Human Rights

Respect · protect · promote

Guide: Nature and scope of the human rights protected in the *Human Rights Act 2019*

Version 3: June 2025

Queensland Government

Queensland legislation has been sourced from the Queensland Legislation website as at 4 May 2022. For the latest information on Queensland Government legislation please go to https://www.legislation.qld.gov.au.

Disclaimer

This document is intended as a guide for information purposes only, and should not be used as a substitute for obtaining appropriate legal advice.

Many rights under the *Human Rights Act 2019* have not yet been subject to thorough judicial analysis by Queensland courts. Discussion of rights therefore draws on other Australian, international, and foreign jurisprudence. Such materials must be used with caution because of differences between the Queensland *Human Rights Act 2019* and other human rights instruments.

To the maximum extent permitted by law, the Department of Justice makes no statement, representation or warranty about the quality, accuracy, context, completeness or suitability for any purpose of this guide.

In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to the attention of the Department of Justice, a reasonable effort will be made to correct them.

The Department of Justice disclaims, to the maximum extent permitted by law, all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages, and costs that any person might incur for any reason including as a result of the information in this document being in any way inaccurate, incomplete, not up to date or unsuitable for any purpose.

Guide: Nature and scope of the protected human rights

Table of contents

Who is this guide for?

All Queensland Government employees who want to develop their understanding of the human rights protected in Queensland can use this guide. However, the guide will cover complex concepts and use some technical legal language. You can find an overview of the protected human rights in our fact sheet, ***Protected human rights***, or from the **Queensland Human Rights Commission**.

The *Human Rights Act 2019* (the HR Act) sets out human rights that are protected for all people in Queensland. The rights are not **absolute**; they can be **limited.**[1] All public service employees have to act and make decisions in a way that is consistent with the HR Act.[2] People developing policy and legislation must actively consider human rights throughout the process. This includes understanding when human rights are **engaged** and how to limit them in a way that is **compatible with the human rights.**[3] For more information about meeting your obligations under the HR Act, see the following guides published on the Human Rights Portal:

- ***When human rights may be limited***
- ***Human rights in decision making***
- ***Develop policy and legislation compatible with human rights***.

Find information about human rights at www.forgov.qld.gov.au/humanrights

Why is it important to understand the nature and scope of the rights?

To understand when human rights are **engaged** and how to limit them in a way that is compatible with the HR Act, you need to start with understanding the nature and scope of the rights. This means understanding:

- what each right protects;
- where rights come from;
- what kinds of policies or decisions might engage rights; and
- how rights have been interpreted by courts and other authorities.[4]

[1] See section 13 of the HR Act. Section 13 sets out factors to consider when thinking about whether a limitation on a human right can be demonstrably justified.
[2] See section 58 of the HR Act.
[3] See sections 8 and 13 of the HR Act. For more information about how to complete this analysis, see the guides on the Human Rights Portal.
[4] Section 48(3) of the HR Act states that 'international law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. While the starting point is the text of the HR Act, it is important to also consider the broader context of human rights law in Australia and internationally.

Thinking about the nature and scope of human rights in the context of every new action, decision, policy proposal, or legislative reform is important because the rights may be **engaged** differently in each situation. There may also be a different outcome for different individuals or groups. You must understand the effect that your proposal may have on individuals; thinking about how rights are affected in your specific context will help you more clearly see the consequences of your action, decision, or policy for an individual.

In ***DPP v Kaba,*** Bell J stated 'it is an elementary first step in a human rights analysis to identify the scope of the right said to have been so limited or infringed. The object of attention is the individual standing dignified and free in the civil arena protected by the specified rights'.[5]

> **Rights are engaged by limitations on the essential interests protected by the right. The subject of the analysis is a person, whose human dignity it is the function of human rights to protect. People do not experience limitations piecemeal, but in the overall situation in which they find themselves. It is a simple point frequently made but so important: human rights are about the rights of people and the further you get away from the human dimension of the impact of the limitations the less likely you are properly to apply the rights.**
>
> ***Kracke v Mental Health Review Board* [2009] VCAT 646 [727]**

How does this guide work?

You will see that the information provided about each right begins with the text of the right as set out in the HR Act. Some sections in the HR Act contain multiple parts that protect discrete rights. For example, section 15 of the HR Act – the right to *recognition and equality before the law* – protects the right to recognition as a person before the law and the right to equality (non-discrimination). These are two distinct rights protected by section 15 of the HR Act.

This guide then provides the following information about each right:

- **Where does the right come from?**
- **What does the right protect?**
- **Does the right have any internal limitations or modifiers?**
- **What policies might trigger the right?**
- **How have the courts interpreted or applied the right (case examples)?**

[5] DPP v Kaba [2014] VSC 52 [106].

Where does the right come from?

The rights protected in the HR Act are modelled on rights protected in international human rights law, including:

- **International Covenant on Civil and Political Rights** (ICCPR)
- **Universal Declaration of Human Rights** (UDHR)
- **United Nations Declaration on the Rights of Indigenous Peoples** (UNDRIP)
- **International Covenant on Economic, Social and Cultural Rights** (ICESCR).

Human rights are also protected under human rights legislation in the Australian Capital Territory and Victoria, including:

- ***Charter of Human Rights and Responsibilities Act 2006*** (the Victorian Charter)
- ***Human Rights Act 2004*** (The ACT HR Act).

Human rights are protected by laws in other international jurisdictions, including New Zealand,[6] South Africa,[7] Canada,[8] and Europe.[9]

This guide will provide information about the corresponding articles or sections our right is modelled on for each right protected in the Queensland HR Act.

What does the right protect?

This part of the guide provides an overview of what the right protects, as well as the values that underpin the right. The information comes from existing domestic and international human rights law. Human rights are discussed and interpreted by the courts in cases heard in Australia and in foreign and international courts. Interpretation of human rights treaty provisions can also be found in general comments published by United Nations Treaty Bodies.[10] Australian case law makes it clear that 'rights should be construed in the broadest way possible before consideration is given to whether they should be limited'.[11]

---

[6] *Bill of Rights Act 1990* (NZ).
[7] *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2 Bill of Rights.
[8] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').
[9] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*'), as amended by *Protocol No 11 to the ECHR*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998), *Protocol No 14 to the ECHR, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).
[10] Treaty Bodies are independent bodies of human rights experts established under each of the UN human rights treaties, such as the UN Covenant on the Rights of the Child. Treaty bodies are not courts and their decisions and general comments are not legally binding. However, opinions of the committees represent an important body of jurisprudence on the interpretation and application of international human rights law.
[11] *Re Application under the Major Crimes (Investigative Powers Act 2004* (2009) 24 VR 415, 434 [80]; *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415, 434 [80]; *Re Kracke and Mental Health Review Board* (2009) 24 VAR 1, 33[97]; *Re Director of Housing and Sudi* (2010) 22 VAR 139, 159 [90]; *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 157-8 [55]; *De Bruyn v Victorian Institute of*

This broader understanding is vital because understanding the values that are at stake makes it possible to better appreciate the importance of the rights that are protected and the impact of limits on rights.[12]

Internal limitations and qualifiers

Some of the protected rights contain internal limitations. These change the way the rights are **engaged**. This section will identify for each of the protected rights whether the right being discussed contains any internal limitations.

Internal **qualifiers** (or **modifiers**) help us understand when a human right is **engaged**. They make up part of the scope or definition of the right (internal qualifiers or modifiers do not justify limiting the right). By way of example, section 18(3) – *the right to freedom from forced work* – includes examples of things that are not forced or compulsory labour when you are thinking about the right to freedom from forced work. For example, if a court orders a person to do community service, this will not engage the right to freedom from forced work, because court-ordered community service is not forced work under this section. Another clear example is the qualifier 'peaceful' in the right of peaceful assembly protected by section 22(1) of the HR Act. Assemblies that are not 'peaceful' do not come within the protection of the right.

In contrast, internal limitations help us understand when it is justifiable to **limit** a human right. For example, section 30(2) – *the right to humane treatment when deprived of liberty* – gives a detained person who has been charged but not convicted a right to be separated from a detained person who has been convicted unless 'reasonably necessary'. If a person who has been charged with an offence but not convicted is detained with people who have been convicted, that individual's right to humane treatment when deprived of liberty will be limited. The internal limitation in section 30(2) provides some criteria for deciding whether the limitation can be justified (when it is 'reasonably necessary').

Some of the protected rights contain references to the concept of arbitrariness:

- **Section 16 right to life**: '…the right not to be **arbitrarily** deprived of life'
- **Section 24 property rights:** '…must not be **arbitrarily** deprived of the person's property'
- **Section 25(a) privacy:** '…not to have the person's privacy, family, home or correspondence unlawfully or **arbitrarily** interfered with'

Forensic Mental Health (2016) 48 VR 647, 691 [126]; *Certain Children v Minister for Families and Children* (2016) 51 VR 473, 496 [143].

[12] Professor the Hon Kevin Bell AM QC, 'COVID19 and Human Rights in Australia: Part 1', *Monash University* (online article, 21 April 2020) https://www.monash.edu/law/research/centres/castancentre/our-areas-of-work/economic,-social-and-cultural-rights/covid19/policy/covid19-and-human-rights-in-australia/covid19-and-human-rights-in-australia-part-1.

- **Section 29(2) liberty and security:** 'must not be subjected to **arbitrary** arrest or detention'.

Arbitrariness can be understood as an internal limitation,[13] which means that it is relevant to whether a limitation on a right can be justified. Case law has defined arbitrariness in a human rights context as conduct that involves 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.'[14]

If the rights in sections 16, 24, 25(a), or 29(2) are limited, we must demonstrate that the limitation is proportionate and not capricious, unpredictable, unjust and unreasonable. For more information about limiting rights, please see the resources available at **www.forgov.qld.gov.au/humanrights**.

Policy triggers

This section will provide examples of policies or decisions that may engage the protected right being discussed to help you think about when your policy or decision might limit human rights.

This is not an exhaustive list and you may want to develop your own list of policy triggers for your area of work.

Case examples: How have the courts interpreted or applied the right?

This section will direct you to case law that has provided interpretation of international and domestic human rights law. Both Australian and international cases may be included. While there are currently limited Queensland cases, human rights have been considered by courts in other jurisdictions.

Case summaries will not provide a comprehensive overview of all the issues; they will only identify key human right issues that may be relevant. You will need to read the case for more information.

You may also wish to refer to the following resources:

- University of Queensland and Caxton Legal Centre **Human Rights Case Law Project** which provides short case notes of published cases that refer to the HR Act

[13] The question of whether arbitrariness is an internal qualifier (whether the right is limited) or an internal limitation (whether a limitation is justifiable) is unsettled in other jurisdictions and is yet to be addressed in a Queensland court. However, relevant case law dealing with arbitrariness in the Victorian Charter supports this approach: *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 35 [109]–[110]; *PBU V Mental Health Tribunal* (2018) 56 VR 141, 179 [124]; *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [31]–[32].
[14] *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].

- Queensland Human Rights Commission **case note summaries** of key decisions that engage the HR Act

Key terms used in this guide

- **absolute** – some rights are considered 'absolute' at international law. This means they cannot be limited for any reason. At international law, absolute rights cannot be suspended or restricted, even during a declared state of emergency.
- **compatible with human rights** – under section 8 of the HR Act, an act, decision or statutory provision is compatible with human rights if it does not limit human rights or only does so to the extent that it is reasonably and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.
- **engaged** – engagement of a human right is not the same as incompatibility. Human rights are engaged whenever a human right is relevant to an act or decision of a public entity.[15] A human right will be engaged when the act or decision of a public entity places limitations or restrictions on, or interferes with, the human rights of a person.[16] A broader view of when a human right is engaged includes 'whenever a human right is relevant to an act or decision of a public authority' and may also include when a right is promoted.[17] It is important to remember that the threshold is low for identifying whether a human right is engaged.[18]
- **limited** – human rights may be subject to certain restrictions or 'limits' under certain circumstances. The term limited is synonymous with 'engaged' in a human rights context and includes when the act or decision of a public entity places limitations or restrictions on, or interferes with, the human rights of a person. See '**engaged**' above.
- **non-derogable** – some rights are 'derogable' at international law – this means that governments can temporarily suspend the application of these rights in the exceptional circumstance of a 'state of emergency', and subject to certain conditions. However, at international law some rights are considered 'non-derogable' – this means that they cannot be suspended even in a state of emergency.[19]
- **public entity** – this term is defined in section 9 of the HR Act. Public entities include government entities (e.g. departments, public service employees, Ministers, local government councillors) and entities that perform functions of a public nature either for the State or for another public entity (e.g. privately operated prisons). However, this does not include the Legislative Assembly or a court or tribunal (except when acting in an administrative capacity).

---

[15] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251 [179]. For information about public entities, see www.forgov.qld.gov.au/human-rights-resources.
[16] *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327 [36]
[17] *Certain Children v Minister for Families and Children* (No 2) (2017) 52 VR 441; [2017] VSC 25
[18] *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 498 [179].
[19] Some rights can be both non-derogable and absolute. This means, at international law, they cannot be suspended or limited for any reason. Other rights might be non-derogable but not absolute. This means, at international law, they cannot be suspended but they may be limited.

- **procedural obligation –** public entities must properly consider human rights before they make decisions, and human rights must be incorporated in the public entity's decision-making process. This is called a procedural obligation.
- **substantive obligation –** public entities must act and make decisions in a way that is compatible with human rights. This is called a substantive obligation.
- **positive obligation –** a positive obligation requires a government to take positive measures (do things) to fulfil a human right. For example, protecting the right to life requires governments to adopt positive measures to protect life (e.g. effective law enforcement).
- **negative obligation –** a negative obligation generally requires a government to refrain from taking action (not do things) to protect a human right. For example, protecting the right to freedom of expression requires a government to not implement measures that stop people from enjoying their right (e.g. laws that unreasonably regulate the content of what people can publish, impose dress codes, or censor media coverage).
- **state –** unless otherwise specified, 'state' refers to the concept at international law of a political entity with a defined territory and population of citizens over which authority and rights of sovereignty are exercised. States enjoy legal capacity at international law.

Recognition and equality before the law

Human Rights Act 2019 (Qld)

Section 15 Recognition and equality before the law

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 2 Article 3 Article 16 Article 26
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 8
ACT	***Human Rights Act 2004***	Section 8

What does the right protect?

Section 15 protects multiple distinct rights, including the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This section reflects the essence of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group. The bedrock value which underpins the right is that everybody without exception has a unique human dignity which is their birthright.

The term 'discrimination' includes direct and indirect discrimination as defined in the *Anti-Discrimination Act 1991*.[20] The *Anti-Discrimination Act 1991* lists characteristics (or attributes) that are protected from discrimination, such as age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality.[21] The right to protection from discrimination in the HR Act **may** include additional characteristics that are not covered by

[20] 'Discrimination' as defined in the HR Act 'includes direct discrimination or indirect discrimination, within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute stated in section 7 of that Act.'
[21] Find more information about anti-discrimination law at www.qhrc.qld.gov.au/your-rights/discrimination-law.

the *Anti-Discrimination Act 1991*.[22] This is because 'discrimination' is defined in the HR Act in a non-exhaustive way.[23]

Section 15(1) protects the right to recognition as a person before the law. It is both an **absolute** and **non-derogable** right at international law and is modelled on Article 16(1) of the ICCPR. Recognition as a person before the law means that all people have legal rights.[24] Legal recognition means that all people enjoy rights under the law, including the protection offered by the law and the protection offered by the human rights in the HR Act. A person who the law does not recognise has no way of enforcing the recognition of their other rights, including 'to commence, defend and participate in legal proceedings and to be treated as a legal person in all other aspects of the operation and administration of the law.'[25]

The equivalent section in the Victorian Charter (section 8(1)) has not been subject to significant judicial analysis in Victoria, and there is very little jurisprudence elsewhere on the more general right to recognition before the law. In ***Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869**, Bell J interpreted section 8(1) to have the same meaning as Article 16 of the ICCPR:

> *The right is to the universal recognition of legal personality of the human being. It follows as a necessary incident of the humanity of every individual which it is the general function of human rights law to respect and protect. As said by Joseph et al, 'if one's humanity is not legally recognized, one will lose legal recognition of, and therefore be effectively denied, one's other human rights'.*[26]

Section 15(2) protects the right of a person to enjoy their human rights without discrimination. It is modelled on Article 2(1) of the ICCPR. This right works alongside all the other rights protected in the HR Act and is also a stand-alone right. It means that human rights protected by the HR Act cannot be limited in a discriminatory way.[27]

Section 15(3) protects the right of a person to equality before the law and that each person is entitled to the equal protection of the law without discrimination. The first limb of section 15(3) refers to existing laws being applied in the same manner to all those subject to them. This right is not directed at legislation itself, but rather, the way in which legislation should be applied.[28] This means that courts, tribunals or public entities will limit the right to equality before the law under the 15(3) when they act 'arbitrarily' – that is, without any objective justification.

