION

Section 13 was modelled on article 17(1) of the ICCPR. See also s. 12 of the Human Rights Act 2004 (ACT).

Similar rights exist in comparative law. Refer to Appendix H for further information.

101 The ‘best interests of the child’ principle derives from Article 3 of the Convention on the Rights of the Child, to which Australia is a party: Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990). See also section 17(2) regarding the right of a child to have such protection as is in his or her best interests.
BIBLIOGRAPHY

Treaties


United Nations Human Rights Committee Jurisprudence


Other Sources

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 14?

You will need to consider s. 14 if you are assessing legislation, a policy or a program where it:

• promotes a particular religion or set of beliefs;
• restricts or interferes with a particular religion or set of beliefs;
• requires someone to disclose his or her religion or belief;
• affects an individual’s ability to adhere to his or her religion or belief;
• impinges upon or disadvantages a person because of the person’s opinions, thoughts or beliefs on a matter;
• attempts to regulate conduct that will affect some aspect of a person’s worship, observance, practice or teaching of his or her religion or belief;
• subjects conduct that is required or encouraged by an individual’s religion or beliefs to criminal penalties or fines;
• places an individual in a position where he or she must choose between demonstrating a belief or participating in society;
• prohibits or limits a person's capacity to teach his or her religion or to attempt to convince others by appropriate means to change their religion;
• requires certain types of conduct that may conflict with a person's religion or beliefs;
• compels certain acts that may be inconsistent with a religion or set of beliefs;
• sets dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress;
• relates to the drafting or application of planning laws in a manner that may make it difficult to establish or operate a place of worship;
• imposes requirements as a condition of receiving a government benefit that prevents a person from adhering to his or her religion or belief;
• restricts the capacity for those under state control (for example, prisoners) to comply with the requirements of their religion;
• requires school children to learn about particular religions or beliefs or to be taught materials that might have the effect of undermining their religious beliefs.

These policy triggers are not comprehensive.

SECTION 14

FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF

Section 14

(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.
DISCUSSION

Section 14 protects a number of rights with respect to freedom of thought, conscience, religion and belief.

It protects not only a right to entertain ideas or hold positions of conscience and religious and other beliefs (including the right not to have religious beliefs), but also a right to demonstrate one’s religion or belief, whether individually or collectively, whether in private or public, and whether through worship, observance, practice and teaching. Note that the right to demonstrate only extends to a person’s religion or belief and does not extend to all matters of thought and conscience.

These two forms of protection can be distinguished. The right to freedom of thought, conscience, religion or belief is concerned with the right to internally hold certain thoughts, beliefs, or positions; whereas the right to demonstrate religion or belief relates to how a person chooses to externally demonstrate his or her religion or belief through a broad range of acts including worship, observance, practice and teaching.

The rights to freedom of thought, conscience, religion and belief

In international human rights law the right to freedom of thought, conscience, religion and belief has been interpreted broadly to include ‘freedom of thought on all matters, personal conviction and the commitment to religion or belief.’

The Charter does not define what is meant by ‘thought’, ‘conscience’ and ‘religion and belief’. The following guidance may be helpful:

‘Thought’

The Charter protects the freedom to think freely. This right is likely to include political, philosophical and social thought and to protect against brainwashing and indoctrination by a public authority.

‘Conscience’

The notion of ‘conscience’ is often bound up with religious belief, but international human rights law suggests that the term requires that there be some philosophical basis for a belief to amount to ‘conscience’.

An example of the application of this freedom in Canada involved the Correction Service of Canada being ordered to provide a vegetarian diet to accommodate an inmate’s non-religious conscientious beliefs.

Note though that the right to freedom of thought and conscience does not imply the right to refuse all legal obligations imposed by law, such as paying taxes, nor does it provide immunity from criminal liability for every such refusal.

‘Religion’

The UN Human Rights Committee has not defined religion. It has only said that ‘religion’ should be interpreted broadly to include ‘theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.’


This suggests that ‘religion’ does not just refer to traditional institutional religions but also to new religions. In other contexts, the High Court of Australia has also adopted a broad interpretation of the notion of religion.107

Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a religion, you should consult Australian law on the subject.108

The Charter does not only protect ‘reasonable’ religious beliefs: all religious beliefs are prima facie protected.109

‘Belief’

Article 18(1) of the ICCPR provides that the right to ‘freedom of thought, conscience and religion’ includes a freedom to adopt a religion or belief of one’s choice and a freedom to demonstrate religion or belief in worship, observance, practice and teaching. The implication is that ‘belief’ is an aspect of ‘thought, conscience and religion.’

The UN Human Rights Committee has not defined what is meant by ‘belief’. It has, however, made clear that the right to freedom of thought, conscience and religion encompasses a broad range of beliefs including religious and non-religious beliefs, such as atheism, agnosticism, and scepticism about religious matters.

Scope of these rights

The scope of the right to freedom of religion and belief is outlined in the following points:

- It protects the right to have a religion or belief of one’s choice. This is closely linked to the right to freedom of thought and conscience.

- It protects the right to adopt a religion or belief of one’s choice. This means that people have the right to change their religion or belief, including a right to leave their religion or convert to another religion.

- It protects freedom from religion or certain beliefs. This means that the government cannot be seen to impose religion or take sides in matters of religion or belief.

- It protects the right to demonstrate one’s religion or belief, whether individually or in community with others, whether in public or private. This right is discussed further below.

Positive or negative obligation?

In international human rights law, the right to freedom of thought, conscience, religion and belief have generally been regarded as primarily negative obligations requiring a nation state to exercise restraint from interference with this right, rather than imposing positive duties on the nation state. However, the state may be obliged in some circumstances to intervene to protect this right, for example where to fail to do so may lead to a ‘seriously offensive attack on religious sensitivities’.110 This may include appropriately drafted laws prohibiting religious vilification. In order to protect religious freedom in this positive sense, restrictions will sometimes be required to be placed on freedom of expression.

107 Church of New Faith v. Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120.


These circumstances may include, for example:

- the publication of offensive portrayals of religious worship;\(^{111}\)
- where private individuals instigate a campaign of harassment against a church or religious group;\(^{112}\)
- broadcasting a film ending with a violent denunciation of a particular religious group;\(^{113}\) and
- any of the above in relation to a person's belief (which may be non-religious).

Right to demonstrate religion or belief

As noted above, s. 14 also protects the right to **demonstrate** one's religion or belief. The scope of this right relates only to religion and belief and does not extend to freedom of thought or conscience.

The right to demonstrate one's religion or belief encompasses a broad range of acts and has both individual and collective aspects. It means that a public authority must not prevent a person from demonstrating his or her religion or belief either alone or with others and either in private or in public. It is for the individual persons to determine whether they wish to demonstrate their religion or belief in public or private; for example, the government cannot force them to worship in private.

‘Worship’

Religious worship means ritual and ceremonial acts giving direct expression to religious beliefs. For example:

- building of places of worship;
- using ritual formulae and objects;
- displaying symbols;
- observing holidays and days of rest.

The UN Human Rights Committee has provided guidance on the meaning of ‘observance’.\(^{114}\)

**Observance** includes:

- ceremonial acts;
- dietary regulations;
- wearing distinctive clothing; and
- participating in rituals associated with particular life stages.

It will also include the use of a particular language customarily spoken by a group.

‘Practice or teaching’

The expression ‘practice or teaching’ is likely to include acts covered by the concept of observance but may also include acts by religious groups integral to the conduct of their basic affairs, such as choosing religious leaders and teachers, establishing religious schools, and preparing religious texts and publications.\(^{115}\)

---

\(^{111}\) Ibid.

\(^{112}\) *Church of Scientology v. Sweden* [1979] ECC 511.

\(^{113}\) *Otto-Preminger Institute v. Austria* (1995) 295 Eur Court HR (ser A); (1995) 19 EHRR 34.


REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights in s. 14 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter.

Among the rights protected in s. 14, limitations have only been accepted in international human rights law on the right to demonstrate religion and belief. They have not been accepted in relation to the right to have, and to adopt, a religion of one's choice or to hold opinions without interference.