---

[22] The limit of possible attributes included under the HR Act that are not already protected by the *Anti-Discrimination Act 1991* has not yet been considered by Queensland courts.
[23] This is different to the Victorian Charter where discrimination is defined as being limited to discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic).
[24] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 79.
[25] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [279].
[26] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [123].
[27] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 79.
[28] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 80.

The section is modelled on Article 26 of the ICCPR, which prohibits discrimination in any field regulated and protected by public authorities. While section 15(2) is specifically about how the HR Act should apply to people, section 15(3) means that existing legislation should also apply to people without discrimination.[29]

Section 15(4) provides a right to equal and effective protection against discrimination. This means that every person has a separate and positive right to be effectively protected against discrimination.

Section 15 places certain obligations on the state for the right to recognition and equality before the law to be fulfilled.

Sections 15(3) and (4) of the HR Act provide a right to equal protection of the law without discrimination as well as a right to effective protection against discrimination. These rights impose correlative duties on the state:

- a **negative obligation** not to discriminate when enacting legislation; and
- a **positive obligation** to enact legislation to protect against discrimination

As mentioned above, the first limb of section 15(3) obliges the courts, tribunals and public entities to avoid treating people arbitrarily when applying or administering existing law.

Relevant resources

- **CCPR General Comment No. 18: Non-discrimination**
- **CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights**
- **HRC General Comment No. 28: Article 3 (The equality of rights between men and women)**
- **CRPD Committee General Comment No. 7**

Internal limitations

The right contains an express exception (section 15(5)) for measures that are taken for the purpose of assisting or advancing persons or groups of persons who are disadvantaged because of discrimination: such measures do not constitute discrimination. The UN Human Rights Committee has stated that:

[29] Human Rights Committee, *General Comment No 18 (1989): Non-discrimination (Article 2 of the International Covenant on Civil and Political Rights*), 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 November 1989) [12]; *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [286]

> *the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.*[30]

In Victoria, the court has stated that 'it is not discriminatory to take affirmative action to redress the historical or entrenched disadvantage suffered by some people or groups.' [31] Measures could include, for example:

- advertising and employing only Aboriginal and Torres Strait Islander people for certain positions
- holding events just for women as part of cultural, religious, educational, or professional events.

Policy triggers

- A policy or statutory provision that provides a substituted decision-making framework (e.g. for guardianship or mental health matters).
- A policy or statutory provision that provides for an entitlement or the delivery of a service to some sectors of society and not others.
- A policy or statutory provision that, while stated in neutral terms, has the potential to have a disproportionate impact on a group in the community or members of the community who have a particular attribute (for example, elderly persons, persons with a disability, or individuals who are not fluent in English).
- A policy or statutory provision that establishes eligibility criteria for programs, entitlements or plans (for example, payment plans under the State Penalty Enforcement Register).
- A policy or statutory provision that engages any of the other protected human rights in a discriminatory way. For example, if a law is aimed at people living in relationships, it should be drafted so that, where relevant, it applies equally to married couples, de facto couples, and same-sex couples.

Case examples

Re: Ipswich City Council [2020] QIRC 194

- Ipswich City Council sought an exemption from the operation of certain provisions of the *Anti-Discrimination Act 1991* so that it could advertise to employ only female waste truck drivers for a training program. It contended that truck driving had long been a male-dominated industry and that it wanted to undertake an affirmative

[30] Human Rights Committee, *General Comment No 18 (1989): Non-discrimination (Article 2 of the International Covenant on Civil and Political Rights*), 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 November 1989).
[31] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [290].

action recruitment plan to target only female drivers and to encourage workplace diversity.

- The Industrial Relations Commission found that the rights contained at sections 15(3) and (4) would be affected by the granting of the exemption in that it would allow discriminatory activity to take place which would affect a person's entitlement to equal protection from the law without discrimination and a person's right to equal and effective protection against discrimination.[32]
- However, it concluded that the exemption was a measure within the meaning of section 15(5) because it would be a measure taken for the purpose of assisting or advancing women disadvantaged because of discrimination.[33] As such, granting the exemption under section 15(5) would not impose a limit on sections 15(3) and (4).

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

- Lifestyle Communities Ltd applied for an exemption to allow the Lifestyle group to exclude people under the age of 50 years from its accommodation villages. They had an exemption for one village but wanted it to extend to all their villages.
- The tribunal said that laws that make provision for people who lack legal competence, for example children, may limit this right in a way that is reasonable and justifiable.
- A person who the law does not recognise has no way of enforcing the recognition of their other rights, including 'to commence, defend and participate in legal proceedings and to be treated as a legal person in all other aspects of the operation and administration of the law'.[34]
- In discussing the right to recognition as a person before the law, Bell J stated: 'The right is to the universal recognition of legal personality of the human being. It follows as a necessary incident of the humanity of every individual which it is the general function of human rights law to respect and protect.'[35]
- The application was ultimately refused on the basis that Lifestyle had not established that its discriminatory activities would be justified and they had not shown that a less restrictive admission rule was not reasonably feasible.[36] Moreover, the exemption sought was held not to be for the purpose of a measure within section 8(4) of the Victorian Charter in that it was not for the purpose of assisting people disadvantaged by discrimination.[37]

PJB v Melbourne Health & Anor (Patrick's Case) [2011] VSC 327

- Patrick had a mental illness and had been an involuntary patient in a hospital for over ten years. He owned a house and wanted to live independently in the community. The hospital felt this would lead to a deterioration in his physical and mental health and

[32] *Re: Ipswich City Council* [2020] QIRC 194 [50]
[33] *Re: Ipswich City Council* [2020] QIRC 194 [64]
[34] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [278]–[279].
[35] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [123].
[36] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [424].
[37] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [424].

applied to have an administrator appointed over his estate with a view to selling his house.

- Bell J found that Patrick had a right to choose where to live and to be free from arbitrary and unlawful interference with his home, and to enjoy these rights equally with other people.
- The right to equality was engaged in Patrick's case because an administrator was appointed to his estate when one would not have been appointed to someone without a disability.[38]
- Bell J said that the Victorian *Guardianship and Administration Act 1986* (Vic) (now repealed) was discriminatory because it was directed at a particular category of person. Because it provided necessary protection for the needs of people with disabilities, the human rights limitations in the legislation would in general terms be justifiable. However, the engagement of the equality right (section 8(3) of the Victorian Charter) still needed to be considered in interpreting specific provisions and in the lawfulness of decisions made under the legislation.[39]
- Bell J considered the values protected by the right to equality: 'the values and interests represented and protected by the human right to equality are at the heart of Patrick's complaints'.[40]
- In deciding the matter, Bell J set aside the tribunal's order of appointing an administrator and dismissed the application based on the proper interpretation of the provisions in the *Guardianship and Administration Act* and the discretionary appointment of the administrator which was incompatible with human rights.[41]

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

- Two applicants, one with a disability, were self-represented at a hearing in the Magistrates' Court in respect of offences against the *Building Act 1993* (Vic). Both applicants were fined.
- At the hearing of the appeal in the Victorian County Court, the applicants were again unrepresented and the appeal was struck out. The applicants sought judicial review of the judge's orders (on the grounds of breach of natural justice and procedural fairness as well as unlawfulness under the Victorian Charter).
- The judge was found to not have applied the human rights protected by the Victorian Charter to the applicants, i.e. the right to equality before the law and the right to a fair hearing.
- The judge did not recognise the applicants as self-represented (one with a disability); appreciate there were two separate applications; explain the court procedure to the applicants; or explain to the applicants the central issue raised in their applications.
- The court found that ss 6(2)(b) and 8(3) of the Charter provided persons with a disability are entitled to equal and effective protection against discrimination in the

[38] *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 [43].
[39] *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 [44].
[40] *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 [44].
[41] *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 [374]-[375].

conduct of hearings and the procedures followed by courts and tribunals. A judicial officer is required to make reasonable adjustments and accommodations so that such persons are not prevented by reason of their disability from effectively participating in a proceeding, including hearings, and have equality or arms with other parties.

- The definitions of direct and indirect discrimination incorporated into the Victorian Charter 'operate according to their own terms to give protection against discrimination on the basis of an attribute within the free-standing legislative framework of the Charter (including section 8(3)) whether or not the discrimination is unlawful within the separate legislative framework of the *Victorian Equal Opportunity Act 2010*'.[42]
- The Victorian County Court orders were set aside, and the applications were remitted to be heard and determined by a different judge.

Police Toll Enforcement v Taha; State of Victoria v Brookes [2013] VSCA 37

- The respondents in this case had outstanding fines and had failed to make instalment order payments, so the Magistrate ordered that they be imprisoned under section 160(1) of the *Infringements Act 2006* (Vic). The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.
- Both respondents had a disability. They applied for judicial review of the decision.
- The Court accepted the submissions that the Victorian Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law.
- The second limb of section 8(3) in the Victorian Charter – the equivalent of section 15(4) in the HR Act – protects substantive equality. It accommodates difference: 'this is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally'.[43]
- Tate JA explained that a construction of section 160 that required the applicants 'to raise these issues with the Court before the Court is obliged to consider whether there are special circumstances in the case imposes a requirement, condition or practice that is likely to have the effect of disadvantaging persons with an impairment which is not reasonable'.[44] The requirement is not reasonable 'because it imposes a condition before a person's impairment is taken into account that only those without that impairment are likely to be able to meet'.[45] Such a construction would therefore result in indirect discrimination and be incompatible with human rights.[46]

[42] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [47]
[43] *Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [36].
[44] *Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [212]
[45] *Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [212]
[46] *Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [213]

Bayley v Nixon and Victoria Legal Aid [2015] VSC 744

- The Applicant, aged 44 at the time, was convicted of several offences and sentenced to 18 years' imprisonment and a new non-parole period of 43 years that likely extinguished any chance of him being released from prison on parole. The Applicant sought leave for appeal against his sentences and applied to Victorian Legal Aid (VLA) for assistance. The Applicant's application for assistance was refused and he applied for independent review of the decisions.
- Despite the independent review finding that two of the convictions would likely be quashed on appeal, which would result in a lower non-parole period being set, the decision to refuse legal assistance was confirmed. The Applicant therefore applied for judicial review of this decision with one ground of the application being that the independent reviewer had unlawfully made the decision by failing to give proper consideration to human rights under section 38(1) of the Victorian Charter.
- Section 8(3) of the Victorian Charter protects the rights to equality before the law, equal protection of the law without discrimination, and equal and effective protection against discrimination. In this case, the Supreme Court found that these human rights aspects of legal aid 'reinforce the objective, criterion-based and non-arbitrary nature of the decision-making process required'.[47] On this basis, Bell J found that the Applicant was equal before the law and his applications had to be considered impartially, objectively and not arbitrarily regardless of the notoriety he attracted for being convicted for egregious crimes. The decision of the independent reviewer was therefore set aside and the application for legal assistance was remitted to another independent reviewer.

[47] *Bayley v Nixon and Victoria Legal Aid* [2015] VSC 744 [39].

Right to life

Human Rights Act 2019 (Qld)

Section 16 Right to life

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 6(1)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 9
ACT	***Human Rights Act 2004***	Section 9

What does the right protect?

The right to life has been described at international law as 'the supreme right from which no derogation is permitted, even in time of public emergency which threatens the life of the nation'.[48]

Without effective protection of the right to life, all other rights of people lack meaning.[49] It is a 'fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights'.[50] The value of the right is in the sanctity of human life, which 'puts it on another plane than that of other deep human goods protected'.[51]

The right to life places both **negative** and **positive obligations** on the **state**:

- a negative obligation to refrain from conduct that causes an arbitrary deprivation of life

[48] Human Rights Committee, *General Comment No 36: the right to life (Article 6 of the International Covenant on Civil and Political Rights*), 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) [3].
[49] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel Publisher, 3rd rev ed, 2019) 121.
[50] Human Rights Committee, *General Comment No 36 (2018): the right to life (Article 6 of the International Covenant on Civil and Political Rights*), 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018); Committee on Economic, Social and Cultural Rights, *General Comment No 14: The right to the highest attainable standard of health (Article 12 of the International Covenant on Cultural, Economic and Social Rights),* 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000).
[51] Human Rights Committee, *Views: Communications Nos 1853/2008, 1854/2008*, 104th sess, UN Doc CCPR/C/104/D/1853-1854/2008 (13-14 March 2008) 16 ('*Atasoy v Turkey*').

- a positive obligation to take steps to prevent the arbitrary deprivation of life by public entities and others. [52]

The obligation to refrain from conduct that causes an arbitrary deprivation of life means that states have a duty to prevent wars, acts of genocide and other acts of mass violence that cause arbitrary loss of life. The positive obligation requires states to take steps to prevent the arbitrary deprivation of life, such as measures to prevent and punish the deprivation of life by criminal acts (through, for example, effective criminal law and law enforcement measures). Another aspect of the positive obligation to protect life is a requirement that public authorities protect the lives of people in their care, including from harm they do to themselves.[53]

The right may also impose a positive obligation that the state to put review mechanisms in place for deaths that may involve an arbitrary deprivation of life (for example, through coronial review mechanisms). The existence of this positive obligation has not been determined by the Victorian Courts,[54] and has not been considered by Queensland courts.

The UN Human Rights Committee has commented that the right to life should not be interpreted narrowly.[55] They interpret the right as placing positive obligations on states to:

- prevent the disappearance of individuals
- thoroughly investigate missing persons cases
- reduce infant mortality
- increase life expectancy (including measures to eliminate malnutrition and epidemics)
- abolish the use of the death penalty where possible.[56]

In the ACT, it has been found that the right to life requires legislation to be interpreted compatibly with the government taking steps to protect the lives of people in its jurisdiction.[57]

The HR Act does not affect any laws about terminating pregnancy.[58] In this context, other jurisdictions with human rights legislation have found that:

---

[52] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 88-89.
[53] *Keenan v United Kingdom* (European Court of Human Rights, Application 27229/92, 4 March 2001) ECTHR 2001.
[54] However, see *Bare v Independent Broad-based Anti-Corruption Commission* [2015] VSCA 197; 48 VR 129, [194]-[215] which noted that the Victorian Charter does not include similar provisions as those found in the ICCPR and ECHR which give rise to a right to effective remedy, including an effective independent investigation.
[55] Human Rights Committee, *General Comment No 36: Article 6 (the right to life),* 124th sess (8 October-2 November 2018) [3].
[56] Human Rights Committee, *General Comment No 36: Article 6 (the right to life),* 124th sess (8 October-2 November 2018) [57]–[58], [26], pt IV.
[57] *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 [35].
[58] See section 106 of the HR Act.

- a foetus or stored embryo has no right to life until born alive (UK and Canada)[59]
- the right to life does not extend to an unborn child (NZ)[60]
- a foetus only has legal rights if born alive and the right to life does not apply to abortion (Victoria).[61]

Relevant resources
• **HRC General Comment No. 6: Article 6 (Right to life)** • **HRC General Comment No. 36: Article 6 (Right to life)**

Internal limitations

The scope of this right is limited by an internal limitation: the right provides that a person has the right to not be ***arbitrarily*** deprived of life. As noted **above**, this can be understood as an internal limitation. An arbitrary deprivation of life is unreasonable or disproportionate.[62]

Policy triggers

- A policy or statutory provision that deals with withdrawal or withholding of life-sustaining treatment.
- A policy or statutory provision that permits law enforcement officers to use force, including the use of weapons in the course of their duties.
- A policy or statutory provision that deals with the use of deadly force (for example, the law relating to self-defence).

Case examples

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21

- The Land Court recommended the refusal of applications for a mining lease and an environmental authority to mine coal in Queensland's Galilee Basin. In reaching this decision, the court determined that it was acting in an administrative capacity and therefore had to comply with the obligations imposed on public entities under section 58 of the HR Act.
- The court determined that several rights were engaged: the right to life, the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, the rights of children, the right to property, the right to recognition and equality before the law, and the right to privacy.[63] It also found a sufficient causal relationship between the act of

[59] *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681; [2004] EWCA Civ 727 [19].
[60] *Right to life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 [102].
[61] *Watt v Rama* [1972] VR 353; *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 48.
[62] Human Rights Committee, *Views: Communication No 45/*1979, 15th sess, UN Doc CCPR/C/15/D/45/1979 (31 March 1982) [13.3] ('*Suarez de Guerrero v Colombia*').
[63] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [1293]-[1295]

authorising the applications and the limitation on human rights that would occur through harm caused by the emission of greenhouse gases when the mined coal is burned.[64]

- Ultimately, the court found that the limits on human rights, primarily caused by climate change, were not demonstrably justifiable.[65]
- In assessing the impact on the right to life, the court stated that it is not necessary for a claimant to have suffered harm to establish the right to life has been violated and that the increased risks of climate change do not need to materialise for the act of authorisation to constitute a limit. With reference to international jurisprudence, the court relied on four propositions:

    1. *The right to life cannot be interpreted in a restrictive manner.*
    2. *The recognition of the interconnectedness of humans with our physical environment.*
    3. *The right to life can be violated by a life-threatening situation, without the loss of life occurring.*
    4. *Environmental degradation, climate change, and unsustainable development constitute pressing and serious threats to the ability to enjoy the right to life.*[66]

- It concluded that approving the project 'would contribute to foreseeable and preventable life-terminating harm' and that 'the importance of preserving the right to life, taking into account the nature and extent of the limitation, weighs more heavily in the balance than the economic benefits of the mine'.[67]

BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environment, Science and Innovation [2024] QLC 7

- The Queensland Land Court considered whether approving an extension of the applicants' mining activities would be compatible with human rights.
- The court found that by approving the extension, which would result in increased greenhouse gas emissions, the right to life, the rights of children, and the right to recognition and equality before the law would be engaged.[68]
- However, the court noted that the proposal would only increase greenhouse gas emissions to 'a very small degree'[69] and concluded that the limits on these rights were justified as they were proportionate and outweighed by the benefits of the proposal.[70]

---

[64] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [1352]
[65] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [1654]
[6666] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [1480]
[67] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 [1512]-[1513]
[68] *BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environment, Science and Innovation* [2024] QLC 7 [63]
[69] *BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environment, Science and Innovation* [2024] QLC 7 [63]
[70] *BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environment, Science and Innovation* [2024] QLC 7 [64]-[67]

Inquest into the death of Selesa TAFAIFA 2021/5437

- The Coroner's Court of Queensland considered the application of the HR Act to the conduct of proceedings in relation to the death in custody of Selesa Tafaifa. At the time of the coroner's decision, her cause of death had not been established.
- The coroner accepted that the right to life under section 16 'requires an independent and impartial investigation into Selesa's death, and that this right extends to the investigation on behalf of the coroner and the preparation of relevant evidence for the coroner'.[71]

Suarez de Guerrero v Colombia (UN Human Rights Committee Communication No. 45/1979)

- A raid was ordered on a house because the police believed that a kidnapping victim was being held prisoner in the house. During the raid, the kidnapping victim was not found, but the police decided to hide in the house and wait for the alleged kidnappers to return. Seven people who subsequently entered the house were shot by the police and died.
- One of those people, Mrs Maria Fanny Suarez de Guerrero, was shot several times after she had already died from a heart attack.
- The UN Human Rights Committee found that the deprivation of life was intentional, and that there was no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect arrest or prevent the escape of the persons concerned.[72].
- The action of the police was found to be disproportionate to the requirements of law enforcement and Maria Fanny Suarez de Guerrero was arbitrarily deprived of her life.[73]
- The right enshrined in ICCPR Article 6 is:

> *the supreme right of the human being. It follows that the deprivation of life by the authorities of the state is a matter of the utmost gravity…the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a state*.[74]

Osman v United Kingdom [1998] VIII Eur Court HR 3124

- Mr Ali Osman was shot dead by Mr Paul Paget-Lewis on 7 March 1988. Mrs Mulkiye Osman was the first applicant and her son, Ahmet Osman, was the second applicant. Ahmet Osman was wounded during the shooting.
- Ahmet Osman was a student at a school where Paget-Lewis worked as a teacher. Paget-Lewis formed an attachment to Ahmet Osman and had previously stated that he had a special relationship with Ahmet. The school met with the Osman family to

[71] *Inquest into the death of Selesa TAFAIFA* 2021/5437 [43]
[72] *Suarez de Guerrero v Colombia*, UN Doc CCPR/C/15/D/45/1979 [13.2].
[73] *Suarez de Guerrero v Colombia*, UN Doc CCPR/C/15/D/45/1979 [13.3].
[74] *Suarez de Guerrero v Colombia*, UN Doc CCPR/C/15/D/45/1979 [13.1].

explain their concerns about the interest Paget-Lewis had taken in Ahmet, but were satisfied that nothing improper had happened, and that the school would monitor the situation. In June 1987, Paget-Lewis was designated temporarily unfit to work and did not return to the school again.

- The applicants claimed that the authorities failed to appreciate and act on a series of clear warning signs that Paget-Lewis represented a serious threat to the safety of Ahmet Osman and his family.
- The European Court of Human Rights (ECtHR) found that there had not been a violation of the right to life.
- The police should exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice.[75]
- The right to life may be engaged where the police:
    - knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party; and
    - failed to take measures within their powers that might reasonably have been expected to have avoided the risk.
- In this case, the court was not persuaded that the police at any decisive stage knew or ought to have known that lives were at real and immediate risk from a third party. The circumstances of the case 'did not disclose any fundamental disregard by the police of the duties imposed by law in respect of the protection of life'.[76]

Pentiacova v Moldova [2005] I Eur Court HR 357

- The applicants were suffering from chronic renal failure and in need of haemodialysis.
- The applicants received state disability allowances.
- Before 1997 the cost of treatment was covered entirely by the hospital.
- Between 1997 and 2004 the hospital's budget was reduced and only necessary procedures and medication were provided for free.
- The applicants argued that their disability allowance was insufficient to pay for the medication necessary for the procedure, and that some patients who could not afford the procedure had died. They argued that their right to life had been breached.
- The ECtHR stated that the right to life may be breached 'where it is shown that the authorities of a state have put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally'.[77]
- In this case, the court found that the right had not been breached and that the complaint was ill-founded.[78]

[75] *Osman v United Kingdom* [1998] VIII Eur Court HR 3124 [116].
[76] *Osman v United Kingdom* [1998] VIII Eur Court HR 3124 [111].
[77] *Pentiacova v Moldova* [2005] 357, 364 (European Court of Human Rights, Fourth Section, Application No 14462/03, 4 January 2005) [218].
[78] *Pentiacova v Moldova* [2005] 357, 377 (European Court of Human Rights, Fourth Section, Application No 14462/03, 4 January 2005) [219].

R (on the application of Rogers) v Swindon NHS Primary Care Trust and another [2006] EWCA Civ 392

- The applicant had applied to the National Health Service Primary Care Trust (PCT) for funding for a course of Herceptin to treat breast cancer. The PCT refused her application.
- The policy of the PCT was to fund unlicensed drug treatment for early-stage breast cancer only where 'exceptional' personal or clinical circumstances could be shown.
- The court found that the decision of the PCT 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.
- In reaching its decision, the court had considered whether the right to life was engaged, but found that regardless of whether the right was engaged or not, the case dealt with a decision that may mean life or death for the appellant which therefore warranted rigorous scrutiny by the court over the decision to refuse funding for treatment.

Keenan v United Kingdom [2001] III Eur Court HR 93

- In this case, the applicant (Mrs Susan Keenan) claimed that her son, Mark Keenan, had died from suicide in prison due to a failure by the prison authorities to protect his life.
- Keenan died from asphyxia caused by self-suspension while serving a four-month prison sentence. He had a history of mental illness and was on anti-psychotic medication. His medical history included symptoms of paranoia, aggression, violence and deliberate self-harm, and his behaviour was sometimes unpredictable.
- The ECtHR found that there was no violation of the right to life in this case. However, the ECtHR did find a violation of ECtHR Article 3 (prohibition of torture).[79]
- Quoting *Osman v United Kingdom* (see example above), the court said:

> *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, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a* **positive obligation** *to arise, it 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…and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*.[80]

[79] This matter is also considered below under the right to protection from torture and cruel, inhuman or degrading treatment (section 17).
[80] *Keenan v United Kingdom* [2001] III Eur Court HR 93, 96 [91]; see case example above *Osman v United Kingdom* [1998] VIII Eur Court HR 3124 [116].

Protection from torture and cruel, inhuman or degrading treatment

Human Rights Act 2019 (Qld)

Section 17 Right to protection from torture and cruel, inhuman or degrading treatment
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 the person's full, free and informed consent.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 7
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 10
ACT	***Human Rights Act 2004***	Section 10

What does the right protect?

The right to protection from torture and cruel, inhuman or degrading treatment is a **non-derogable** right at international law. It protects the right of the individual to personal dignity and physical and mental integrity[81]: 'every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect'.[82]

The right prohibits three distinct types of conduct:

- torture
- cruel, inhuman or degrading treatment or punishment
- medical or scientific experimentation or treatment without consent.

Torture involves a very high degree of suffering that is intentionally inflicted. For an act to be torture it must:

- be intentional

[81] *Kracke v Mental Health Review Board* [2009] VCAT 646 [547].
[82] *Kortel v Mirik* (2008) 28 VAR 405; [2008] VSC 103 [655].

- inflict severe physical or mental pain or suffering
- be for a prohibited purpose
- be inflicted by or with the consent or agreement of a public official or a person acting in an official capacity.

The vulnerability of the victim should also be considered (for example, if the person is in detention and powerless against the treatment or punishment).

Victorian case law has considered the freedom from torture:

> *The purpose of the right to freedom from torture is to protect people from deliberate inhuman treatment covering very serious and cruel suffering. It is directed at preventing treatment of the most severe kind… [T]he fundamental value which the right expresses is the personal dignity and integrity of the individual and the physical and psychological inviolability of their person*.[83]

Cruel and inhuman treatment also involves a high degree of suffering, but it does not have to be intentionally inflicted.

Degrading treatment is focused on the experience of humiliation, which is a subjective test.

For conduct to amount to **cruel, inhuman or degrading treatment or punishment**, it does not need to involve physical pain. It can include acts that cause physical and mental suffering. For example, treatment or punishment that:

- humiliates or debases a person
- causes fear, anguish, or a sense of inferiority
- is capable of breaking moral or physical resistance
- drives a person to act against their will or conscience.

> *The purpose of the right to freedom from cruel, inhuman or degrading treatment or punishment is to protect people from various forms of ill-treatment which, although not torture, still attain a minimum level of severity and intensity in the suffering inflicted. The right expresses the fundamental values of the personal dignity and integrity of the individual and the physical and psychological inviolability of their person, but on a broader plane than the right to freedom from torture.*[84]

The right doesn't just protect from physical pain but also mental suffering and extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. United Nations General Comment No. 20 emphasises

[83] *Kracke v Mental Health Review Board* [2009] VCAT 646 [572]-[573].
[84] *Kracke v Mental Health Review Board* [2009] VCAT 646 [574]-[575].

that this right protects, in particular, children, pupils and patients in teaching and medical institutions.[85]

The right also protects people from being subjected to medical or scientific experimentation or treatment without their full, free and informed consent. It was held in *Kracke v Mental Health Review Board* that:

> *The purpose of this right is to protect people from medical or scientific experimentation or treatment without their full, free and informed consent. It is directed at such experimentation or treatment of any kind, even that which is beneficial to the individual. The right…expresses the fundamental value of the autonomy of the individual, the authority of people to make decisions in matters that affect themselves and the importance of such decisions being full, free and informed*.[86]

Treatment has been interpreted in Victoria as having a wide meaning, including 'behaving towards or dealing with someone in a certain way, giving medical care or attention or applying a process or substance to someone…treatment picks up a broad range of governmental and other action and decision-making towards people, consistently with the fundamental purposes of the right'.[87]

Treatment has also been defined as the carrying out of an operation, the administration of a drug or other substance, or any other medical procedure, not including palliative care.[88] In *Re BWV; Ex parte Gardner,* Morris J stated that 'a medical procedure can generally be described as a procedure that is based upon the science of the diagnosis, treatment or prevention of disease or injury, or of the relief of pain, suffering and discomfort'.[89] For example, a bail condition that requires a person to 'obtain medical and like treatment might engage this right'.[90]

The right imposes **positive obligations** on the **state** to adopt safeguards to ensure that people are protected from actions that inflict these kinds of harm, or at least to ensure that there are few or no opportunities for it to occur without detection.

[85] Human Rights Committee, *General Comment No 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (Article 7 of the International Covenant on Civil and Political Rights*), 44th sess (10 March 1992) [5].
[86] *Kracke v Mental Health Review Board* [2009] VCAT 646 [576]-[7].
[87] *Kracke v Mental Health Review Board* [2009] VCAT 646 [557].
[88] *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 [159].
[89] (2003) 7 VR 487; [2003] VSC 173 [75].
[90] *Woods v DPP* (2014) 238 A Crim R 84; [2014] VSC 1 [15].

Relevant resources

- **CCPR General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)**
- **Convention against torture and other cruel, inhuman or degrading treatment or punishment (Article 1)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that regulates the treatment of persons at a site for which a public entity is responsible (for example, public hospitals, a mental health service or facility, prisons, state schools, state-operated aged care services).
- A policy or statutory provision that regulates medical treatment of persons without their consent, for example under mental health or guardianship law.
- A policy or statutory provision that affects the physical or mental well-being of a person in a way that may cause serious physical or mental pain or suffering or humiliate the person.
- A policy or statutory provision that authorises a person to be searched (including intrusive searches).