Limitations on the right to demonstrate religion and belief have been justified by reference to public health, public safety and the protection of the rights of others.

Some examples that have arisen in international cases of reasonable limitations on the right to demonstrate one's religion or belief are:

- A Sikh man was dismissed from his job with a Canadian state railway company after refusing to wear safety headgear. He argued that the dismissal violated his right to demonstrate his religion by wearing a turban. The Canadian Government maintained that the restriction on his freedom to demonstrate his religion was a justified measure for public health and safety. The UN Human Rights Committee accepted the Canadian Government's argument. 116

- In certain contexts, limits on the rights of teachers or students to wear religious apparel or symbols in state schools has been upheld, 117 but in other contexts such restrictions have been said to be a violation of religious freedom. (Any restrictions in Victoria on religious apparel in government schools would need to be justified under s. 7.)

- A prisoner who was dangerous and violent was not permitted to be present for communal worship in prison, although he was given private access to a chaplain.

An example from New Zealand involved a person who was a Seventh Day Adventist appealing a sentence of periodic detention which required him to attend a program on a Saturday morning (his Sabbath). Although attending the program would have been contrary to his religious beliefs, the court held that the limitation on his right was reasonable and there was no breach of his right to demonstrate his religion or belief.

If you think your policy, program or legislation may be a limitation on the rights protected in s. 14, it is important that you examine the specific circumstances when applying s. 7 to determine if the limitation is reasonable. Consult Part 2 of these Charter Guidelines for further guidance on s. 7.

---


117 Dahlab v. Switzerland (2001) v. Eur Court HR 447 (ser A). See also Leyla Sahin v. Turkey, Application No. 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) which also involved the issue of whether a prohibition on wearing the hijab violated the right to manifest one's religion.
KEY POINTS TO REMEMBER

- Section 14 protects:
  - the right to hold certain thoughts, positions of conscience and religious and other beliefs;
  - the right not to have religious or other beliefs;
  - the right to change religious and other beliefs; and
  - the right to demonstrate one's religion or belief, whether individually or collectively, whether in private or public or whether through worship, observance, practice and teaching.

- This section has a broad scope. 'Thought' includes political, philosophical and social thought. 'Conscience' refers to beliefs with some philosophical basis.

- The expressions 'religion' and 'belief' should be interpreted broadly to include theistic, non-theistic and atheistic beliefs.

- A public authority may be obliged in some circumstances to intervene to protect these rights. Examples of when this may be required are discussed above.

- The right to demonstrate one's religion or belief relates only to religion and belief and does not extend to thoughts or conscience. It means that a public authority must not prevent a person from demonstrating his or her religion or belief either alone or with others, either in private or in public.

- The scope of the right to demonstrate one's religion or belief is broad. It applies to a range of acts including observance, worship, practice and teaching. These terms are not defined in the Charter although guidance is provided above on what they mean in the international sphere.

- The rights protected by s. 14 may be limited in accordance with s. 7. However, note that in international human rights law, limitations have only been permitted in respect of the right to demonstrate one's religion and belief. It may be more difficult than usual to justify a limitation on the other rights protected in s. 14.

- You may be required to balance the right in s. 14 with that in s. 15 (freedom of expression) since the effect of a particular method of opposing or denying religious beliefs through speech may violate the right protected in s. 14.

MEASURES TO IMPROVE COMPLIANCE

- Develop links with religious leaders of communities that commonly use public services and consider whether certain staff might benefit from information sessions about the teachings and practices of religious groups.

- Examine dress codes developed by a public authority (for example, in legislation, manuals, guidelines or school rules) to ensure that they accommodate religious beliefs.

- Scrutinise legislation, policy and programs to ensure that they do not interfere with the rights of people to:
  - attend worship;
  - have access to religious leaders in a confidential setting;
  - if in state detention, be given food that complies with their religious requirements or other beliefs (and also the need for variation, nutrition and quantity);
  - be allowed to wear clothing that complies with their religion and to maintain a personal appearance (for example, beard or dreadlocks) that complies with their religion.
This will be particularly relevant in contexts where the public authority exercises a high degree of control over individuals, for example, with respect to prisoners, public authority employees and people in state care.

- Planning laws that govern the building, extension etc. of places of worship should be reviewed to ensure that they do not discriminate between religious buildings and other buildings or between places of worship for one religion and other religions.
- Where school curricula in government schools require that students are taught about religions, care should be taken to ensure that a diverse range of religions are taught and that the style of teaching is neutral rather than proselytising. Consideration should be given to whether students should be allowed to not attend these classes if attending would conflict with their religious beliefs.

RELATED RIGHTS AND FREEDOMS

If your legislation, policy or program raises an issue under s. 14, you should also consider the following rights:

- the right to equality (s. 8);
- the right to freedom of expression (s. 15);
- the right to enjoy one’s culture (s. 19).

HISTORY OF THE SECTION

Section 14 is modelled on article 18 of the Covenant.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law


United Nations Human Rights Committee Jurisprudence


Other Sources


You should also consider the application of the Equal Opportunity Act 1995 (Vic.).
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 15?

You will need to consider s. 15 in assessing legislation, a policy or a program where it:

- regulates what anyone can say, write or communicate through their art or actions (for example, regulates the contents of any speech, publication, broadcast, display or promotion; regulates offensive speech);
- regulates the format of any expression (for example, restricts political leaflets to black-and-white printing);
- regulates the time, place or manner of any form of expression (for example, regulates the number of people who can participate in a street march; prohibits ‘busking’ in particular areas; restricts protesters’ access to particular places);
- restricts or censors media coverage;
- requires a person to obtain prior approval before expression may lawfully occur (for example, street demonstrations);
- requires particular material to be reviewed or approved before it is published;
- attaches criminal or civil liability to the publication of ideas, opinions or information;¹¹⁹
- compels someone to express information (for example, a subpoena);
- regulates or restricts an individual’s access to information (including access to material on the internet);
- penalises or disadvantages any person on the basis of their opinions;
- imposes a dress code (for example, a dress code that prohibits staff from wearing t-shirts with ‘political messages’).

Some specific and commonly encountered triggers for the right to freedom of expression are:

- reporting of judicial proceedings;
- censorship and classification;

¹¹⁹ Lingens v. Austria (1986) 103 Eur Court HR (ser A); (1986) 8 EHRR 407.
• busking;
• public disorderly conduct;
• commercial expression – advertising;
• public servants expressing political opinions;
• interception of prisoners’ mail and monitoring of telephone calls;
• telephone interception.

These policy triggers are not comprehensive.

**DISCUSSION**

Section 15 establishes a number of rights relating to freedom of expression.

It protects:
• the right to hold an opinion without interference; and
• the right to seek, receive and impart both information and ‘ideas of all kinds’ whether within or outside of Victoria, and whether orally, in writing, in print, by way of art or in another medium.

The right to seek, receive and impart information and ideas is subject to limitations that come within either s. 15(3) or s. 7 (or both). Limitations on the right to freedom of expression are discussed below.

**Why free speech?**

There are many rationales advanced for why free speech is worthy of protection. A lengthy examination of the various rationales is outside the scope of these Charter Guidelines. They largely centre around the promotion of self-fulfilment of individuals in society, notions that ‘truth’ will be revealed when there is vigorous debate and the functioning of the democratic process. For example, one view taken by the UK courts is that:

‘... freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.’

In other words, freedom of expression is an essential foundation of a democratic society.

The Charter establishes the right to freedom of expression in qualified terms. The scope of the right is discussed in the following section.

**The right to hold an opinion without interference**

The right to hold an opinion without interference protects a person’s right to have an opinion free of interference by the state. It does not apply once a person manifests or communicates their opinion (in speech, writing or action). Manifesting or communicating one’s opinion is governed by s. 15(2), that is, the right to freedom of expression.

An example of an activity that interferes with the right to hold an opinion without interference would be ‘brainwashing’ by a public authority; that is, compelling or coercing a person to change his or her opinion or adopt a particular belief.