Case examples

Johnston v Commissioner of the Queensland Police Service [2024] QSC 2

- The applicants were a group of Queensland Police Service and Queensland Health employees who argued that directions which required all staff to receive the Covid-19 vaccine were unlawful and breached a number of their human rights.
- The applicants submitted that their right under section 17(c) not to be subjected to medical treatment without full, free and informed consent had been breached because they could not give consent if the effect of a mandatory vaccination direction was to force a person to choose between vaccination and employment.
- The Supreme Court found that, while consent is often accompanied by some form of pressure, where a person's livelihood can be put at serious risk if consent is not given, the consent cannot said to be 'free'.[91] It therefore concluded that, while no other rights raised by the applicants had been limited by the directions, the right not to be subjected to medical treatment without full, free and informed consent had been limited by the direction.[92]

[91] *Johnston v Commissioner of the Queensland Police Service* [2024] QSC 2 [332]
[92] *Johnston v Commissioner of the Queensland Police Service* [2024] QSC 2 [333]

- Despite this, the court found that the limitation was justified to protect the occupational health and safety of employees.[93]

Vanilla Rentals v Tenant [2023] QCAT 519[94]

- The dispute before QCAT involved the termination of the respondent's tenancy agreement by the applicant. The respondent contended that a number of her rights had been engaged by the dispute and the hearing process, including the right to protection from torture and cruel, inhuman or degrading treatment.[95]
- The tribunal found that the respondent's forcible eviction from the property did not amount to 'cruel, inhuman or degrading' treatment under section 17(b). While it was accepted that forcible eviction could lead to mental suffering, it did not reach the necessary threshold of severity or intensity.[96] In reaching this conclusion, the tribunal used the analysis provided by Garde J in *Certain Children v Minister for Families and Children* which states that:

  treatment may be considered degrading if it humiliates or debases a person, causes fear, anguish or a sense of inferiority, or is capable of possibly breaking moral or physical resistance or driving a person to act against their will or conscience. Degrading treatment involves more than the usual element of humiliation which follows from the very fact of being convicted and punished by a court. Similarly, inhuman treatment must reach a minimum level of severity manifesting in bodily injury or intense physical or mental suffering. The assessment of the minimum threshold is relative and depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effect, and the sex, age and state of health of the alleged victim.[97]

Kracke v Mental Health Review Board [2009] VCAT 646

- Mr Kracke was a 37-year-old man subjected to medical treatment without his consent. He had been diagnosed as mentally ill and required to take psychotropic medication, which have adverse side effects. Mr Kracke had been trying to convince the medical authorities to let him stop taking them.
- VCAT found that 'it is an obvious interference with a person's dignity and integrity to give them medical treatment without their consent'.[98]
- Extreme kinds of treatment of mentally ill patients can rise above the minimum level of severity and violate their right not to be subjected to inhuman or degrading treatment.[99] 'The right to refuse unwanted treatment respects the person's freedom to choose what should happen to them, which is an aspect of their individual

[93] *Johnston v Commissioner of the Queensland Police Service* [2024] QSC 2 [459]
[94] This matter is also considered below under the right to property (section 24).
[95] *Vanilla Rentals v Tenant* [2023] QCAT 519 [37]-[40]
[96] *Vanilla Rentals v Tenant* [2023] QCAT 519 [46]
[97] *Certain Children v Minister for Families and Children* (2016) 51 VR 473 [162]
[98] *Kracke v Mental Health Review Board* [2009] VCAT 646 [548].
[99] *Kracke v Mental Health Review Board* [2009] VCAT 646 [542].

personality, dignity and autonomy.'[100] The right is especially important in the context of treating someone for mental illness.[101]

- Giving someone involuntary treatment seriously limits their interest in personal integrity and autonomy, and in making medical decisions about matters affecting them.[102] Making a community treatment order engages the patient's right to freedom from medical treatment without their full, free and informed consent.[103]
- It was considered in this case that involuntary treatment orders allow for detention first and the involuntary medical treatment of patients second. In the first instance, the right to freedom of movement (section 12 Victorian Charter, section 19 HR Act) and right to liberty (section 21 Victorian Charter, section 29 HR Act) were engaged by the detention of Mr Kracke.
- However, in the second instance in respect of involuntary medical treatment, VCAT found that Mr Kracke's treatment did not engage the right to freedom from torture (section 10(a) Victorian Charter, section 17(a) HR Act) because of the nature of the treatment was not deliberately 'inhuman treatment covering very serious and harmful suffering.'[104] Similarly, the treatment was not considered to be cruel, inhuman or degrading (section 10(c) Victorian Charter, section 17(b) HR Act).[105]
- However, in this case VCAT ultimately found that despite Mr Kracke's treatment engaging his right to personal integrity and autonomy in making personal medical decisions (section 10(c) Victorian Charter):

> *nothing in the present case comes near an actual or potential violation of Mr Kracke's right not to be treated in an inhuman or degrading way…that right is not* engaged *in the circumstances of the present case*.[106]

ZEH (Guardianship) [2015] VCAT 2051

- ZEH was a 25-year-old woman with an intellectual disability. Her parents applied to VCAT for consent for ZEH to have a tubal ligation as a form of permanent contraception.
- ZEH was sexually inactive; however, ZEH's parents were concerned that ZEH was vulnerable to being taken advantage of sexually and were also concerned about the potential side effects of the oral contraceptive pill, which they thought was manifested in ZEH's headaches, dizziness and fainting spells. There was no medical evidence to back any link between these episodes and ZEH's use of the pill.
- ZEH consistently expressed the view that she had no objection to continuing to take the pill, that she did not wish to have a baby and was unconcerned about the proposed

[100] *Kracke v Mental Health Review Board* [2009] VCAT 646 [569].
[101] *Kracke v Mental Health Review Board* [2009] VCAT 646 [570].
[102] *Kracke v Mental Health Review Board* [2009] VCAT 646 [735].
[103] *Kracke v Mental Health Review Board* [2009] VCAT 646 [738].
[104] *Kracke v Mental Health Review Board* [2009] VCAT 646 [734].
[105] *Kracke v Mental Health Review Board* [2009] VCAT 646 [734].
[106] *Kracke v Mental Health Review Board* [2009] VCAT 646 [568].

operation. Her parents and sister strongly felt that the procedure would be in her best interest.

- The alternative treatment option (if permission for tubal ligation was not granted) would be the continued use of the pill.
- VCAT found that:
    - the administration of the procedure without ZEH's full and informed consent would amount to an invasive and significant compromising of ZEH's physical integrity,[107] engaging (and limiting) her right to equal treatment before the law and her right to protection from medical treatment without full, free and informed consent under the Victorian Charter.
    - the rights engaged were fundamental and in considering the nature of the rights, VCAT took into account Australia's obligations under the International Convention on the Rights of Persons with Disabilities, which includes the right for persons with disabilities to retain their fertility on an equal basis with others.[108]
    - the proposed limitation on ZEH's rights was significant.[109] The purpose of the limitation was to prevent pregnancy if she were to become sexually active. However, ZEH takes the contraceptive pill to manage period pain, which provides reasonably effective contraception. Further, care is taken to protect ZEH from sexual assault.
- VCAT was not satisfied in these circumstances that the limitation was necessary to prevent pregnancy.
- VACT noted the High Court's views from Marion's Case

> *Human dignity requires that the whole personality be respected: the right to physical integrity is a condition of human dignity but the gravity of any invasion of physical integrity depends on its effect not only on the body but also upon the mind and on self-perception.*[110]

- VCAT ultimately found that:

> *Sterilisation of a young woman with intellectual disability requires, as the High Court has made clear, justification of the most compelling kind. ZEH's circumstances, on the evidence before me, are such that there is no therapeutic basis for the procedure, and there are less invasive and less permanent contraceptive options available to her. I acknowledge and respect the loving intentions of the applicants, and recognise that they are strong advocates for her rights and her best interests. In the current circumstances, however, I am not satisfied that there is compelling justification for the special procedure, nor that it is the least restrictive option, and I do not consent to it.*[111]

[107] *ZEH (Guardianship)* [2015] VCAT 2051 [56]
[108] *ZEH (Guardianship)* [2015] VCAT 2051 [57]-[58]
[109] *ZEH (Guardianship)* [2015] VCAT 2051 [61]
[110] *Marion's Case* [1992] HCA 15 [7]
[111] *ZEH (Guardianship)* [2015] VCAT 2051 [67]

Davies v State of Victoria [2012] VSC 343

- Mr Davies was a disability development and support officer employed by the Department of Human Services. He dragged CJ, a disabled person in his care, approximately 1.5 metres across a carpeted hallway, causing bruising and grazing on his buttocks.
- The Victorian Supreme Court said that this treatment was 'disrespectful, cruel and degrading to CJ'.[112]
- Mr Davies' conduct amounted to cruel, inhuman and degrading treatment, breaching CJ's human rights.

Certain Children (by their litigation guardian Sister Marie Brigid Arthur) v Minister for Families and Children [2016] VSC 796

- This case was about the detention of children in the Grevillia Unit of Barwon Prison following its establishment as a youth justice remand centre.
- Garde J found that the conditions for the young people collectively amounted to cruel, inhuman or degrading treatment due to:
    - very long periods of solitary confinement in cells formerly used for adult prisoners
    - uncertainty about the length of lockdowns
    - fear and threats by staff
    - use of control dogs, including German Shepherds
    - use of handcuffs when moving the children to an outdoor area
    - noise of loud banging or screaming
    - failure to tell the children about their rights or the centre's rules
    - general lack of space and amenities
    - limited opportunity for education
    - absence of family visits or religious advisor access.
- The fact that the plaintiffs were children was significant when assessing whether the conduct was cruel, inhuman or degrading treatment or punishment.

Certain Children v Minister for Families and Children (No 2) [2017] VSC 251[113]

- This decision *in Certain Children (by their litigation guardian Sister Marie Brigid Arthur) v Minister for Families and Children* was upheld by the Court of Appeal on 28 December 2016 however, [114] before the judgment was published, the Governor again ordered the redesignation of Grevillea and additional children to be transferred from Parkville on 29 December 2016.

---

[112] *Davies v State of Victoria* [2012] VSC 343 [56].

[113] This case is also considered under the right to protection of families and children (section 26) and the right to humane treatment when deprived of liberty (section 30).

[114] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796.

- Additionally, further orders were made that exempted some staff from restrictions preventing them from using OC spray (pepper spray) and extendable batons within the designated remand and youth justice centre area of Grevillea.
- These decisions were once again challenged by the children plaintiffs, represented by their litigation guardian, on the grounds that they were unlawful under section 38(1) of the Victorian Charter and incompatible with section 10(b) (section 17(b) HR Act) regarding the right to protection from torture, cruel, inhuman or degrading treatment (among other rights) as they were engaged and unjustifiably limited.
- Dixon J firstly held that all decisions engaged section 38(1) of the Victorian Charter and specific rights relevant to each decision. His honour accepted the plaintiffs' argument that the weapons exemption engaged section 10(b) (among other sections), as the use of OC spray and extendable batons in a remand and youth justice centre may constitute cruel or inhuman treatment if grossly disproportionate to the purpose achieved, and if the use resulted in pain or suffering that meets a certain threshold. However, in this case the court considered that these elements had not been made out and section 10(b) was not limited.
- Despite this, all three orders were ultimately found to be unlawful actions and incompatible with the right to protection of families and children and the right to humane treatment when deprived of liberty under sections 17 and 22, respectively. The Secretary of the Department of Families and Children was also prohibited from detaining children at a place of detention that has been declared unlawful and prevented from detaining or continuing to detain at Grevillea any person in their custody.

Ciorap v Moldova (European Court of Human Rights, Chamber, Application 12066/02, 19 September 2007)

- Tudor Ciorap was a Moldovan national in detention in Chisinau prison. He had been diagnosed with mosaic schizophrenia.
- He claimed that his conditions of detention were inhuman because of overcrowding, shortage of beds, damp, rodents, parasitic insects, lack of proper ventilation or access to daylight, restricted electricity and water, and poor quantity and quality of food.
- He went on hunger strike to protest against alleged violations of his rights and those of his family. He was kept under medical supervision and a doctor ordered force feeding after finding his health to have deteriorated.
- Mr Ciorap lodged a complaint about the pain and humiliation of the force feeding, which he claimed resulted in bleeding, a broken tooth, and an abdominal infection.
- The ECtHR found that the conditions of Mr Ciorap's period of detention had been inhuman, in particular as a result of extreme overcrowding, unsanitary conditions, and the low quantity and quality of food.
- In relation to the force feeding, the court stated that a measure which was of therapeutic necessity from the point of view of established principles of medicine

could not, in principle, be regarded as inhuman and degrading'.[115] However, the manner in which Mr Ciorap had been repeatedly force fed was intended to stop his protest, not to meet medical reasons, and could only be considered as torture.

Ireland v United Kingdom (1978) 25 Eur Court HR (Ser A)

- This case concerned members of the Irish Republican Army who had carried out acts of terrorism in the UK and were subsequently arrested and detained, where they were interrogated using practices that included deprivation of sleep, wall-standing and hooding.
- The Government of the Republic of Ireland argued the detention of these members was extrajudicial and the interrogation practices with which they were subjected amounted to torture and inhuman or degrading treatment in breach of Article 3 of the ECHR.
- The ECtHR considered that whether an act amounts to torture or to cruel, inhuman or degrading treatment or punishment is 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'.[116]
- Consequently, it was determined that the interrogation practices breached Article 3 in these circumstances because they were premeditated, used in combination and lasted for hours at a time which resulted in at least intense physical and mental suffering, as well as acute psychiatric disturbances.[117]

Keenan v United Kingdom [2001] III Eur Court HR 93

- The applicant alleged that her son had died from suicide in prison due to a failure to protect his life by the prison authorities, that he had suffered inhuman and degrading treatment due to the conditions of detention imposed on him and that she had no effective remedy in respect of her complaints.
- The Court held in this case that:

> *in considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected their personality in a manner incompatible with Article 3… This has also been described as involving treatment such as to arouse feelings of fear, anguish, and inferiority capable of humiliating or debasing the victim and possible breaking their physical or moral resistance…or as driving the victim to act against his will or conscience*.[118]

---

[115] *Ciorap v Moldova* (European Court of Human Rights, Fourth Section, Application No 12066/02, 19 September 2007) [77].
[116] *Ireland v United Kingdom* (1978) 25 Eur Court HR (Ser A) [162].
[117] *Ireland v United Kingdom* (1978) 25 Eur Court HR (Ser A) [167].
[118] *Keenan v United Kingdom* [2001] III Eur Court HR 93, 134 [110]; the facts of this case are set out above under the right to life (section 16).

- Further, in this case it was found that:

> *the lack of effective monitoring of Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk… the belated imposition of a serious disciplinary punishment…which may well have threatened his physical and moral resistance…is not compatible with the standard of treatment required in respect of a mentally ill person and had to be regarded as inhuman and degrading treatment and punishment*.[119]

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

- The applicant had been in solitary confinement for a period of seven years.
- The applicant sought a judicial review challenge with human rights grounds attached, that related to decisions of Queensland Corrective Services (QCS) to issue a Maximum Security Order (MSO) (including a direction not permitting association with other prisoners) for a further six months. The effect of these decisions was to continue his accommodation in solitary confinement and prevent him associating with other persons.
- The Queensland Supreme Court declared that the decision breached the prisoner's right to be treated humanely when deprived of liberty under section 30 of the HR Act, and that QCS failed to discharge the onus of demonstrating that the limitation was proportionate. QCS were found to have acted unlawfully in respect of the obligations under the HR Act to act and make decisions that are compatible with human rights as well as to give proper consideration to human rights when making decisions.
- However, while section 30 was engaged, the court found that the right to protection from torture and cruel, inhuman or degrading treatment in section 17(b) of the HR Act had not been limited by issuing the MSO. The court stated that for section 17(b) to be engaged by the decision the applicant had to demonstrate, at a minimum, that the terms of his confinement were of such a nature that they will manifest in bodily injury or physical or mental suffering.[120] The court ultimately found that no such evidence had been adduced and therefore the right was not engaged.
- In discussing the relationship between sections 17(b) and 30 of the HR Act, the court confirmed the description outlined in *Castles* to the effect that section 17(b) prohibits bad conduct towards any person (imprisoned or not) while section 30 mandates good conduct towards people who are incarcerated.
- The court also provided a summary of the factors outlined in *Certain Children No. 2* as to the factors that should to be considered when deciding whether section 17(b) is engaged:
    - the scope of the right contained in section 17(b) is conditioned by a minimum standard or threshold of severity or intensity that can manifest in bodily injury or physical or mental suffering,

[119] *Keenan v United Kingdom* [2001] III Eur Court HR 93, 97.
[120] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [190]

- the combination of the adjectives – cruel, inhuman or degrading – define the prohibited treatment or punishment,
- the assessment of the minimum threshold is relative, and it depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim,
- most cases of breach will involve on the part of the decision-maker deliberate imposition of severe suffering or intentional conduct to harm, humiliate or debase a victim, and
- the purpose of the decision-maker's conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right.[121]

[121] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [186]

Freedom from forced work

Human Rights Act 2019 (Qld)

Section 18 Freedom from forced work

(1) A person must not be held in slavery or servitude.
(2) A person must not be made to perform forced or compulsory labour.
(3) In this section –
court order includes an order made by a court of another jurisdiction.
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 performed under a work and development order under the *State Penalties Enforcement Act 1999*; or
(c) work or service required because of an emergency threatening the Queensland community or a part of the Queensland community; or
(d) work or service that forms part of normal civil obligations.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 8
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 11
ACT	***Human Rights Act 2004***	Section 26

What does the right protect?

The right to freedom from forced work is both an **absolute** and **non-derogable** right at international law. Slavery represents a direct attack on the essence of human personality and dignity,[122] and the right protects an individual's inherent dignity as a human being. The right addresses three concepts: slavery, servitude, and forced or compulsory labour.