For this right to be interfered with, a person’s opinion must be somehow involuntarily influenced. It would not appear to be sufficient merely to seek to influence opinion, for example, by mass-media propaganda. By contrast, a legislative provision that penalises or disadvantages a person on the basis of his or her opinion may interfere with this right.

**The right to freedom of expression**

**What expression?**

Section 15 protects a right to freedom of political, artistic and commercial expression in any medium. Examples of expression covered by this section are:
• written and oral communications;
• television programs;
• commercial advertising;

120 *R v. Secretary of State for the Home Department, ex p Simms* [1999] 3 All ER 400.

• broadcasting, film and video;
• pictures;
• sign language;
• dress; and
• images.

You should note that the right to freedom of expression:
• protects not only favourable information or ideas but also political protest or criticism and unpopular ideas, including those that ‘offend, shock or disturb’ because ‘such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society’;
• is not restricted to communicating one’s own views and ideas – it simply refers to the right to communicate information and opinions whether or not these are personally held; and
• encompasses a freedom not to express (for example, to say nothing or not to say certain things). For example, the right protects a person from saying things that may be repugnant to their personal beliefs.

What is protected?
Section 15 establishes the freedom to seek, receive and impart both information and ideas of all kinds.

‘Impart’
An example of a case where freedom to impart information was breached involved the confiscation of leaflets and a subsequent fine pursuant to legislation which required all publishers of periodicals to include certain information in publications. The UN Human Rights Committee said (in a case against the Government of Belarus) that the applicant’s freedom to impart information had been breached.

‘Seek and receive’
An important manner in which the right to seek and receive information is realised is through legislation providing for freedom of information. However, s. 15 does not create a right to freedom of information.

For example, s. 15 may be interfered with by restrictions on access to public libraries or public internet terminals in libraries. There is no obligation to provide either under the Charter, but if they are provided there must be no restriction in relation to access to public libraries or public internet terminals in libraries that cannot be justified either under the special limitations to be found in s. 15(3) or under the general limitation of s. 7.

REASONABLE LIMITS
As with all of the human rights protected in the Charter, the right to freedom of expression may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

The right to freedom of expression is also subject to a specific limitation in s. 15(3). The right to freedom of expression has a distinctive role within the Charter in that it is specifically recognised that there are special duties and responsibilities that attach to it.

123 Handyside v. UK (1976) 24 Eur Court HR (ser A); (1979–80) 1EHRR 737.
Section 15(3): specific limitation

The ICCPR recognises that the right of free expression in article 19(2) can be abused so as to undermine the rights of others. For this reason, it recognises in article 19(3) that the exercise of the right to freedom of expression ‘carries with it special duties and responsibilities’ and establishes a means by which the right can be restricted.

The Charter models this approach by including s. 15(3), which contains a specific limitation on the right to freedom of expression. This invites consideration of particular matters that are identified as ones which, when satisfied, specifically justify a restriction on the right.

1. Is the restriction ‘lawful’?

The requirement for a restriction to be lawful means that the limitation is sufficiently provided by law (for example, in legislation).

2. What is the purpose of the restriction?

You must consider the purpose of the restriction and ensure that it is necessary either:

- to respect the rights and reputation of other persons; or
- for the protection of national security, public order, public health or public morality.

With the exception of ‘person’, these terms are not defined in the Charter. However, they have all been considered in international human rights law jurisprudence. Their meaning is discussed in the following paragraphs.

**Person:** The term ‘person’ in s. 15(3)(a) is defined in s. 3 of the Charter as a human being. It does not apply to corporations.

**National security:** The protection of national security is a well-established basis for restricting rights in international human rights law. It is invoked when the political independence or the territorial integrity of a country is at risk. Common national security restrictions on freedom of expression are the prohibition on the transmission of ‘official secrets’ and civil proceedings for breach of confidence in some circumstances. Both seek to limit expression by prior restraint. Note that the mere mention of national security will not mean that a restriction is permissible. It must still be reasonably necessary.

**Public order:** The term ‘public order’ may be defined as the sum of rules which ensure the peaceful and effective functioning of society. Common ‘public order’ limitations on the right to freedom of expression include prohibitions on speech that may incite crime, violence or mass panic.
**Public health:** The ‘public health’ limitation on the right to freedom of expression has not been the subject of any cases before the UN Human Rights Committee. A prohibition of misinformation about health-threatening activities and restrictions on the advertising of harmful substances such as tobacco are probably justified under this limitation. This was the stated intention of the inclusion of this aspect of the specific limitation by the Human Rights Consultation Committee in its Report. 126

**Public morality:** The UN Human Rights Committee has stated that there is no universally applicable common standard for what constitutes ‘public morality’.127 A restriction on obscene or pornographic material is an example of a restriction of free expression on the ground of public morality.

3. Is the restriction ‘reasonably necessary’?

As stated above, the restriction must be necessary for one of the prescribed purposes. This requirement is often referred to as one of ‘proportionality’. In other words, the law must be appropriate and adapted to achieving one of the ends or purposes enumerated in s. 15(3).128

This means that you must consider:

- whether the policy, program or legislation is effective to achieve one of the enumerated ends;
- whether it impinges on free expression more than is necessary to achieve that end given the seriousness of that end; and
- whether there are less restrictive means of achieving that end.

**Examples of restrictions that may come within the scope of section 15(3):**

- Imposing a ban on misinformation about the health effects of smoking may be considered reasonably necessary to protect public health.
- Prohibiting the sale of pornographic material may be considered reasonably necessary to protect public morality.
- Civil or criminal law restrictions on speech that incites racial violence and other violent conduct are also likely to be lawful restrictions for the purpose of both respecting the rights and reputation of others and protecting public order. 129

**Section 7: General limitation**

It is possible that the right protected by s. 15 may be limited even though none of the requirements of the specific limitation (s. 15(3)) are present. The right to freedom of expression may be restricted by a legislative provision, policy or program that meets the requirements of the general limitation under s. 7 of the Charter, even though it does not meet the particular requirements of the specific limitation under s. 15(3). You should refer to Part 2 of these Charter Guidelines for more information on s. 7.

126 Human Rights Consultation Committee (Victoria), Rights, Responsibilities and Respect (2005) 44.

127 Hertzberg v. Finland, Human Rights Committee, Communication No. 61/1979, UN Doc. CCPR/C/15/D/61/1979 (2 April 1982) [10.3].


129 In relation to violent expression, see Irwin Toy Ltd v. Quebec (1989) 1 SCR 927.
KEY POINTS TO REMEMBER

- The Charter establishes a right for all persons in Victoria to hold an opinion without inference and to express themselves by seeking, receiving and imparting both information and ‘ideas of all kinds’.
- Expression may occur orally, in writing, in print, by way of art or in another medium (for example sign language).
- The right to freedom of expression applies to information and ideas sought, received and imparted in and outside Victoria.
- As with all of the rights in the Charter, freedom of expression may be reasonably limited. In relation to s. 15, limitations or restrictions on the right may be permissible either because they satisfy the specific requirements of s. 15(3) or the general requirements of s. 7. Both sections are central provisions that will need to be considered whenever the right to freedom of expression is raised.

MEASURES TO IMPROVE COMPLIANCE

- Examine whether your policy or legislation falls within any of the policy triggers listed above, that is, raises an issue under s. 15 of the Charter.
- If the answer is ‘yes’, in most cases your task will be to consider whether it is a justified restriction on the rights protected by s. 15.
- First, consider the nature of the harm that is being addressed.
  - Does it come within one of the following:
    - the protection of the rights and reputation of other persons?
    - national security?
    - public order?
    - public health?
    - public morality?
  - If so
    - Is the policy or legislation likely to be effective in addressing that harm?
    - Is that restriction limited to what is necessary to prevent the harm?
    - How serious is the harm or potential harm?
    - What is the extent of the restriction on freedom of expression?
    - Whose expression is restricted?
      Do they have realistic alternative avenues for communicating their message? Does the policy or legislation restrict more people than necessary?
    - What forms of expression are restricted?
      Does the policy or legislation restrict more forms than necessary? Are alternative avenues of communication open?
    - What subject matters of expression are restricted?
  - Is some alternative form of regulation possible that would result in a lesser restriction of freedom of expression?
    - Consider whether in your case an option would be to impose conditions on that form of speech to make it acceptable, rather than banning that form of speech altogether (for example, requiring product information and warnings rather than banning product advertising).
  - If not, consider whether it is a reasonable and demonstrably justified limitation pursuant to s. 7.
RELATED RIGHTS AND FREEDOMS

The right to freedom of expression is very broad and intersects with a wide variety of rights. It is expected that policy officers will frequently be required to balance s. 15 with other Charter rights, for example:

- right to freedom of thought, conscience, religion and belief, especially the right to manifest a person's religion or belief (s. 14);
- the right to peaceful assembly and freedom of association (s. 16);
- the right to take part in public life (s. 18);
- cultural rights, especially the right of persons with a particular religious background to declare or practice their religion and the right to persons with a particular linguistic background to use their language (s. 19);
- rights in criminal proceedings, especially a person's right not to be compelled to testify against himself or herself or to confess guilt (s. 25(2)(k)).

HISTORY OF THE SECTION

Section 15 was modelled on article 19 of the ICCPR.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Books and reports


Case Law


United Nations Human Rights Committee Jurisprudence

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 16?

You will need to consider s. 16 if you are assessing legislation, a policy or a program that:

- limits the ability of a person or group of persons to exercise the right to peacefully protest (for example, regulating picketing in an employment setting, or regulating public demonstrations);
- limits the ability of a person or group of people to hold or participate in a public or private gathering or to come together for a common purpose (for example, restricting the areas where, or times at which, a demonstration, picket or public event can take place);
- treats people differently on the basis of their membership of a group or association;
- prohibits or creates disincentives for membership in a group or association (including in a criminal justice context);
- requires a person to disclose membership in a group or association;
- compels a person to belong to a professional body or workplace association;
- confers preferences on a person belonging to a group or association.

These policy triggers are not comprehensive.

DISCUSSION

Section 16 provides for the two separate but related rights of freedom of peaceful assembly and freedom of association.

Right to peaceful assembly

The right to peaceful assembly protects the right of individuals and groups to meet in order to exchange ideas and information, to express their views publicly and to hold a peaceful protest.

The ICCPR jurisprudence on the content of this right is very limited compared to the jurisprudence on many other rights in the Covenant.

It is clear that this right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful. However, the right is not engaged when those who organise or participate in a demonstration have violent intentions that result in public disorder.

The right to peaceful assembly creates a positive duty. There is some international jurisprudence to support the view that this right requires public authorities to take reasonable and appropriate positive measures to ensure that the right can be exercised, for example, by protecting demonstrators from physical violence by counter-demonstrators or setting up areas for people to assemble peacefully.

Right to freedom of association

When does it apply?

The right to freedom of association protects the right of all persons voluntarily to group together for a common goal and to form and join an association. It applies to all forms of associations including trade unions.

As for the right to peaceful assembly, the ICCPR jurisprudence on the scope of this right is quite limited.

To what extent does the right to freedom of association encompass a right not to associate?

The Universal Declaration on Human Rights provides:

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Neither the ICCPR nor the Charter expressly includes an equivalent right to article 20(2) of the Universal Declaration on Human Rights. However, the right to freedom of association has been interpreted by the European Court of Human Rights as also encompassing a negative right – the right not to join associations, including trade unions. In international human rights law, association rights generally tend to have both a positive and a negative aspect; that is, a person cannot be stopped from joining and cannot be forced to join.

Another issue that may arise is the extent to which the right to associate applies to professional bodies. In international case law, a requirement for compulsory membership of a professional body has not generally violated this right, particularly if the association is responsible for professional regulation.

What is the scope of the right?

The scope of the right to freedom of association is unsettled in international human rights law, particularly the extent to which it protects the activities of the association.

The United Nations Human Rights Committee has been divided on the issue. A majority of the Committee has taken the view that the equivalent ICCPR right (article 22) does not protect the right to strike. However, a strong dissent of the same committee said that ‘the exercise of the right requires that some measure of concerted activities be allowed; otherwise it could not serve its purpose.’

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights to peaceful assembly and freedom of association may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

For example, in respect of the right to peaceful assembly, public nuisance laws may impose reasonably justified limits on this right. Laws restricting a person’s right to engage in a non-violent assembly that is likely to create public disorder may also be justified. In both cases you will need to carefully examine the relevant legislation or policy in light of s. 7.

131 Young, James and Webster v. United Kingdom (1981) 44 Eur Court HR (ser A) [51]–[65]; (1982) 4 EHRR 38 [55–56] (a closed shop agreement that required British rail employees to belong to one of three unions as a condition of employment violated art. 11 of the European Convention on Human Rights. The court, however, did not decide whether this negative right has the same status as the positive right of freedom of association.) See also Sigurud A. Sigurjónsson v. Iceland (1993) 264 Eur Court HR (ser A) [35]; (1993) 16 EHRR 462 [35]; Gustafsson v. Sweden (1996) II Eur Court HR 637 [42]–[44]; (1996) 22 EHRR 409 [45].


KEY POINTS TO REMEMBER

Right to peaceful assembly
• This right protects individuals and groups to meet for non-violent purposes.
• The right imposes both a positive and negative obligation on public authorities.
• The right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful, but not to violent gatherings.

Right to freedom of association
• The right to freedom of association means that all persons have a right to voluntarily group together for a common goal.
• Forming and joining a trade union is one example of the application of this right.
• The right most likely also protects the right not to associate with others.
• A requirement for compulsory membership of a professional body has not generally violated the right to freedom of association, particularly where the body is responsible for professional regulation.
• The scope of the right is unsettled in international human rights law, particularly the extent to which it protects the activities of the association.

MEASURES TO IMPROVE COMPLIANCE

Right to peaceful assembly
• If your policy, program or legislation restricts the right to peaceful assembly, ensure that any restrictions:
  - serve a legitimate interest;
  - are no more than what is necessary to protect that interest; and
  - clearly contemplate the person’s right to continue to assemble peacefully where possible.

It is advisable that you state the reasons for any restrictions in your policy, program or legislation.

Right to freedom of association
• Although professional associations may be exempt from the right to freedom of association (and the negative aspect of the right – the right not to join an association), if you are establishing a framework supporting a new professional body or association, consider creating exemptions for people who do not wish to be members of that particular organisation or association.
• Ask yourself:
  - is membership required in order to achieve the objectives of the policy?
  - is the criteria for allowing an exemption practicable?
  - will those persons obtaining exemption be significantly disadvantaged by not being a member of the organisation?

If you are developing a policy that offers inducements to persons who associate with certain bodies, ensure that the inducements are not so great as to effectively compel persons to join that body. If the same benefits are obtainable elsewhere, the inducements would probably fall out of this category and an issue under section 16 would be unlikely to be raised.

RELATED RIGHTS AND FREEDOMS

These rights are closely related to the following additional rights protected in the Charter:
• right to freedom of expression (s. 15);
• right to freedom of thought, conscience, religion and belief (s. 14);
• right to freedom of movement (s. 12).

HISTORY OF THE SECTION

Paragraph (1) of s. 16 is modelled on article 21 of the ICCPR. Paragraph (2) of s. 16 is modelled on article 22 of the ICCPR. Articles 21 and 22 of the ICCPR include specific limitations that have not been reflected in s. 16.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Books and reports

Case Law
7. Young, James and Webster v. United Kingdom (1981) 44 Eur Court HR (ser A).

United Nations Human Rights Committee Jurisprudence
Section 17

(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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 17?

You will need to consider s. 17 in assessing legislation, a policy or a program where it:

• affects the ability to form and maintain close or enduring personal relationships;
• recognises or fails to give legal recognition to close or enduring personal relationships;
• regulates the obligations of people towards each other as part of a family;
• regulates the obligations of parents and guardians towards children;
• provides for the separation and removal of children from parents or guardians or other adults responsible for their care;
• regulates family contact of prisoners or others in involuntary state care;
• regulates access to children removed from the family;
• creates a regime for giving children access to information about biological parents when the child has been adopted or born using artificial means such as sperm or egg donation;
• enables intervention orders to be granted between family members;
• deals with the division of estates on intestacy;
• affects the welfare of children within the family or in the care of public authorities, including in police detention.