Slavery involves ownership of one person by another. However, slavery as a legal status does not exist in Australia.[123] Legal ownership of one person by another is impossible,[124] so defining slavery is expressed in terms of the exercise of power over a person: 'the status or

[122] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 221.
[123] *Ho v The Queen; Leech v The Queen* (2011) 219 A Crim R 74; [2011] VSCA 344 [32].
[124] *R v Tang* (2008) 237 CLR 1; [2008] HCA 39 [33].

condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[125]

Possible indications of slavery include a person being:

- the subject of sale and purchase
- used at another's orders without restriction
- inadequately paid for labour
- physically confined
- unable to choose between continued service and freedom
- unable to return to their country of origin.[126]

Servitude is less than ownership, but involves the provision of services through coercion, exploitation, or dominance.[127]

Forced or compulsory labour is 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[128] Factors that may indicate forced or compulsory labour include whether it was:

- unjust
- oppressive
- distressing
- degrading
- disproportionate.[129]

The common element between the concepts of slavery, servitude, and forced or compulsory labour is that the individual is subject to a degree of enforced control.[130]

Relevant resources

- League of Nations ***Convention to Suppress the Slave Trade and Slavery 1926***
- International Labour Organisation ***Convention concerning Forced or Compulsory Labour 1930***
- Andreas Schloenhardt and Laura-Rose Lynch, '***McIvor and Tanuchit:* A Truly 'Heinous' Case of Sexual Slavery**' (2012) 35(1) *UNSW Law Journal* 175
- **Protocol of 2014 to the Forced Labour Convention, 1930**

[125] *Convention to Suppress the Slave Trade and Slavery,* signed 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) Article 1.
[126] *Ho v The Queen; Leech v The Queen* (2011) 219 A Crim R 74; [2011] VSCA 344 [32].
[127] *Siliadin v France* [2005] VII Eur Court HR 335, 366 [103]-[104], 370 [124].
[128] *Siliadin v France* [2005] VII Eur Court HR 335, 354 [51]; International Labour Organisation, *Convention concerning Forced or Compulsory Labour*, ILO Doc C29 (1 May 1932, adopted 20 June 1930) art 2(1).
[129] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 104.
[130] *R v SK* [2012] 3 WLR 933; [2011] EWCA Crim 1691 [40].

Internal limitations

The right to freedom from forced work contains an internal qualifier, which lists types of work that will not fall under the definition of forced or compulsory labour, including work or service:

- required under a court order or work development order
- required in an emergency
- that is part of normal civil obligations

This type of limitation is part of the definition of the human right, which means it changes when the right will be **engaged**. For example, community service ordered by a court does not engage the right to freedom from forced work because it does not come within the scope of the right.

Work that is part of normal civil obligations must:

- be provided for by law
- be imposed for a legitimate purpose
- not have a punitive purpose or effect.[131]

The corresponding qualifications to Article 4 of ICCPR at international law are 'grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs'.[132]

Policy triggers

- A policy or statutory provision that provides for the provision of any labour or the performance of any service under threat of a penalty.
- A policy or statutory provision that gives a Minister or public entity the power to employ or direct people to perform work in a vital industry or during a state of emergency (for example, requiring military service).

Case examples

W, X, Y and Z v United Kingdom (1968) 11 Eur Comm Hr 562

- The four applicants in this matter joined, with their parents' consent, the navy or army at the ages of 15 or 16 for a period of nine years. However, under the relevant legislation the period of nine years was to be calculated from the date on which they

[131] Human Rights Committee, *Views: Communication No 1036/*2001, 85th sess, UN Doc CCPR/C/85/D/1036/2001 (13 October – 3 November 2005) [4.11], [7.5] ('Faure *v Australia*').
[132] *Van der Mussele v Belgium* (1984) 6 EHRR 163; (1983) Eur Court HR (Ser A) 13 [38].

attained the age of 18 years. This meant that the applicants' repeated requests for discharge, which were made for various reasons, were denied by the relevant authorities because they had not served the minimum enlistment period as prescribed by legislation.

- The applicants therefore applied to the European Commission of Human Rights (the Commission) alleging that the refusal of their discharge requests by the relevant authorities amounted to forced labour in breach of their right under Article 4 of the ECHR (among others).
- The Commission held that the limitation provision in Article 4(3)(b) applied, which provides that '"forced or compulsory labour" shall not include…any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service.'[133] Accordingly, the Commission was of the view that any complaint which alleged that such service constituted 'forced or compulsory labour' had to be rejected in light of the express limitation provision.
- However, the Commission considered that although 'servitude' and 'forced or compulsory labour' may often overlap, they are distinguished within Article 4 and the limitation provision in (3)(b) excluding military service from the scope of 'forced or compulsory labour' does not necessarily exclude such service from the prohibition on 'slavery or servitude'. Consequently, the Commission considered whether the applicants' being refused their requests for discharge amounted to 'slavery or servitude.' The Commission held that, generally, the restrictions on the personal freedoms and rights of soldiers who enlist after attaining the age of majority do not amount to an impairment of rights which fall within the scope of 'slavery or servitude.' It followed that the young age at which the applicants entered into service with their parents' consent cannot attribute 'servitude' to the normal condition of a soldier.
- Obliging a soldier to serve out a minimum enlistment period in the armed forces, contrary to his wishes, did not constitute slavery or servitude.

R v Tang [2008] HCA 39

- The question of what powers attach to the 'right of ownership' has been considered in Australia in the context of the *Criminal Code Act 1995* (Cth). The Criminal Code's definition of slavery derives from the Slavery Convention, with two differences.
- First, because it is not lawfully possible to hold the status of slave in Australia, the Code refers only to 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.
- The concept of slavery does not extend to a harsh or exploitative employment relationship. Further:

> *powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible,*

[133] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Article 4(3)(b)

> *not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place*.[134]

- Second, it provides that it is still slavery when that condition has come about by reason of a debt or contract made by the person.

UN Human Rights Committee, *Views: Communication No 1036/2001*, 85th sess, UN Doc CCPR/C/85/D/1036/2001 (3 November 2005) ('*Faure v Australia*')

- This case considered whether requiring a person receiving unemployment benefits to undertake community work was a breach of the right to be free from forced labour as protected by Article 8 of the ICCPR.
- Bernadette Faure was receiving unemployment benefits when the *Social Security Legislation Amendment (Work for the Dole) Act 1997* commenced, under which she was required to meet certain obligations. This included attending a Work for Dole program. When she stopped attending the program her unemployment benefits were cancelled. She argued that the Work for Dole program amounted to forced or compulsory labour.
- To 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*.[135]

- On the evidence presented, including the absence of a degrading or dehumanising aspect of the specific labour performed, the Committee found that the labour in question did not violate article 8 of the Covenant.

[134] *R v Tang* [2008] HCA 39 [32].
[135] Human Rights Committee, *Views: Communication No 1036/*2001, 85th sess, UN Doc CCPR/C/85/D/1036/2001 (13 October – 3 November 2005) [7.5] ('*Faure v Australia*').

Freedom of movement

Human Rights Act 2019 (Qld)

Section 19 Freedom of movement

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 12
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 12
ACT	***Human Rights Act 2004***	Section 13

What does the right protect?

The right to freedom of movement protects the fundamental value of freedom:[136] 'liberty of movement is an indispensable condition for the free development of a person'.[137] In *DPP v Kaba,* Bell J stated that:

> *when we stop to think what we do every day, it is easy to see how critical freedom of movement is to us as individuals and our relationships with others. Like good health, the value of freedom of movement is not usually appreciated until it is compromised*.[138]

The right places an obligation on the **state** not to act in a way that unduly restricts the freedom of movement. The right should be protected through government restraint, rather than through taking positive steps to promote the freedom of movement (such as, for example, providing free public transport).

The UN Human Rights Committee stated that laws authorising limits to the right should:

- use precise criteria
- not give unfettered discretion
- be necessary to protect the purpose
- be least intrusive option

[136] *Antunovic v Dawson* (2020) 30 VR 355; [2010] VSC 377 [72].
[137] Human Rights Committee, *General Comment No 27: Freedom of Movement (Article 12 of the International Covenant on Civil and Political Rights),* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).
[138] *DPP v Kaba* [2014] VSC 52 [115].

- be proportionate to the interest protected.[139]

The HR Act protects three rights:

1. to move freely within Queensland
2. to enter and leave Queensland
3. to choose where to live.

The right to **move freely within Queensland** may be said to:

> *embrace a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the state or by other individuals. It extends, generally speaking, to movement without impediment throughout the State, but subject to compliance with regulations legitimately made in the public interest, such as traffic laws, and subject to the private and property rights of others. And it would include a right of access to facilities necessary for the enjoyment of freedom of movement, subject to legitimate regulation of those facilities. The concept would also ordinarily include a right of access to places and services used by members of the public…*[140]

This right may be **engaged** where the state actively curtails a person's freedom of movement or subjects a person to strict private surveillance or reporting obligations before or when moving.[141]

A person does not have to have a particular purpose or reason for wanting to move or stay in a particular place for the right to be **engaged**. For example, statutory provisions prohibiting loitering may restrict a person's freedom of movement.[142]

The right to **enter and leave Queensland** must be interpreted consistently with section 92 of the Australian Constitution.[143] Section 92 provides for 'trade, commerce and intercourse among the States' to be 'absolutely free'. This freedom may be subject to some restriction or regulation.[144]

---

[139] Human Rights Committee, *General Comment No 27: Freedom of Movement,* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13]-[14].
[140] *DPP v Kaba [2014] VSC 52* [100], quoting Mason J in *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70, 102.
[141] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 107; *Raimondo v Italy* (1994) 18 EHRR 237; (1994) Eur Court HR (Ser A) 3 [40].
[142] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 107.
[143] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 108.
[144] *Palmer v Western Australia* [2021] HCA 5; *Cole v Whitfield* (1988) 165 CLR 360, 393-394; *AMS v AIF* (1999) 199 CLR 160; [1999] HCA 26 [153], [221]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 192; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; [2005] HCA 44 [174].

The right to **choose where to live** within Queensland will be **engaged** when someone is directed where to live, for example:[145]

- a prisoner on bail who is under supervised release
- a person with mental illness who is ordered to live at a certain place.

The right to freedom of movement is related to the **right to liberty** protected in section 29 of the HR Act. The right to freedom of movement 'is directed to restrictions on movement which fall short of physical detention coming within the right to liberty'.[146] The difference between the two rights is 'one of degree or intensity, not of nature or substance'.[147] The two rights can be considered on a scale, and whether the right to freedom of movement or the right to liberty is **engaged** will depend on the situation of the individual concerned, including the type, duration, effects, and manner of implementation of the restriction.[148]

Relevant resources
• **CCPR General Comment No. 27: Article 12 (Freedom of Movement)**

Internal limitations

This right contains an internal qualifier or modifier, which limits when the right may be **engaged**. Section 19 refers to 'every person **lawfully within Queensland**'. The right to freedom of movement is not protected for people who are not 'lawfully' within Queensland.

For example:

- people who are unlawful 'non-citizens' under the *Migration Act 1958* (Cth);[149] or
- people who have bail conditions saying they can't leave another state. If they do they are breaching their bail conditions and therefore in Queensland unlawfully.

Policy triggers

- A policy or statutory provision that restricts a person's movement or where they can live.
- A policy or statutory provision that empowers a public entity to restrict a person's movement based on national security considerations, or for the protection of public health.
- A policy or statutory provision that allows for surveillance or monitoring of a person's movements.

[145] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 108.
[146] *Kracke v Mental Health Review Board* [2009] VCAT 646 [588].
[147] *Kracke v Mental Health Review Board* [2009] VCAT 646 [583].
[148] *Kracke v Mental Health Review Board* [2009] VCAT 646 [634].
[149] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 106.

- A policy or statutory provision that limits the ability to move through, remain in, enter or leave areas of public space, including public buildings.
- A policy or statutory provision that restricts access to areas of environmental or cultural significance.
- A policy or statutory provision that imposes planning controls by zoning residential locations away from commercial, industrial or agricultural areas.

Case examples

Nigro v Secretary, Department of Justice [2013] VSCA 213

- Supervision orders made under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) may limit the right to freedom of movement. However, the threshold for making a supervision order is 'unacceptable risk' that 'depends upon both the severity of the apprehended conduct and the likelihood that the conduct will occur.[150] Therefore, a limit to the right to freedom of movement can be justified under section 7(2) of the Victorian Charter.
- The unacceptable risk requirement was aimed at achieving 'a balance between the offender's rights and the right of members of the public to be protected against the risk of the offender committing further sexual offences'.[151]
- Justifying a limit on freedom of movement will depend on the circumstances. For example, a supervision order with a condition that the person 'must not obtain paid or unpaid employment, or undertake voluntary work, which involves him attending, contacting or entering into people's homes and/or entering licenced venues' was unreasonably wide and therefore an unjustified limit on the person's freedom of movement.[152] This was because the offences were not committed in the context of employment in someone's home, and there was no connection between the person's offences and entering licenced premises.
- In this case, the Court found that the conditions on the appellant's post-sentence supervision order were unreasonably wide and not justifiable in the circumstances.

Woods v DPP [2014] VSC 1

- Mr Woods was 17 years old and had been charged with committing an indictable offence while on bail and waiting for a trial for other offences. He had originally been refused bail because he had not shown cause and represented an unacceptable risk.
- One of the bail conditions requested by the prosecution was that he not use public transport at all. This was refused by the Victorian Supreme Court.
- The court said 'imposing a condition that he [Mr Woods] not use public transport at all would impede his freedom of movement to an extent which would not be warranted for any legitimate purpose of bail'.[153]

[150] *Nigro v Secretary, Department of Justice* [2013] VSCA 213 [101].
[151] *Nigro v Secretary, Department of Justice* [2013] VSCA 213 [103].
[152] *Nigro v Secretary, Department of Justice* [2013] VSCA 213 [292].
[153] *Woods v DPP* [2014] VSC 1 [100].

Antunovic v Dawson [2010] VSC 377

- Ms Antunovic was being treated for mental illness under a community treatment order. She had been living at the Norfolk Terrace Community Care Unit and wanted to go home to live with her mother.
- The conditions of Ms Antunovic's order did not require her to live at a particular place. However, the psychiatrist at the unit told Ms Antunovic that she could not go home. She was allowed to go out during the day but had to return to the unit each night. The unit and the psychiatrist said that these restraints were in Ms Antunovic's best medical interests.
- It was found in this case that:

> *the limitation on her [Ms Antunovic's] right to freedom of movement is clear. She is both being compelled to live at one place and prevented from living at another place against her wishes. She is thereby being prevented from exercising her right to freedom of movement and her right to choose where to live*.[154]

- Bell J found that the requirement to live at the unit was a partial but 'substantial restraint' on her freedom of movement, and that being prevented from living with her mother added another dimension to the restraint. The freedom of movement and residence enjoyed by the general public at common law 'is an important aspect of the private and social life and the development of the individual, including that which occurs within their own family'.[155]
- Bell J ordered that Ms Antunovic be released immediately because the restraints were without lawful foundation.[156]

DPP v Kaba [2014] VSC 52 [157]

- Mr Kaba was the passenger in a car pulled over for a random check of the driver's licence and the registration of the vehicle. Mr Kaba was angry about the delay and left the vehicle to walk along the footpath towards nearby flats.
- The police repeatedly asked for his name and address, which he refused to provide, claiming it was racist harassment. When Mr Kaba became abusive, the police officers arrested him, and he assaulted one of the police officers. Mr Kaba claimed that this breached his right to freedom of movement under the Victorian Charter.
- As an aspect of the common law right to freedom of movement, the right to drive a motor vehicle on the public roads is akin to the right to walk in public streets and navigate on public waters.[158]
- A police traffic stop represented an interference with the right to freedom of movement of the driver and the passenger.[159]

---

[154] *Antunovic v Dawson* [2010] VSC 377 [117].
[155] *Antunovic v Dawson* [2010] VSC 377 [118].
[156] *Antunovic v Dawson* [2010] VSC 377 [202].
[157] This case is also considered below under the right to privacy and reputation (section 25).
[158] *DPP v Kaba* [2014] VSC 52 [85].
[159] *DPP v Kaba* [2014] VSC 52 [101].