DISCUSSION

Section 17 provides for protection of families and children.

Section 17(1): Protection of families

Meaning of ‘family’

In international human rights law, ‘family’ is given a broad interpretation and includes a range of types of family.

As previously mentioned in the discussion on s. 13 (the right to privacy and reputation, including the right not to have one’s family unlawfully or arbitrarily interfered with), the approach of the UN Human Rights Committee regarding ‘family’ is not to provide a definitive list of who is, or is not, included in the term, but to provide general guidance on the definition. Thus, the UN Human Rights Committee says:
Regarding the term “family”, the objectives of the Covenant require that for purposes of article 17 [reflected in s. 13 of the Charter], this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.\footnote{Human Rights Committee, General Comment 16 (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 142 (2003) [5].}

Similar considerations apply to articles 23 and 24 of the ICCPR, upon which s. 17 of the Charter is partly modelled. The meaning of ‘family’ in the ICCPR has evolved in the case law of the UN Human Rights Committee to reflect social developments that have occurred since the ICCPR commenced.\footnote{International Covenant on Civil and Political Rights, opened for signature, ratification and accession (all ways in which a state can agree to be bound by a convention in international law) on 19 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).}

For example, the UN Committee has said that family is not confined by marriage.\footnote{Hendriks v. Netherlands, Human Rights Committee, Communication No. 201/1985, UN Doc. CCPR/C/33/D/201/1985 (12 August 1988).} A family may take various forms under this section and should be defined broadly. The question is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

Scope

The Charter provides that families are to be protected by society and the state. This provision is related to the right to privacy in s. 13 which prohibits (among other things) a public authority from unlawfully or arbitrarily interfering with a person’s family.

The UN Human Rights Committee has interpreted the equivalent ICCPR provision to require countries to adopt legislative, administrative and other measures to protect families. In other words, protection refers at least to legal protection but may also extend beyond this to other forms of protection. There may be a rights violation if the absence of accommodation or financial support is in itself used to justify taking children from their families.\footnote{Anufrijeva v. Southwark [2004] QB 1124.}

This right has commonly arisen in a number of contexts.

Removal of children from a family unit

Legislative provisions that provide for a child to be removed from a family unit will need to be considered in light of s. 17(1) but also s. 17(2) and s. 13 of the Charter.

While family unity is an important Charter value, in this context, as in others, different rights may overlap or conflict. Section 17(1) might be qualified by the right to protection in s. 17(2) (for example, when children are removed from a situation of family violence).

Public authorities should ensure that there are adequate procedural safeguards in place to ensure that any decision to remove a child from a family unit is both lawful and not arbitrary. The meaning of these terms is discussed in the discussion on s. 13 in these Charter Guidelines. For example, in the United Kingdom, social workers who have concerns about family welfare are required to inform parents in a clear and timely way of their concerns and to give parents the opportunity to make representations about any actions that may affect family unity (such as the removal of a child or the making of a negative report about the family).\footnote{Re C [2002] EWCH (Fam) 1379.}

Refer to the section on Measures to Achieve Compliance (on page 112) for more information.
Incarceration of parents

Sections 17(1) and 17(2) may also be engaged by the incarceration of a parent. Consideration needs to be given to ways of allowing the family relationship to continue within the prison context which may, in the case of infants, extend to being allowed to stay with their mothers in prison.\textsuperscript{140} This will also be relevant in the context of an interstate transfer of a prisoner who is a parent.

Identity of a biological parent

The right to family life may extend to a person knowing the identity of his or her biological parent, for example, in situations where he or she has been adopted or born as a result of sperm or egg donation, but this right to know the identity of a biological parent must be weighed against privacy rights.\textsuperscript{141}

Residency and family unity

Another key area in which this right has arisen in international law is residency rights and family unity. This should not arise under the Charter, however, as migration law is a matter of Commonwealth law.

Section 17(2): Protection of children

Section 17(2) recognises that children are entitled to special protection. It is premised on the recognition of children’s vulnerability because of their age. A child is defined in s. 3 as being a person under 18 years of age.

Under the Charter, children are entitled to the enjoyment of all of the rights, as human beings (except where there is an eligibility criterion that they do not satisfy, for example the right to vote, under s. 18(2)). Section 17(2) is one of a few provisions in the Charter that grant special rights to children as opposed to children and adults generally. The Charter also confers special rights on children in ss. 23 and 25(3).

Scope

The UN Human Rights Committee has interpreted the equivalent ICCPR provision (article 24) to require countries to adopt special measures to protect children, in addition to the measures that are required to protect children and adults generally under the ICCPR. The best interests of the child should be taken into account as an important consideration in all actions affecting a child.

The purpose of the measures, according to the committee, is ‘intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant’.\textsuperscript{142} In other words, public authorities should first seek to ensure that children’s human rights outlined in the Charter are protected. This may require consideration of social or economic circumstances. For example, when examining a report from Canada, the UN Human Rights Committee noted its concern with the way in which the National Child Benefit Supplement for low-income families had been implemented in some Canadian provinces. It was concerned that some children were being unfairly denied benefits under the scheme. The committee noted that the equivalent ICCPR right (article 24) may be invoked in this situation because ‘… the very high poverty rate among single mothers leaves their children without the protection they are entitled to under the Covenant.’\textsuperscript{143}

Note that the obligations imposed under s. 17(2) must be carried out without discrimination.

\textsuperscript{140} R (on the application of P&Q) v. Secretary of State [2001] EWCA Civ. 1151; R (on the application of L) [2001] 1 FLR 406.

\textsuperscript{141} Re T (a child) [2001] 2 FLR 1190.

\textsuperscript{142} UN Human Rights Committee, General Comment 17, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 144 (2003) [3].

\textsuperscript{143} UN Human Rights Committee, Concluding Observations on Canada (1999) UN Doc. CCPR/C/79/Add.105 [20].
As with all of the human rights protected in the Charter, the rights protected in s. 17 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

There are a number of legitimate interventions in families presently provided for in legislation; for example, laws protecting women from domestic violence or protecting against child abuse. These forms of family intervention may impose reasonable limits on the rights in s. 17 in accordance with the requirements of s. 7. The specific legislation will nonetheless need to be vetted for compliance with the Charter under these Charter Guidelines.

KEY POINTS TO REMEMBER

• Section 17 provides for protection of families and children.

• In international human rights law, ‘family’ is given a broad interpretation and includes a range of types of family.

• The scope of what is meant by ‘protection’ is unclear. It will require any removal of a child from a family unit to be carried out only where it is lawful and where it is not arbitrary. You will need to carefully consider ss. 7 and 13 in addition to s. 17 if you are reviewing legislation, a policy or a program that may provide for removal.

• The Charter recognises that children are entitled to special protection because of their vulnerability as minors. As human beings, they are also entitled to the enjoyment of all of the other human rights in the Charter unless they do not meet an eligibility criterion.

• Under s. 17(2), public authorities should seek to ensure that all of the human rights in the Charter are protected for children. This should be done without discrimination.

• Section 17 is subject to general limitations imposed under s. 7.

MEASURES TO IMPROVE COMPLIANCE

• If you are reviewing legislation or developing a policy or program that provides for the removal of a person (including a child) from a family unit by a public authority, you will need to carefully consider ss. 7, 13 and 17 of the Charter. You should seek to ensure that a removal of a person from a family unit is not arbitrary or unlawful.

• Where the policy or legislation involves children, consider whether it adequately takes into account the best interests of the child as an important consideration.

• Where legislation provides for children to be subject to differential treatment compared to adults (for example, where an Act expressly excludes children from its operation), examine the purpose of the provision. Ensure that the provisions are to protect the child and do not interfere with children’s rights under the Charter.

• Ensure that processes that will have a significant impact on children and families are fair and transparent and that there is scope within the processes for a child’s interests to be represented.

RELATED RIGHTS AND FREEDOMS

Section 17 is very closely related to the right to privacy and reputation in s. 13. You should consult s. 13, which prohibits arbitrary and unlawful interferences with the family, if an issue is raised under s. 17.

More generally, the rights under s. 17 are closely related to the following additional rights protected in the Charter (especially in the context of the detention of children):

• the right to protection from torture, and cruel, inhuman or degrading treatment (s. 10);

• the right to liberty and security (s. 21);

• the right to humane treatment when deprived of liberty (s. 22).
HISTORICAL BACKGROUND

Section 17(1) is modelled on article 23(1) of the ICCPR. Paragraphs (2), (3) and (4) of article 23 were intentionally omitted from the Charter. This is apparent from the report of the Human Rights Consultation Committee.144

Section 17(2) is modelled on article 24(1) of the ICCPR. Paragraphs (2) and (3) of article 24 were intentionally omitted. This is also apparent from the report of the Human Rights Consultation Committee.145

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Report


Case Law

5. Re C [2002] EWCH (Fam) 1379.

Treaties


United Nations Human Rights Committee Jurisprudence


Other Sources


144 Human Rights Consultation Committee (Victoria), Rights, Responsibility and Respect (2005) 45.
145 Ibid.
SECTION 18
TAKING PART IN PUBLIC LIFE

Section 18

(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.

DISCUSSION

Section 18 protects the following rights:

- the right to participate in public affairs directly or through a representative;
- the right to vote in genuine, periodic and free elections; and
- the right to have access to the public service and public office.

The first question you need to consider under this right is who it applies to.

Who does s. 18 apply to?

The first paragraph of s. 18 (that is, the right to participate in public affairs) applies to all people in Victoria.

By contrast, the right to vote and to access the public service and public office are restricted to only 'eligible' persons.

The term 'eligible' is not defined in the Charter. Eligibility is to be determined by Victorian legislation, that is, persons who are eligible to have the right to vote and stand for election are those that Victorian legislation provides may do so. Eligibility may include both Australian citizens and non-citizens.

Another example where eligibility is determined by other Victorian legislation is eligibility for employment in the public service, which is determined by the Public Administration Act 2004 (Vic).

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 18?

You will need to consider s. 18 in assessing legislation, a policy or a program where it:

- limits the ability of a category of individuals to take part in municipal and parliamentary elections;
- requires individuals to meet certain conditions in order to be eligible to participate in municipal and parliamentary elections;
- regulates how individuals vote in elections (for example, the method of voting);
- regulates access to employment in the public service or appointment to public office;
- establishes requirements for membership of public bodies;
- regulates the conduct of elections and the electoral process;
- regulates the suspension and conduct of local government;
- regulates the suspension and removal of statutory office holders.
Section 18(1): Right to participate in public affairs

This section provides that every person in Victoria has the right to participate in public affairs. This right is subject to reasonable limitations under s. 7.

Concept of ‘public affairs’

The expression ‘public affairs’ is a broad concept, which embraces the exercise of governmental power by all arms of government at all levels.\textsuperscript{146} It is not limited to legislative processes but includes participation in non-government organisations and public debate. For example, it will include the formulation of policies regarding disability discrimination through to a local council’s decision regarding the frequency of rubbish collection.

Section 18 acknowledges that participation in public affairs may be direct, or indirect through freely chosen elected representatives. Examples of direct participation considered by the UN Human Rights Committee are:

- exercising power as members of Parliament or by holding executive office;
- voting in an election or a referendum to change a Constitution;
- taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community;
- taking part in bodies established to represent citizens in consultation with government;
- exerting influence through public debate and dialogue with elected representatives.\textsuperscript{147}

Indirect participation occurs where people elect a body to represent them. In this case, the UN Human Rights Committee has considered that bodies elected by the people must in fact exercise governmental power; the elected body cannot be a mere advisory body with no legally enforceable powers.\textsuperscript{148} The Westminster-style system of government found in Victoria falls within this understanding.

It is important to note that the right to participate in the conduct of public affairs does not provide a right to a specific outcome from such participation. It requires each person to be given the opportunity, without discrimination, to exercise the right. This may require a public authority to take positive measures to enable a person to exercise this right.

For this reason it is recommended that policy officers consider:

- whether there are any impediments to the exercise of the right to participate in public affairs by persons in Victoria;
- if there are impediments, how might these be overcome?

For example, a non-English speaker may face an impediment to his or her right to participate in public affairs if there is no electoral information translated in his or her native language or a language he or she could understand.

\textsuperscript{146} UN Human Rights Committee, General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [5].

\textsuperscript{147} Ibid [8].

Section 18(2)(a): Right to vote and be elected

Right to vote

The right to vote must be established by law. The right to vote does not include as a corollary the right not to vote.

The right to vote may be subject to reasonable limitations under s. 7 of the Charter.

This right is confined to ‘eligible persons’. Section 48 of the Constitution Act 1975 (Vic.) provides that only persons of ‘the full age of eighteen years’ are eligible to vote and excludes people who have been convicted of treason or are serving a sentence of five years or more for an offence against the law of Victoria, the Commonwealth or another state or territory.\(^\text{149}\)

Section 18 makes clear that in order to exercise these rights, people need the opportunity to do so. This means that a government must put in place measures that enable eligible persons to exercise their right to vote. The UN Human Rights Committee has said that the opportunity to vote may require:

- positive measures to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement, which prevent persons entitled to vote from exercising their rights effectively; and
- information and materials about voting to be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.\(^\text{150}\)

Right to be elected

The right to stand for election ensures that eligible voters have a free choice of candidates in an election.

The UN Human Rights Committee has made clear that any restrictions on the right to stand for election, such as minimum age, must be justified on objective and reasonable criteria. Moreover, persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.\(^\text{151}\)

This right also requires that conditions for standing for an election, such as nomination dates, fees or deposits, should be reasonable and not discriminatory. Moreover, the grounds for removal of elected office holders should be established by laws based on objective and reasonable criteria and should incorporate fair procedures.

As with the right to vote, the right to be elected is not conferred on all Victorians; it is limited to ‘eligible’ persons.

Eligibility is determined by legislation, including the Constitution Act. In that Act, people who have been convicted of an indictable offence punishable by imprisonment for five years or more are not qualified to be elected as a member of Parliament (s.44(3)). In addition to section 44, you should also refer to sections 48 and 49 of the Constitution Act for qualification requirements to stand for election.

\(^{149}\) Constitution Act 1975 (Vic.), s. 48. Section 12 of the New Zealand Bill of Rights Act 1990 expressly provides that electoral rights are only enjoyed by those who are of or over the age of 18 years. By contrast, s. 17 of the Human Rights Act 2004 (ACT) provides that ‘every citizen’ has the right to vote, leaving age requirements to be viewed as a reasonable limitation under s. 28 (the equivalent of s. 7 of the Charter).

\(^{150}\) UN Human Rights Committee, General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [12].

\(^{151}\) Ibid [15].
Section 18(2)(b): Right to have access to the Victorian public service and public office

The Charter provides that eligible persons have a right to have access to the Victorian public service and public office. Note also that the Charter\textsuperscript{152} amends s. 8 of the \textit{Public Administration Act 2004} (Vic.) (in the consequential amendments) by inserting human rights into the public service values.

Meaning of ‘public service’ and ‘public office’

The concepts of ‘public service’ and ‘public office’ are not defined in the Charter.

In international law, the term ‘public service’ extends to all positions within the executive, judiciary and legislature and other areas of state administration such as lecturers in public universities. In international human rights law, ‘public office’ would not appear to differ from the interpretation of ‘public service’.

The position is different in Victorian law. The Public Administration Act defines ‘public service’ in the narrower sense of employees of the Crown. This definition of ‘public service’ applies to all references to that term in any Act, unless the contrary intention appears, pursuant to s. 38 of the \textit{Interpretation of Legislation Act 1984} (Vic.). This means that ‘public service’ in the Charter only covers the public service in the general sense of employees of the Crown, whereas ‘public office’ is intended to cover other office holders, such as the judiciary, members of Parliament and holders of office in other areas of state administration.