- When police stop a vehicle to check on the licence of the driver and the registration of the vehicle, they interfere with the right to freedom of movement of the driver, and necessarily any passenger, under section 12 of the Victorian Charter.[160]

Baumann v France [2001] V Eur Court HR 340

- In November 1993, Mr Baumann's German passport, along with some cash and other items, were seized by French police in Strasbourg after his hotel room was searched following an on-the-spot investigation about a stolen vehicle and related criminal transactions. The property was sealed and deposited at the consignment of exhibits of the *tribunal de grande instance* in Strasbourg. No court proceedings were brought against Mr Baumann and he sought the return of his property from the investigating judge.
- Throughout 1993 and 1994, Mr Baumann's lawyer made repeated requests to the investigating judge for the return of the property but his application was refused on the grounds that the items had been confiscated by order of the Criminal Court and proceedings could not be reopened as the decision was final.
- Mr Baumann subsequently appealed the matter to the ECtHR, arguing that his rights under the ECHR had been breached. In particular, Mr Baumann submitted that his right to freedom of movement under Article 2 of Protocol No. 4 to the ECHR was infringed by the seizure and confiscation of his passport.
- The ECtHR found that the taking an identify document, such as a passport, limits the right to freedom of movement: 'a measure by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement'.[161]
- Further, the ECtHR found that the continued deprivation of Mr Baumann's passport and the interference with his right to freedom of movement was unjustified considering the seizure was initially taken following an on-the-spot investigation and Mr Baumann was not prosecuted, a witness or even involved in the criminal proceedings in which his passport was confiscated. Consequently, Mr Baumann was awarded damages and France was ordered to pay the costs and expenses of proceedings.

[160] *DPP v Kaba* [2014] VSC 52 [118].
[161] *Baumann v France* [2001] V Eur Court HR 340 [62].

Freedom of thought, conscience, religion and belief

Human Rights Act 2019 (Qld)

Section 20 Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including –
  (a) the freedom to have or to adopt a religion or belief of the person's choice; and
  (b) the freedom to demonstrate the person's 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 the person's freedom to have or adopt a religion or belief.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 18(1) Article 18(2)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 14
ACT	***Human Rights Act 2004***	Section 14

What does the right protect?

The right to freedom of thought, conscience, religion and belief is based on article 18 of the ICCPR.

The High Court of Australia has said that the freedom of religion is 'of the essence of a free society'.[162] A 'religion' or 'belief' is not limited to traditional religions, or to religions and beliefs with institutional characteristics or practices like traditional religions. It also includes theistic, non-theistic and atheistic beliefs, as well as the freedom to have no religion or belief.[163] The concept of 'belief' may include non-religious beliefs,[164] such as pacifism and academic beliefs.[165] The right to freedom of thought, conscience, religion and belief is 'far

[162] *Church of the New Faith v Commissioner of Pay-roll Tax* (Vic) (1983) 154 CLR 120, 130.
[163] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience, or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [2].
[164] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 131-132
[165] *McAdam v Victoria University* [2010] VCAT 1429 [57].

reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief'.[166]

Section 20(1)(a) protects the freedom to have or adopt a religion or belief: this includes the freedom to choose, replace, or retain that belief, or to adopt atheistic views.[167] The right includes the freedom to change a religion or belief. At international law, this is both an **absolute and non-derogable right**.[168]

Section 20(1)(b) protects the freedom to demonstrate the person's religion or belief.
Freedom to demonstrate religion or belief through worship, observance, practice and teaching includes ritual and ceremonial acts, and practices integral to those acts, including things like:

- displaying symbols
- building places of worship
- using objects
- observing holidays and days of rest
- observing dietary regulations
- wearing distinctive clothing or head coverings
- participating in rituals
- using a particular language
- choosing religious leaders, priests and teachers
- establishing seminaries or religious schools
- preparing and distributing religious texts or publications. [169]

The right protects a person's freedom to demonstrate their religion or belief individually or as part of a community. The right doesn't just protect a person's individual spiritual existence; to exercise their right effectively, the person may require a like-minded community, which is why there is a collective element to the right.[170] The contradiction in this right is that allowing the freedom to be exercised fully can lead to the suppression of the freedom of religion of others, because of the common belief held by many religions and faiths that their view is total

[166] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1].
[167] Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [5].
[168] *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256; [2014] VSCA 75 [537].
[169] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 4.
[170] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 502.

truth.[171] Therefore, the balance between how the right is protected and limited is important.[172]

Section 20(2) protects a person from being coerced or restrained in a way that limits their freedom:[173] a person should not be coerced, threatened, forced, or sanctioned (including penal sanctions) to adhere, recant, or convert.[174] People who already have their behaviour constrained, such as prisoners, continue to enjoy their right to manifest their religion or belief to the fullest extent they can within the nature of the constraint.[175] Policies or practices that have the intention or effect of impairing this right are inconsistent with the right.[176]

Read in conjunction with the right to equality in section 15, the right places an obligation on the state to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination.

Relevant resources

- **CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that promotes, restricts or interferes with a particular religion or set of beliefs.
- A policy or statutory provision that requires disclosure of religion or belief.
- A policy or statutory provision that regulates conduct that will affect a person's worship, observance, practice or teaching or their religion or belief (for example, a dress code that does not accommodate religious dress).

---

[171] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 499-500.
[172] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 500.
[173] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 130.
[174] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [5].
[175] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8].
[176] Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [5].

- A policy or statutory provision that imposes requirements as a condition of receiving a benefit, or accessing a service, that prevents a person from adhering to their religion or belief.
- A policy or statutory provision that restricts the capacity for those under state control (e.g. prisoners) to observe their religion.

Case examples

Drage v Gold Coast Hospital and Health Service [2025] QSC 22

- Mr Drage was employed as a security officer by Queensland Health until his dismissal for failing to comply with his employer's requirement that he receive the Covid-19 vaccine. Mr Drage made attempts to apply for exemptions on religious grounds, but these were denied.
- Mr Drage claimed that the vaccination requirement violated his right to practice his religion.
- The Supreme Court considered the right to freedom of religion, citing existing case law which makes clear that, while the right to have a religion or belief under section 20(1)(a) is absolute and cannot be interfered with, the right to manifest or demonstrate that religion or belief under section 20(1)(b) is not.[177]
- In assessing whether Mr Drage's objections to the vaccine requirement were based on a religious belief, the court noted that to be protected, religious beliefs had to satisfy some minimum requirements, had to be intelligible and capable of being understood, had to have a certain level of cogency, seriousness, cohesion and importance, and had to be worthy of respect in a democratic society.[178] The court also noted that even a person's 'zealous adherence' to their personal beliefs does not qualify as a religious belief that is capable of protection as a human right.[179]
- The court ultimately found that Mr Drage's objections to the vaccine were based on his understanding of the risks or safety concerns with the vaccine and his doubts about its efficacy. They were not, however, connected to his religious beliefs. His objections were therefore personal, not religious.[180] As a result of this, and other findings, his application was dismissed.

Queensland Police Service v Ahmed [2023] QMC 2

- Mr Ahmed was charged after refusing to allow police access to his mobile phone during a search of his property. He argued that he did not provide the access information because his phone contained photographs of his wife without a hijab and it would have offended his faith, as a devout Muslim, if male police officers were to view the images.

[177] *Drage v Gold Coast Hospital and Health Service* [2025] QSC 22 [43]
[178] *Drage v Gold Coast Hospital and Health Service* [2025] QSC 22 [107]
[179] *Drage v Gold Coast Hospital and Health Service* [2025] QSC 22 [110]
[180] *Drage v Gold Coast Hospital and Health Service* [2025] QSC 22 [138]-[140]

- Mr Ahmed gave evidence that, had arrangements been made at the time of the search for a female officer to view the images, this would not have contravened his religious beliefs and he would have provided access.[181]
- The court noted the obligations of the police to give proper consideration to human rights and to act compatibility with human rights protected under the HR Act, including freedom of thought, conscience, religion and belief, and that these extend to the execution of search warrants.[182] It accepted that Mr Ahmed's genuinely held religious beliefs constituted a 'reasonable excuse' under the particular charge and the charge was therefore dismissed.[183]

Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191[184]

- An exemption from the *Equal Opportunity Act 1995* (Vic) allowed the Victorian Electoral Commission (VEC) to request and consider information about political activities (as opposed to political beliefs) of potential employees. This was considered a reasonable and justified limit on this right as it was required to ensure employee impartiality (actual and perceived).[185]
- However, an exemption allowing the VEC to consider the political views or beliefs (rather than the political activities) of potential employees was not justified.[186]

Christian Youth Camps Ltd v Cobaw Community Health Services [2014] VSCA 75

- This case was about the conflict between the right to freedom of religion and the right to freedom from discrimination.[187]
- Cobaw was an organisation that worked to prevent youth suicide. It wanted to run a weekend camp for same sex attracted young people and asked to hire a camping resort owned and operated by Christian Youth Camps (CYC). CYC had been established by the Christian Brethren Church and was managed by Mr Rowe.
- Mr Rowe and CYC refused to let Cobaw hire the camping resort on the basis that they objected to the syllabus that would be taught at the camp, which was against their religious beliefs. Cobaw claimed that CYC had discriminated against them on the basis of the sexual orientation of those who would be attending the camp.
- It was found that where a person has voluntarily agreed to take on responsibilities in secular employment that they know may affect their ability to demonstrate their religion or belief, that person is less likely to be able to successfully raise their right to freedom of religion and belief in order to justify infringing the rights of others, particularly the right to be free from discrimination.

---

[181] *Queensland Police Service v Ahmed* [2023] QMC 2 [21]
[182] *Queensland Police Service v Ahmed* [2023] QMC 2 [78]
[183] *Queensland Police Service v Ahmed* [2023] QMC 2 [83]-[86]
[184] This case is also considered below in the context of the 'Freedom of expression'.
[185] *Victorian Electoral Commission (Anti-Discrimination Exemption)* [2009] VCAT 2191 [139]-[140].
[186] *Victorian Electoral Commission (Anti-Discrimination Exemption)* [2009] VCAT 2191 [139].
[187] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [1]-[3].

- Considering the right to freedom of religion or belief in the context of commercial activities, Redlich JA noted that the further the relevant activity is from the core elements of a person's religion or belief, the less likely it will be protected under the right.[188] For example, a person's core religious beliefs might include the condemnation of homosexuality. In that case, the right may not protect a person employed in a printing business from having to provide ordinary materials like letterheads and business cards to homosexual people, but it may protect that person from having to provide materials proselytising and promoting a homosexual lifestyle or ridiculing his beliefs.
- Neave JA quoted *Hasan v Bulgaria* [2002] XI Eur Court HR 119:

> *Religious communities traditionally and universally exist in the form of organised structures. …[T]he believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary* ***state*** *intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members*.[189]

- In dismissing CYC's appeal, the court found that Mr Rowe's decision to refuse the booking, which limited Cobaw's right to freedom from discrimination, was not justified because CYC was not established for religious purposes and could therefore not rely on the religious exemption for discrimination.[190] Even if CYC was established for religious purposes, it was held that the discriminatory decision was 'not necessary to avoid injury to the religious sensitivities of people of the Christian Brethren religion'.[191] Maxwell P and Neave JA also held that CYC could not rely on the religious exemption because corporations could not hold beliefs upon which the exemption could apply and even if they could, the refusal by CYC did not necessarily comply with genuine religious beliefs or principles.[192]

Hoskin v Greater Bendigo City Council [2015] VSCA 350

- Bendigo City Council granted a permit for the construction of a mosque in an industrial zone within the City of Greater Bendigo. The permit application advertisement led to hundreds of objections from the community, the majority of which expressed concerns and fears that the mosque's construction would have adverse social and cultural impacts for the City. The objectors first sought merits review at VCAT and later

[188] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [542].
[189] *Hasan v Bulgaria* (2002) XI Eur Court HR 119, 137 [62].
[190] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [243]-[244] (Maxwell P), [358] (Neave JA), [47] (Reidlich JA).
[191] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [302[-]303] (Maxwell P), quoting *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [344] (Hampel J).
[192] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [308], [327], [362] (Maxwell P), [411] (Neave JA), [473] (Reidlich JA).

appealed to the Supreme Court after VCAT granted the permit, arguing that VCAT was required to engage and independent assessor to assess social impacts and had erroneously assessed social impacts themselves.

- The court upheld VCAT's decision to grant the permit, finding that there was no requirement for a social impact assessment and it was not open for the appellants to object to the granting of the permit based on the assertion that a mosque was an unacceptable use of land due to the practice of Islamic faith, which effectively amounted to an objection to a form of religious worship in itself.[193]
- In reaching its decision to reject the application, the court found that the Council and VCAT were obligated under section 38 of the Victorian Charter to give proper consideration to the human rights of the future worshippers of the mosque to practice their faith when deciding whether or not to grant the permit. Accordingly, VCAT was both entitled and required under the operation of the Victorian Charter to disregard the objections to the practice of religious worship in mosques.[194]
- It follows that refusing a permit or planning permission for a place of worship, such as a mosque, may interfere with the right by restricting the right of an identifiable group to practice their faith.

Haigh v Ryan [2018] VSC 474

- Paul Haigh was a prisoner in Barwon Prison serving life sentences. He practiced the Pagan religion and claimed that his religious observance involved the use of Tarot cards.
- The prison withheld four cards from a particular Tarot pack, considering them 'objectionable material' because of their images. Haigh argued that this removed the cards' value and integrity as a spiritual and religious tool and prevented him from using the set as a whole.
- Haigh told the court that refusing him access to the four cards interfered with his religious practice, protected by the freedom to demonstrate religion or belief in section 14(1)(b) of the Victorian Charter (section 20(1)(b) of the HR Act).
- Ginnane J found that the use of Tarot cards can be a ritual associated with the practice and observance of religion, and that withholding the cards was a limitation on the exercise of Haigh's religious right. It was ultimately held that:

> *…courts and administrators should be extremely wary about determining what is required for a person to practise their religious beliefs…generally, people can choose the set of beliefs, practices and observances which they accept, even if they are gullible or misled*.[195]

R v Chaarani (Ruling 1) [2018] VSC 387

- Abdullah Chaarani had been charged with conspiring to do acts in preparation for, or planning, a terrorist act. Mr Chaarani's wife, Aisha Al Qattan, wanted to wear a nikab

[193] *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 [76]-[82], [89].
[194] *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 [31]-[39], [125].
[195] *Haigh v Ryan* [2018] VCS 474 [55].

(niqab) while sitting in the public gallery in court during the trial. The nikab would completely cover her head and face except for an opening for her eyes.

- The court had previously ordered that any spectators in the public gallery must have their faces uncovered for security reasons. Mr Chaarani and his wife asked for a variation of that order, arguing that it breached Al Qattan's right to religious freedom.
- After balancing the rights of Al Qattan and the need to maintain court security, it was found that ordering spectators to have their faces uncovered was a reasonable limitation on the right to freedom of religion.
- The court also noted that if Al Qattan did not wish to uncover her face in the public gallery 'arrangements will be made for live streaming of the proceedings to a remote facility within the court building'.[196]

[196] *R v Chaarani (Ruling 1)* [2018] VSC 387 [24].

Freedom of expression

Human Rights Act 2019 (Qld)

Section 21 Freedom of expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within Queensland and whether –

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by the person.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 19
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 15
ACT	***Human Rights Act 2004***	Section 15

What does the right protect?

The right to freedom of opinion and expression is often described as foundational to the ICCPR.[197] The Human Rights Committee state that:

> *freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society…freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights*.[198]

[197] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 541.

[198] Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights),* 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [2]-[3].

These rights 'form a basis for the full enjoyment of a wide range of other human rights'.[199]

The right expresses two different concepts of freedom – freedom from state intervention, and freedom of access to the state:

- Freedom of expression is an essential part of an individual's privacy, requiring absolute protection against external interference. In this context, state intervention is only legitimate when expressing an opinion interferes with the rights of others or is an obvious, direct threat to life in society.
- Freedom of expression as a political right, aimed at integrating the individual in society with the focus on the political, collectivizing function.[200]

These underlying values have been articulated in Victorian cases. For example, in *McDonald v Legal Services Commissioner (No 2)*, Bell J stated that:

> *the fundamental values and interests represented by the right to freedom of expression are freedom, self-actualisation and democratic participation for individuals personally; and freedom, democracy under the rule of law and ensuring government transparency and accountability for society generally*.[201]

The right to hold an opinion (as protected by section 21(1)) is an **absolute right** at international law. It protects a person's internal autonomy, and includes the right to have an opinion, or to not have a particular opinion.[202] The right to hold an opinion is a fundamental component of an individual's privacy, requiring absolute protection without external influence. Attempts to coerce someone into holding, changing, or expressing any opinion would interfere with this right.

The right to freedom of expression protected by section 21(2) is important both to individuals as well as the rule of law.[203] The right has a wide scope, protecting almost all forms of expression, including verbal (oral, writing, print), or through art or conduct. Means of expression may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions.