What does the right encompass?

In international human rights law, this right has been interpreted by the UN Human Rights Committee as providing a right of access, on general terms of equality, to positions in the public service and in public office.

The UN Human Rights Committee has said:

‘… affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures.’\textsuperscript{153}

To ensure compliance with this right, the criteria and processes for appointment, promotion, suspension and dismissal within the public service must be objective and reasonable, and non-discriminatory.

**REASONABLE LIMITS ON THE RIGHTS IN SECTION 18**

Like all of the human rights protected in the Charter, the rights in section 18 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

\textsuperscript{152} Section 47 of the Charter and cl. 5 of the Schedule.

\textsuperscript{153} UN Human Rights Committee, General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [23].
KEY POINTS TO REMEMBER

• Section 18 protects various rights of political participation.

• Conditions relating to the exercise of these rights should be based on reasonable, objective and non-discriminatory criteria.

• The right to participate in public affairs applies to all people in Victoria. The right to vote and to occupy public office applies only to ‘eligible’ persons.

• Eligibility is to be determined by Victorian legislation.

• These rights may be subject to reasonable limitations. You should refer to the discussion on s. 7 of these Charter Guidelines.

• The right to participate in public affairs may extend to participation in non-government organisations and public debate, but does not provide a right to a specific outcome from such participation.

• The right of eligible persons to vote requires measures to be put into place to enable eligible persons to exercise their right to vote. It does not confer a right not to vote.

• The right of eligible persons to be elected may be limited, provided that restrictions can be reasonably and objectively justified.

• Eligible persons also have a right to access the public service and public office.

• The concepts of ‘public service’ and ‘public office’ together encompass the public service in the narrow sense of employees of the Crown as well as the executive, judiciary and legislature and other areas of state administration.

• The criteria and processes for appointment, promotion, suspension and dismissal in the public service and in public office ought to be objective and reasonable.

MEASURES TO IMPROVE COMPLIANCE

• When reviewing the eligibility requirements on the right to vote and to stand for election, ensure that any limitations on eligibility can be reasonably and objectively justified.

• When reviewing the eligibility requirements for the right to access the Victorian public service and public office, ensure that the criteria and processes for appointment, promotion, suspension and dismissal in the public service are objective, reasonable and non-discriminatory.

• Consider whether there are any impediments to the exercise of the right to participate in public affairs by persons in Victoria. If there are impediments, how might these be overcome? For example, are there physical or communication barriers preventing persons with financial hardship, disabilities, language barriers or different cultural backgrounds, from exercising these rights?

• If you are establishing criteria for the establishment of electoral boundaries, ensure that the criteria reflect the need for broad parliamentary representation.

RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under section 18, you should check whether it also raises an issue under the following Charter provisions:

• the right to recognition and equality before the law (s. 8).

HISTORY OF THE SECTION

Section 18 is modelled on article 25 of the ICCPR but does not reflect all of its terms.

Similar rights exist in comparative law. Refer to Appendix H for further information.
BIBLIOGRAPHY

Book

Case Law

Legislation

Other Sources
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 19(1)?

You will need to consider s. 19(1) in assessing legislation, a policy or a program where it:

• limits the observance of any religious practices, regardless of the religion;
• restricts the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group;
• limits the ability of individuals to communicate in languages other than English;
• limits the ability of Aboriginal persons or members of an ethnic group to continue to take part in a cultural practice;
• prohibits the use of any particular language;
• imposes or coerces individuals to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire;
• prevents people using their language in community with others;
• restricts the provision of services or trade on religious holidays;
• regulates censorship;
• regulates cultural or religious practices around the provision of secular public education;
• makes provision for government information only in English;
• regulates traditional medical practices;
• regulating an age of majority;
• licenses or provides a restriction on the preparation and serving of food.

These policy triggers are not comprehensive.154

DISCUSSION

Section 19(1) confers certain cultural rights on individuals.

It was modelled on article 27 of the ICCPR, which is directed towards ‘ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’

However, unlike the ICCPR, section 19(1) does not apply only to ‘minorities’. It applies to persons with a particular cultural, religious, racial or linguistic ‘background’, reflecting the wording of the Multicultural Victoria Act 2004. In other words, the cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected. Such persons may or may not be a member of a minority group, in the sense of being in a group with numerically fewer members or members who are in a subordinate position compared with those in the rest of the community.

The rights protected by s. 19(1) are distinct from, and in addition to, all other rights held by people as individuals in common with everyone else. They apply to all people physically present in Victoria – even if they are only in the State on a temporary basis.

Scope of the right

Section 19(1) is concerned with protecting a person from being denied the right to enjoy his or her culture, religion or language. A person may have been denied the right in this section if his or her enjoyment of a right is substantially restricted. This will require you to consider the extent of any interference with the right protected by s. 19(1). You will first need to consider the meaning of ‘culture’, ‘religion’, ‘race’ and ‘language’.

‘Culture’

Culture manifests itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous people (discussed in relation to s. 19(2)). In international human rights law, the UN Human Rights Committee has adopted a broad and flexible interpretation of the meaning of ‘culture’ so that in that context it has embraced the maintenance of traditional beliefs and practices (for example, the wearing of traditional dress), but it may also include those social and economic activities that are part of a group’s tradition; for example, it may include traditional activities such as fishing or hunting.

The UN Human Rights Committee considers that certain activities may be cultural even though they are undertaken for economic gain. However, in order for such activities to be cultural, they must be ‘an essential element in the culture of an ethnic community’.

‘Religion’

Section 19(1) protects the right of persons with a particular religious background to declare or practise their religion. Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a ‘religion’, you should consult Australian law on the subject. As mentioned above in the context of s. 14 (freedom of thought, conscience, religion and belief), in Australia a broad interpretation of what constitutes a ‘religion’ has been adopted by the High Court.


156 Ibid [5.1], [5.2].

157 Ibid [3.2].


159 See, for example, Butterworths, Halsbury’s Laws of Australia, 21 Human Rights, 4 ‘Civil and Political Rights’ [81]; Church of New Faith v. Commissioner of Payroll Tax (Vic.) (1983) 154 CLR 120.

160 Church of New Faith v. Commissioner of Payroll Tax (Vic.) (1983) 154 CLR 120.
The right of persons with a particular religious background to declare and practise their religion will be subject to many of the same considerations as those set out in relation to s. 14; however, the focus of s. 14 is on the right of individuals as *individuals* to practise their religion. By contrast, the focus of s. 19(1) is on the right of the individual to practise their religion *in community with others*.

‘Race’
The term ‘race’ has a broad meaning which may include colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.161

‘Language’
The right of an individual to use his or her language applies to all persons who wish to use their language in community with others. It is distinct from the right to freedom of expression.

Individual or collective rights?
Section 19(1) states that ‘all persons … must not be denied the right, in community with other persons of that background…’. [emphasis added]. The inclusion of the words ‘in community’ raises the issue of the nature of the rights conferred in s. 19(1): are they individual rights or collective rights of persons with a particular background?

The UN Human Rights Committee has clarified that the rights in article 27 of the ICCPR (on which s. 19(1) is modelled) are conferred on individuals, not on a community. This means that an individual can exercise the rights in s. 19(1) on his or her own. It would also be possible for an individual to exercise these rights together with other persons with the same background.

**REASONABLE LIMITS**
As with all of the human rights protected in the Charter, the rights protected in s. 19(1) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

**KEY POINTS TO REMEMBER**
- Section 19(1) applies to persons with a particular cultural, religious, racial or linguistic ‘background’ who are physically present in Victoria.
- These persons may or may not be a member of a minority group.
- The rights protected by s. 19(1) are distinct from, and in addition to, all other rights held as individuals in common with everyone else.
- A ‘denial’ of the rights in s. 19(1) may occur by substantially restricting the enjoyment of the rights. Whether a ‘denial’ occurs is a matter of degree, requiring an assessment of the magnitude of the interference.
- **Culture**: The term ‘culture’ has a broad and flexible interpretation in international human rights law. It may manifest itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous people.
- **Religion**: Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a religion, you should consult Australian law on the subject.
- **Race**: The term ‘race’ has a broad meaning which may include colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.
- **Language**: The right of an individual to use his or her language applies to all persons who wish to use their language in community with others. It is distinct from the right to freedom of expression.