The expression must be able to convey some kind of meaning, whether or not it actually does convey objectively clear meaning to a particular person, and that meaning may be

---

[199] Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights),* 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [4].
[200] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 542.
[201] *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 [22].
[202] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 139; *RT (Zimbabwe) v Home Secretary* [2013] 1 AC 152; [2012] UKSC 38 [43].
[203] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 139-140.

subjective.[204] It may be enough for the expression to attempt to convey a meaning –the threshold is low.[205] The right protects the expression of ideas and information that may 'offend, shock or disturb the state or any sector of the population'.[206] However, the right can be limited, and may be when expression is 'unquestionably antithetical to freedom, democracy and the rule of law that sustain our society' (for example, hate speech).[207]

Forms of peaceful protest may be protected by the right to expression, including, for example, setting up a camp.[208] However, not all conduct will constitute expression. For example, facial hair was not a form of expression in *Kuyken v Lay*.[209] In Victoria, the words 'in another medium' do not mean 'every person must be free to choose the form in which to express himself or herself, irrespective of the destructive impact upon society's most cherished democratic values'.[210] Equally, not all criminal conduct is excluded from the scope of the right.[211]

The right to freedom of expression includes the right to seek and receive information. This may include a right of access to information held by government, and an obligation on government to disclose information. The Human Rights Committee state that Article 19 'embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production'.[212] In *XYZ v Victoria Police*, Bell J stated that 'the purposes of the right to seek, receive and impart information will be frustrated if the government, without justification, can simply refuse the information sought'.[213]

Freedom of expression has an important relationship to economic, social and cultural rights. For example, illiteracy is an obstacle both to the exercise of freedom of expression and the right to receive information.[214]

Relevant resources

- **CCPR General Comment No. 34: Article 19 (Freedoms of opinion and expression)**

[204] *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 [61]
[205] *R v Keegstra* [1990] 3 SCR 697; *Weisfeld v Canada (Minister for Public Works)* (1994) 116 DLR (4th) 232.
[206] *Handyside v United Kingdom* (1976) 1 EHRR 737; (1976) Eur Court HR 5 [49].
[207] *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 [89].
[208] *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; *Hall v Mayor of London* [2011] 1 WLR 504; [2010] EWCA Civ 817; *City of London v Samede* [2012] 2 All ER 1039; [2012] EWCA Civ 160; *R (Gallastegui) v Westminster City Council* [2013] 2 All ER 579; [2012] EWCA Civ 28.
[209] *Kuyken v Lay* [2013] VCAT 1972.
[210] *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 [89]-[98].
[211] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 143.
[212] Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights),* 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [18].
[213] *XYZ v Victoria Police* (2010) 33 VAR 1; [2010] VCAT 255 [533].
[214] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 543.

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that requires a person to obtain prior approval before expression may lawfully occur (for example, to hold a protest or busk in a particular area).
- A policy or statutory provision that regulates the contents of speech, publication, broadcast, display or promotion, or regulates offensive speech.
- A policy or statutory provision that imposes a dress code (for example, a dress code that prohibits staff from wearing t-shirts displaying 'political messages').
- A policy or statutory provision that restricts or censors media coverage (for example, on the reporting of judicial proceedings).
- A policy or statutory provision that disadvantages a person, or any harassment intimidation or stigmatisation of a person, on the basis of that person's opinion, may limit this right.

Case examples

Deemal-Hall v Office of the Director of Prosecutions [2024] QCATA 131

- The appellant had sought access to documents which were relevant to her, held by the Director of Public Prosecutions (DPP), under the *Information Privacy Act 2009* (IP Act). Some documents, which included the names and personal details of other individuals, were not released.
- The tribunal found that the right to freedom of expression under section 21(2) confers a right to obtain certain government-held documents and information, at least if the individual seeking this has a legitimate interest.[215] However, this right had to be balanced with the right to privacy of the individuals named in the documents.[216]
- In balancing these competing rights, the tribunal found that the limitation on the right to freedom of expression, imposed by the IP Act and the *Right to Information Act 2009,* was demonstrably justified as reasonable.[217] As such, the decision to deny the appellant access to the additional documents was not a breach of the HR Act.

Hickey v Commissioner of Police [2023] QDC 181

- Mr Hickey was convicted of stalking the complainant, following action she had taken as an investigator of the Fair Trade office. Following his conviction, a restraining

[215] *Deemal-Hall v Office of the Director of Prosecutions* [2024] QCATA 131 [32]
[216] *Deemal-Hall v Office of the Director of Prosecutions* [2024] QCATA 131 [34]
[217] *Deemal-Hall v Office of the Director of Prosecutions* [2024] QCATA 131 [36]

order was implemented which included restricting Mr Hickey's ability to post content about the complainant on the internet. Mr Hickey breached this part of the restraining order on a number of occasions.

- Mr Hickey appealed the decision of a Magistrates Court to extend the restraining order, arguing, among other things, that he should have been free under section 21 to make whatever comments he wanted about the complainant on the internet, so long as they were not false or threatening.[218]
- The court found that the extended restraining order clearly limited his freedom of expression. However the right was only limited in a very minor way, as he remained free to comment on any other topic, and was imposed to protect the dignity, privacy and reputation of the complainant.[219]

BJ [2022] QCAT 326[220]

- CH was employed by a provider of services and support to BJ and had filed applications for the appointment of a guardian and an administrator for BJ. Following the dismissal of the applications by the Queensland Civil and Administrative Tribunal, BJ filed an application seeking the tribunal's authorisation to share information about the proceedings with the Disability Royal Commission and a news media company.
- CH sought to have her identity withheld from any authorised publication on the basis that she made the application as part of her employment and that it was likely that a reputationally damaging account would be presented by BJ.
- The tribunal considered three rights which could be affected by the decision, including the right to privacy and reputation under section 25 and the right to freedom of expression under section 21.[221] It considered BJ's right to freedom of expression and ultimately concluded that the public interest and BJ's own interests outweighed the potential adverse impact on CH's right to privacy and reputation.[222]

The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors [2020] QSC 54

- The Australian Institute for Progress (AIP), an 'ideologically centre-right' think tank, wrote to the Electoral Commission of Queensland and advised that it intended to participate in the state election later that year by advocating for a particular political party and conducting political research.
- AIP sought declaratory relief in the Queensland Supreme Court after the Electoral Commission of Queensland advised that it considered the AIP to be a 'third party' within the meaning of the *Electoral Act 1992* (Qld) and confirmed that it was not lawful for prohibited donors to make gifts to other entities which incur electoral expenditure.

---

[218] *Hickey v Commissioner of Police* [2023] QDC 181 [26]
[219] *Hickey v Commissioner of Police* [2023] QDC 181 [37]-[38]
[220] This matter is also considered below under the right to privacy and reputation (section 25).
[221] *BJ* [2022] QCAT 326 [19]
[222] *BJ* [2022] QCAT 326 [37]

- While the HR Act only applies to individuals and not corporations, the court found that relevant sections which prohibited property developers from making certain donations to political parties were a justifiable limitation on the right to freedom of expression.
- The court found the limitation of the right to freedom of expression in this case was a proper purpose because of 'the risk of actual or perceived corruption related to developer donations in state elections and improving transparency and accountability in state elections and state government'.[223]

XYZ v Victoria Police [2010] VCAT 255

- XYZ was a senior constable with Victoria Police. He had been subject to an ethical standards investigation, which found no evidence of wrongdoing. XYZ said that his career and health were ruined by the investigation and the way it was carried out. He wanted to expose what he felt was an unlawful and improper Ethical Standards Department investigation and applied for documents associated with the investigation. He was given some documents, but not others.
- The case tested whether the human right of freedom of expression (as protected by the Victorian Charter) incorporated a positive right to freedom of information.
- VCAT found that the right to freedom of expression in section 15(2) of the Charter implicitly imposes a positive obligation on the government to give access to government-held documents. The right to obtain government-held documents is not absolute and is subject to justifiable exceptions for objective, proportionate and reasonable purposes.
- The scope of the right to freedom of information extends to cases in which the individual seeks information on a subject engaging the public interest or in which they have a legitimate interest.

Magee v Delaney [2012] VSC 407

- Mr Magee painted over an advertisement in a bus shelter in furtherance of his philosophical opposition to advertising and sought to escape criminal liability on the basis that this act engaged the right to freedom of expression under section 15(2) of the Victorian Charter. He was convicted on charges of damaging property and possessing materials for the purpose of damaging property and ordered to pay a fine of $500 by the magistrate. Mr Magee appealed this decision.
- On appeal, the court considered whether painting over the advertisement engaged the right to freedom of expression under section 15(2) of the Victorian Charter. It was held that although the painting over an advertisement is an act capable of imparting information or ideas for the purposes of freedom of expression, imparting the information by means of damage to a third party's property does not engage the right under section 15(2) of the Victorian Charter.[224] Further, any engagement of Mr

[223] *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors* [2020] QSC 54 [123].
[224] *Magee v Delaney* [2012] VSC 407 [65]-[66], [97].

Magee's right to freedom of expression was negated by the right's internal limitations in section 15(3)(a)-(b) of the Victorian Charter that allows for lawful restrictions reasonably necessary to respect property rights and for the protection of public order.[225]

- The appeal was therefore dismissed on the basis that Mr Magee acted without lawful excuse and was correctly convicted.

Magee v Wallace [2014] VSC 643

- Mr Magee was fined for posting bills obscuring commercial advertising under section 10(1) of the *Summary Offences Act 1966* (Vic), which created the offence of posting bills and defacing property.
- The court found the section was compatible with human rights because it was a lawful restriction reasonably necessary for the protection of public order because 'it was possible that actions of the type that Mr Magee engaged in might lead to some form of public disturbance involving persons seeking to stop those actions.[226]

Kuyken v Lay (Human Rights) [2013] VCAT 1972

- Mr Kuyken was a Leading Senior Constable employed by Victoria Police, and wore his facial hair in a neatly trimmed goatee. Victoria Police changed their guidelines, banning ponytails, buns, beards, goatees, soul patches, and other facial hair apart from clean, tidy and neatly trimmed sideburns and moustaches. Kuyken claimed that this limited his right to freedom of expression.
- VCAT held that wearing a goatee does not in itself impart any information, ideas, or meaning. This meant that Mr Kuyken's right to freedom of expression was not engaged by the Victoria Police guidelines, as the wearing of certain facial hair was not found to be freedom of expression for the purposes of section 15(2) of the Victorian Charter and therefore could not be limited by the ban put in place by Victoria Police.

VPOL v Anderson and Ors (Criminal) [2012] VMC 22

- Protestors were charged with offences under the *Summary Offences Act 1966* (Vic) after they were involved in a demonstration outside of Max Brenner (a restaurant) at QV Melbourne (a shopping centre). The demonstration was an exercise in freedom of expression which was restricted by Victoria Police through charging the demonstrators with the offence of 'wilful trespass'. The Victorian Charter includes a provision (section 15(3)(b)) that allows for lawful restrictions reasonably necessary for the protection of public order.
- The 'wilful trespass' offence was found to not apply to the protestors, who were demonstrating their disapproval of the political interests of a retail tenant at QV Melbourne.
- It was found in this case that:

[225] *Magee v Delaney* [2012] VSC 40 [131], [154].
[226] *Magee v Wallace* [2014] VSC 643 [44].

> *The gathering of the protestors in QV square and the expression of their political beliefs, notwithstanding the limited physical activity between the protest line and police line immediately in front of Max Brenner's did not, in my opinion, constitute a threat to public order or a significant breach of the peace so as to warrant a restriction on their rights to express their political opinions. In fact, the evidence revealed that a large number of members of the public appeared to be watching with interest and one even* ***engaged*** *in robust discussions with a number of the protestors. …[A] number of customers at Max Brenner's remained at the tables outside observing the activities. The demonstration only lasted 15 minutes before the protestors were requested to leave and the arrests occurred shortly thereafter. There was no threat to public order or breach of the peace to the extent necessary so as to justify a lawful restriction on the right of the protestors to express their political beliefs as is contemplated by the Charter*.[227]

Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191

- The Victorian Electoral Commission (VEC) applied for an exemption under the *Equal Opportunity Act 1995* to request and consider information about the political activities of its potential employees, including their previous activities in publishing political opinions.
- The exemption was found to be a reasonable and justified limit on the right to freedom of expression because the VEC need to be (and appear to the community to be) impartial in conducting elections. One of the factors in the decision was that free expression of political view by all Australians through the ballot box was made possible through the limits imposed on the rights of VEC employees, including their freedom of expression.[228]

Kerrison v Melbourne City Council [2014] FCAFC 130

- Ms Kerrison was participating in an Occupy Melbourne protest when police and Council officers removed a tent that she was wearing as part of her protest. Police officers removed the tent against Kerrison's wishes, including by using a knife to cut some of the knots holding the tent around her.
- The Full Court of the Federal Court found that removing the tent limited her freedom of expression. The court said that the tent was 'an effective visual form of protest',[229] and removing it limited her rights because it 'precluded her from imparting her ideas about the constraints on the Occupy protestors in the way she had decided was most effective'.[230]
- The court found that the limitation was justified because it was aimed at preserving and maintaining public gardens for their equitable use, rather than preventing Kerrison from protesting.

---

[227] *Vpol v Anderson and Ors (Criminal)* [2012] VMC 22, 36 [69].
[228] *Victorian Electoral Commission (Anti-Discrimination Exemption)* [2009] VCAT 2191 [92], [99].
[229] *Kerrison v Melbourne City Council* [2014] FCAFC 130 [233].
[230] *Kerrison v Melbourne City Council* [2014] FCAFC 130 [233].

Peaceful assembly and freedom of association

Human Rights Act 2019 (Qld)

Section 22 Peaceful assembly and freedom of association

(1) Every person has the right of peaceful assembly.

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 21 Article 22
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 16
ACT	***Human Rights Act 2004***	Section 15

What does the right protect?

The right of peaceful assembly protects the right of individuals to gather to exchange, give or receive information, to express views, or to conduct a protest or demonstration. Because of its democratic function in creating, communicating, and realising political views, [231] there is a strong obligation at international law to take positive steps to protect the right – a duty to take positive measures to fulfil and protect the right, including protection from interference by the state and from private parties.[232]

Commentary on the right at international law has highlighted the inherent conflict in the right, in that assemblies can fortify and maintain democracy only when they challenge the interests of state power; but effective exercise of the freedom of assembly depends on the state's protection of the right.[233] The UN Human Rights Committee has noted that a failure to respect and ensure the right of peaceful assembly is typically a marker of repression.[234]

---

[231] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 592.

[232] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 604.

[233] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 593.

[234] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [2].

Organisers and participants are protected both in preparing for, conducting, and attending an assembly. Assemblies can be held in many ways, including inside or outside; in private buildings or on private property; in public streets or squares; at one location or moving about (e.g. demonstrations, processions, protest marches, rallies); on foot or with vehicles. Those who organise an assembly generally have the right to choose a location within sight and sound of their target audience.[235]

While the word 'assembly' is open to broad interpretation, its political role is critical.[236] In *Caripis v Victoria Police,* the member agreed that 'the right to participate in a peaceful non-violent protest exemplifies the rights to freedom of expression and peaceful assembly'.[237] In this context, 'assembly' means the intentional, temporary gathering of several people for a specific purpose.

The UN Human Rights Committee adopted a General Comment on Article 21 of the ICCPR on 23 July 2020. The Committee stated that the right to peaceful assembly imposes a corresponding obligation on States to respect and ensure its exercise without discrimination. This requires States to allow such assemblies to take place without unwarranted interference and to facilitate the exercise of the right and to protect the participants.[238]

The approach of the authorities to peaceful assemblies and any restrictions imposed must be 'content neutral' and therefore not related to the message conveyed by the assembly. Restrictions should not be based on the identity of the participants or their relationship with the authorities.[239]

The right imposes both negative and positive obligations on the state to respect the right to peaceful assembly. The **negative obligation** includes no unwarranted interference with peaceful assemblies. For example, States are obliged not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organisers without legitimate cause.[240]

States have a **positive obligation** to facilitate peaceful assemblies. This includes ensuring a legal and institutional framework exists within which the right can be exercised effectively. Further, authorities may need to be proactive in ensuring that participants can exercise the right fully and without discrimination, such as blocking off streets, redirecting traffic, or

[235] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 595.
[236] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 597.
[237] *Caripis v Victoria Police* [2012] VCAT 1472 [69].
[238] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [8].
[239] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [22].
[240] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [23].

providing security in order to protect participants against possible abuse by non-state actors, other members of the public, counter-demonstrators and private security providers.[241]

The right to freedom of association is critical for democracy.[242] As a civil right, individuals are protected from arbitrary interference (by both the state and private parties) when associating with others for any reason or purpose.[243] The freedom of association allows people to pursue common interests (e.g. sporting, politics, trade) in formal groups,[244] and protects the economic right to join trade unions.