161 *Equal Opportunity Act 1995 (Vic.)* s. 4.
MEASURES TO IMPROVE COMPLIANCE

- Take steps towards fostering positive relations with communities to develop a good understanding and knowledge of the practices, cultural traditions and observances of cultural, religious, racial and language groups.
- Consult with these groups about what legislation they regard to be an interference with those cultural practices and traditions.

RELATED RIGHTS AND FREEDOMS

When considering s. 19(1) you should also consider the following rights under the Charter:

- the right to recognition and equality before the law (s. 8);
- the right to freedom of thought, conscience, religion and belief (s. 14);
- the right to freedom of expression (s. 15);
- the cultural rights of Aboriginal persons (s. 19(2)).

HISTORY OF THE SECTION

Section 19(1) was modelled on article 27 of the ICCPR and incorporates ideas from s. 4 of the Multicultural Victoria Act 2004.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law


Legislation


Other Sources


POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 19(2)?

You will need to consider s. 19(2) if you are assessing legislation, a policy or a program where it:

• limits the ability of Aboriginal persons to continue to take part in cultural practices;
• imposes or coerces Aboriginal persons to do something that interferes with their culture;
• limits the ability of Aboriginal persons to communicate in languages other than English;
• may interfere with the relationship between Aboriginal persons and land, water and resources;
• concerns the protection of Aboriginal cultural heritage in Victoria, including Aboriginal human remains and secret or sacred objects;
• results in an agreement with one indigenous group that interferes with the distinct cultural practices of another.

These policy triggers are not comprehensive.

DISCUSSION

The distinct rights of Aboriginal persons in Victoria have been set out in s. 19(2) of the Charter. These rights are primarily based on article 27 of the ICCPR and decisions of the UN Human Rights Committee to extend article 27 to protect the cultural rights of indigenous peoples.

The preamble to the Charter provides a context in which to consider the specific rights of Aboriginal persons in relation to identity, culture, language, kinship and relationship to traditional lands and waters. The Preamble provides that the Charter is founded on a principle that ‘human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters’.

Under s. 19(2), four rights are recognised:

• the right to enjoy identity and culture;
• the right to maintain and use language;
• the right to maintain kinship ties; and
• the right to maintain a distinctive spiritual, material and economic relationship with the land and waters and other resources with which there is a connection under traditional laws and customs.
The Charter defines ‘Aboriginal’ to mean a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples. This is the same definition as is used in the Aboriginal Heritage Act 2006 (Vic).

If one or more of the policy triggers are present, you should consult the discussion on s. 19(1) in these Charter Guidelines, in addition to the information below.

Identity and culture

You should refer to the discussion on culture under s. 19(1) for guidance on the meaning of ‘culture’. The key point to remember is that culture manifests itself in a number of forms and embraces the maintenance and expression of traditional beliefs, practices and social and economic activities that are part of a group’s tradition. It may include traditional activities for Aboriginal people, such as fishing and hunting. Further, the right may protect traditional cultures that have adapted ‘to the modern way of life’.

In the context of international human rights law, the protection of the cultural rights of indigenous peoples under article 27 has often arisen in the context of economic development. For example, a case was brought before the UN Human Rights Committee by members of an indigenous people in Finland. They claimed that the government had violated their right to culture when it authorised quarrying works disturbing their traditional reindeer-herding practices. Noting that reindeer husbandry was an essential element of their culture, the UN Human Rights Committee found that in this case, the right to culture had not been violated since the mining activities did not have an unduly detrimental effect on their cultural activities.

This conclusion was based on a number of considerations, including:

- the authors had been consulted during the permit process;
- reindeer herding in the area had not been adversely affected by the quarrying that had occurred; and
- conditions in the quarrying permit sought to minimise the impact of the activity on reindeer husbandry and the environment.

Language

The content of the right under s. 19(2) for Aboriginal persons in relation to language is to ‘maintain and use’ their language. Research into identifying Aboriginal language areas in Victoria and the revival and teaching of Aboriginal languages can be found through the Victorian Aboriginal Corporation for Languages.

In the context of the decline of many indigenous languages, it is relevant to consider that the UN Human Rights Committee has noted that the enjoyment of individual rights under article 27 depends on the ability of the minority group to ‘maintain’ its culture, language or religion, and that positive measures may be necessary to correct conditions that prevent or impair the enjoyment of those rights.

Like s. 19(1), the right of Aboriginal persons to ‘use’ their language is distinct from the right to freedom of expression.

Kinship ties

Kinship ties play an important role in Aboriginal communities. The notion of ‘kinship ties’ is closely linked to other cultural and religious practices.

The right to maintain kinship ties is particularly important in issues surrounding the removal of children from their homes, fostering, adoption and other processes whereby Aboriginal children might be taken away from their families and their indigenous culture.

Section 19(2) does not mean that a child should not be removed from an abusive situation, but that care should be taken to ensure that whatever arrangements are made for the child, there should be respect paid to his or her right to maintain contact with his or her kin.

---

Spiritual, material and economic relationship with land, waters and other resources

Section 19(2)(d) was based on article 25 of the *United Nations Draft Declaration on Indigenous Rights*, which reads:

‘Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.’

This right is designed to protect the distinctive relationship between Aboriginal persons and traditional lands, waters and other resources. In the context of international human rights law, the former Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms Erica-Irene A Daes, has identified a number of unique elements to explain the nature of the relationship to the land of indigenous peoples, as follows:

‘(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.’

This right under s. 19(2)(d) should be taken into account in the context of the protection of Aboriginal cultural heritage in Victoria. It should be taken into account if a law or a policy restricts access to a place of spiritual significance for Aboriginal people or prevents or limits traditional practices on that land. It also requires consideration of restrictions on traditional Aboriginal practices that bring material benefit for that community, for example hunting or fishing.

This aspect of s. 19(2) may interact with the law on native title in Australia.

Individual or collective rights?

Section 19(2) states that ‘Aboriginal persons… must not be denied the right, *with other members of their community*, …’ [emphasis added]. The inclusion of the phrase ‘with other members of their community’ raises the issue of the nature of the rights protected by s. 19(2): are they individual rights or collective rights?

As in the case of s. 19(1), the rights conferred by s. 19(2) are conferred on individuals, not on a community. Nonetheless, sometimes there can be tensions or clashes between the cultural rights of an individual and the countervailing interests of the group or community to which they belong.

**REASONABLE LIMITS**

As with all of the human rights protected in the Charter, the rights in s. 19(2) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

---


KEY POINTS TO REMEMBER

- Section 19(2) recognises four distinct rights of Aboriginal persons in Victoria.
- The preamble to the Charter provides a context in which to consider those rights.
- Some positive measures of protection may be required to correct conditions that prevent or impair the enjoyment of the rights under s. 19(2).
- Indigenous rights to culture often arise in the context of economic development.
- Consultation with Aboriginal communities is critical if you are considering policy or legislation involving some aspect of the relationship of Aboriginal persons and their identity, culture, language, kinship ties, or their relationship with land, waters and other resources.

RELATED RIGHTS AND FREEDOMS

If you are examining s. 19(2) you should also consider the right to culture in s. 19(1).

HISTORY OF THE SECTION

The rights protected in s. 19(2) are not expressly contained in the ICCPR. However, the UN Human Rights Committee has stated that article 27 of the ICCPR (which was the model for s. 19(1)) extends to protecting the cultural rights of indigenous peoples. Paragraph (d) of s. 19(2) is modelled on article 25 of the United Nations Declaration on Indigenous Rights.

BIBLIOGRAPHY

United Nations Human Rights Committee Jurisprudence

Other Sources