The legal form of an association is unrestricted – except for those founded by law or an administrative act (e.g. public corporations, institutions). **States** have a **positive obligation** at international law to provide legal frameworks for associations to incorporate, if they wish to. The freedom of association may also protect the right of individuals to carry out the activities of the association, but the extent to which it does so is unclear.[245] Individuals have the right to choose which associations to be part of, or to form new ones.

Relevant resources

- **CCPR General Comment No. 37: Article 21 (Right of peaceful assembly)**

Internal limitations

The right protects only '**peaceful**' assemblies.[246] Non-violent forms of civil disobedience (e.g. sit-ins or blockades) are peaceful assemblies as long as participants do not use force or exercise active opposition.[247] Loud, boisterous or rowdy assemblies are also peaceful.[248] 'Violence' in the context of ICCPR Article 21 typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to

[241] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [24].
[242] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 614.
[243] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 614.
[244] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 162.
[245] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 616; Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 162.
[246] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 599-600.
[247] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 600.
[248] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 600.

property.[249] Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to 'violence'.[250]

There is said to be no clear dividing line between what is deemed to be peaceful and what is not. However, a presumption exists in favour of considering assemblies peaceful.[251] Further the UN Human Rights Committee has stated that simply not meeting the domestic legal requirements does not mean participants are not to be afforded the protection of the right.[252] The question of whether or not an assembly is peaceful must be answered with reference to violence that originates from the participants, on a case-by-case basis. However, peaceful assemblies can sometimes be used to pursue contentious ideas or goals. Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy.[253]

At international law, an assembly does not lose its peaceful nature because of the responses by police or opponents. The Human Rights Committee has stated 'an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralise such violence is not sufficient to ban a demonstration'.[254] Under Victorian law, however, actual or threatened violence will be a breach of peace.[255] At international law, the justification for limiting the freedom of association must be based on real and not hypothetical concerns.

Policy triggers

- A policy or statutory provision that 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, meeting, picket or public event can take place).
- A policy or statutory provision that discourages involvement in protest activities through surveillance, recording, or monitoring.

---

[249] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [17].
[250] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [15].
[251] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [17].
[252] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [16]
[253] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [7].
[254] Human Rights Committee, *General Comment No 37: right of peaceful assembly (Article 21 of the International Covenant on Civil and Political Rights),* UN Doc CCPR/C/GC/37 (23 July 2020) [7].
[255] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 159; *Edwards v Raabe; Moore v Raabe* (2000) 117 A Crim R 191; [2000] VSC 471 [25]; *Nicholson v Avon* [1991] 1 VR 212, 221.

- A policy or statutory provision that creates sanctions for participating in peaceful assemblies (including criminal and administrative penalties).
- A policy or statutory provision that compels a person to belong to a professional body or workplace association (note, however, that a requirement for compulsory membership of a professional body has not generally limited this right, particularly if the association is responsible for professional regulation).
- A policy or statutory provision that treats people differently on the basis of their membership of a group or association.
- A policy or statutory provision that prohibits membership in a group or association with certain persons (for example, in a criminal justice context).

Case examples

Wallace v Tannock & Anor [2023] QSC 122

- Mr Wallace was due to be released from custody after serving sentences for multiple rapes and attempted murder. Prior to his release, Mr Wallace was assessed as representing a risk of future sexual reoffending. As a result, a supervision order was granted under the *Dangerous Prisoners (Sexual Offenders) Act 2003* which would be enforced by Queensland Corrective Services (QCS).
- Following his release, QCS staff became concerned about Mr Wallace's behaviour, including an apparent sexual preoccupation with the female NDIS workers who supported him in his home.
- A direction was issued by QCS which only permitted Mr Wallace to have male NDIS support workers and to obtain approval to have any visitors, including family members, at his home. Mr Wallace argued that these conditions were not compatible with his human rights.
- The Supreme Court concluded that Mr Wallace's right to freedom of association under section 22(2) had been engaged and limited.[256] It found that the direction to only permit male NDIS workers was justified to mitigate the damage to society that could arise from Mr Wallace's offending against a female support worker.[257]
- However, the court found that the limitation on the right to freedom of association was not justified with respect to requiring approval to have visitors in his home. There was no rational basis for concerns that Mr Wallace would offend against male visitors, including those from his own family. The respondent failed to show that the limitation on Mr Wallace's rights would achieve the purpose of the direction, which was to ensure community safety.[258]

[256] *Wallace v Tannock & Anor* [2023] QSC 122 [45]
[257] *Wallace v Tannock & Anor* [2023] QSC 122 [46]
[258] *Wallace v Tannock & Anor* [2023] QSC 122 [48]-[56]

Appleby v United Kingdom [2003] VI Eur Court Hr 185

- Appleby and others claimed they were prevented from meeting in the town centre, a privately owned shopping mall, to impart information and ideas about proposed local development plans.
- The court found that prohibiting a group from campaigning in a private shopping centre did not violate the freedom of assembly because the group had other means available to them to exercise their rights.

UN Human Rights Committee, *Decision: Communication No 397/1990*, 45th sess, UN Doc CCPR/C/45/D/397/1990 (22 July 1992) (PS v Denmark)

- PS separated from his wife and custody of their son was awarded to the mother. Part of the access arrangements included terms that PS would refrain from teaching his son the tenets of his religion and taking him to religious rallies, gatherings, meetings, missions, or similar activities. Appeals confirmed that these arrangements were in the best interests of the child.
- PS eventually applied to the Human Rights Committee, and part of his complaint was that the restrictions violated his (and his son's) right to peaceful assembly and freedom of association.
- The Human Rights Committee found that the facts submitted by PS did not raise issues under articles 21 and 22 – the restrictions did not fall within the scope of the rights.

UN Human Rights Committee, *Decision: Communication No 1157/2003*, UN Doc CCPR/C/87/D/1157/2003 (10 August 2006) ('*Coleman v Australia*')

- Mr Coleman stood on the edge of a fountain to deliver a public address at the Flinders Pedestrian Mall in Townsville. He did not have a permit and was convicted and given a fine. The District Court dismissed his appeal. He delivered another speech at the same pedestrian mall and was arrested for not paying his previous fine, then held in custody for five days. He was also charged with obstructing police. The conviction was upheld through to the Court of Appeal, where his appeal was dismissed. The High Court also denied his application for leave to appeal.
- Mr Coleman went to the Human Rights Committee, claiming that his right to freedom of assembly had been violated.
- The Committee found that while Mr Coleman's freedom of expression had been disproportionately restricted, he was unable to show that an 'assembly' existed – on the evidence before the Committee, Mr Coleman was acting alone. Therefore, the right to freedom of assembly was not engaged.[259]

[259] UN Human Rights Committee, *Decision: Communication No 1157/2003*, UN Doc CCPR/C/87/D/1157/2003 (10 August 2006) [6.4] ('*Coleman v Australia*').

Caripis v Victoria Police [2012] VCAT 1472[260]

- Ms Caripis attended a climate change protest where Victoria Police filmed and took photographs of the event and retained the images. She claimed that retaining video and photographs breached her right to peaceful assembly. As she had been made more self-conscious by knowing that the police retained images of her, and police surveillance had a chilling effect on the exercise of her rights.
- VCAT found that the knowledge of the footage did not prevent her from participating in similar protest events, and 'was not persuaded that Ms Caripis's increased self-consciousness was like that chilling effect.'[261] In her finding, the Member stated that 'it was not clear to me that the retention of images of her has changed the way she exercises her rights'.[262]
- On this basis, VCAT ultimately came to the conclusion that the complainant's right to peaceful assembly was not engaged, or interfered with, by the retention of protest footage by Victoria Police.[263]

Attorney-General v Sri [2020] QSC 246

- The Attorney-General sought a second injunction in the Queensland Supreme Court to restrain protest organisers from attending and encouraging others to attend a planned sit-in protest on the Storey Bridge.
- The Court found that the orders sought by the Attorney-General were a legitimate and proportionate limitation on the right to peaceful assembly because the threatened obstruction of traffic was a significant burden upon the broader community's right to movement.[264]
- The Court therefore granted the injunctions sought by the Attorney-General to restrain the respondents from attending or encouraging others to attend the sit-in protest, given the urgent circumstances to protect a public benefit.[265]

[260] This case is also considered under the right to privacy and reputation (section 25).
[261] *Caripis v Victoria Police* [2012] VCAT 1472 [74].
[262] *Caripis v Victoria Police* [2012] VCAT 1472 [74].
[263] *Caripis v Victoria Police* [2012] VCAT 1472 [100].
[264] *Attorney-General v Sri* [2020] QSC 246 [43].
[265] *Attorney-General v Sri* [2020] QSC 246 [43].

Taking part in public life

Human Rights Act 2019 (Qld)

Section 23 Taking part in public life

(1) Every person in Queensland 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 local government elections that guarantee the free expression of the will of the electors; and

(b) to have access, on general terms of equality, to the public service and to public office.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 25
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 18
ACT	***Human Rights Act 2004***	Section 17

What does the right protect?

Section 23 protects the right of all people to use their voice and contribute to the public life of the **state**. It protects political rights, allowing individuals to actively participate in the political decision-making process.[266] The conduct of public affairs is a broad concept:

> *which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels*.[267]

Participation in the conduct of public affairs may be direct or through freely chosen representatives. Direct involvement may include voting; standing for public office; being considered for employment in the public service; being elected to the legislative assembly;

[266] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 699.

[267] Human Rights Committee, *General Comment No 25: Participation in Public Affairs and the Right to Vote (Article 25 of the International Covenant on Civil and Political Rights),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [5].

and participating in public debate.[268] The Human Rights Committee state that 'article 25 [on which HR Act section 23 is based] lies at the core of democratic government based on the consent of the people…'[269] Any conditions on exercising this right should be based on objective and reasonable criteria.[270]

The right to vote and be elected is a key aspect of the right to take part in public life: it is integral to our system of representative government.[271] People must be elected through lawfully established voting processes, and elected representatives must actually exercise governmental power and be electorally accountable. The Human Rights Committee state that an independent electoral authority should be established to ensure that the electoral process is fair, impartial, and lawful, and to scrutinise voting and counting.[272]

The Human Rights Committee has said that positive measures should be taken to overcome specific difficulties people face in voting, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively.[273] They also suggest that information and materials about voting should be available in minority languages, and should use methods such as photographs and symbols to ensure that voters have adequate information to make a choice. 'Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.'[274]

The right to access the public service provides a right of access, on general terms of equality, to positions in the public service and in public office. The term 'public service' is not defined in the HR Act and has yet to be considered in a human rights context in Australia. At international law the term is said to include the judiciary, legislature, and the entire executive. However, the definition of public service in the *Public Service Act 2008* is much narrower than international law. Whether or not the broader interpretation is to be preferred, the right does not guarantee a job with the public service, but only the opportunity to secure such a job subject to any legitimate qualifications.[275] Criteria and processes for appointment, promotion, suspension and dismissal within the public service must be objective, reasonable, and non-discriminatory.[276]

---

[268] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 172.
[269] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [1].
[270] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [4].
[271] *Roach v Electoral Commissioner* (2007) 233 CLR 162; [2007] HCA 43.
[272] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [20].
[273] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [12].
[274] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [12].
[275] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 183.
[276] See also the right to recognition and equality of before the law and the general right to equality (section 15).

The Human Rights Committee has also stated that:

> *…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.*[277]

Relevant resources

- **CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service**

Internal limitations

The scope of this right is limited by an internal qualification: section 23(2) is restricted to 'eligible' people. 'Eligible' is not defined by the HR Act, and its meaning will be determined by other Queensland legislation. This qualification recognises that there may be exceptions to universal suffrage, such as children, certain prisoners, and non-Queensland residents. The internal qualification means that the right will not be **engaged** if the individual is not 'eligible'.

Policy triggers

- A policy or statutory provision that limits the ability of persons to take part in elections.
- A policy or statutory provision that imposes eligibility requirements for the public service and public office.
- A policy or statutory provision that sets processes and procedures for voting.

Case examples

Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95

- A judicial review was sought by three groups over the Deputy Premier's decision to 'call-in' a development application made by Wanless Recycling Park to establish a resource recovery and landfill facility near Ipswich.
- The Deputy Premier has the power to call-in a particular development where a 'state interest' is involved, meaning that the development is removed from the conventional system whereby developments are approved or refused by local councils and are then subject to Planning and Environment Court Appeals. Instead,

[277] Human Rights Committee, *General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote),* 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [23].

the development is placed within the jurisdiction of the Minister who has the power to assess and decide the application.

- The applicants claimed that the Deputy Premier's call-in decision had been made incompatibly with their rights, including to participate in public life without discrimination because Wanless was able to gain more favourable access to the Deputy Premier and public officials through the engagement of lobbyists.[278]
- The Supreme Court found that the applicants were able to make representations to the Deputy Premier as part of the call-in process, which represented an opportunity to participate in public affairs.[279] It also found that no lobbying took place on behalf of Wanless and that, if it had, this enhancement of Wanless' prospects would not in itself have limited the applicants' opportunity to participate in the conduct of public affairs, stating 'The human right is a right to participate. It is not a right to, or a guarantee of, an equal voice or equality of bargaining power'.[280]
- With specific regard to section 23(2)(b), the court stated that this addresses the right to join the public service, not to communicate with a public servant.[281]
- When considering the enjoyment of section 23 rights 'without discrimination', the court noted that the definition in the HR Act included direct and indirect discrimination within the meaning of the *Anti-Discrimination Act 1991*, but that the definition should be read more widely as allowing for analogous grounds of discrimination.[282] However, although the applicants argued that there were differential opportunities enjoyed in the representation process, based on political association, there was no evidence to support this.[283]
- Overall, the Deputy Premier's actions were not found to have limited human rights and, if they had, any limitation would have been reasonable and justified.[284]

Slattery v Manningham CC (Human Rights) [2013] VCAT 1869

- Mr Slattery lived in the City of Manningham. He was diagnosed with bipolar disorder, attention deficit hyperactive disorder, and post-traumatic stress disorder in 1996. In 2001, he had a stroke that caused an acquired brain injury. In 2004, he was diagnosed with a hearing impairment.
- From 1998, Mr Slattery made thousands of written and verbal complaints to Manningham City Council. In 2009, the Council banned Mr Slattery from going to any building that was owned, occupied, or managed by the Council. He had to communicate with the Council in writing. He asked the Council to review the ban in 2012, but they refused.
- VCAT found that the ban engaged Mr Slattery's right to take part in public life, as protected by the Victorian Charter.

[278] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [314]
[279] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [312]-[313]
[280] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [314]-[315]
[281] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [324]
[282] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [316]-[318]
[283] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [322]
[284] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [347]

- The right was unjustifiably limited because:
  - it was imposed because of conduct resulting from Mr Slattery's disability
  - his rights were limited on a discriminatory basis
  - there were less restrictive ways available to achieve the Council's purpose – they could have acted differently.

Richardson v City of Casey Council (Human Rights) [2014] VCAT 1294

- Mr Richardson was banned from asking questions at the City of Casey Council meetings following a Council resolution on 20 September 2011 to amend the Public Question Time Policy to specify that questions from Mr Richardson must not be dealt with.[285] This was due to Mr Richardson repeatedly asking questions in contravention of the policy.
- In this case, VCAT found that the limit to Mr Richardson's right to take part in public life was justifiable, because:
  - the only practical effect of the ban was that Mr Richardson wasn't expressly identified at meetings or in minutes as posing the questions
  - Mr Richardson could send emails to the Council, attend and participate in public meetings and gatherings (including Council meetings), make submissions, have letters published in the newspaper, and make public statements
  - Mr Richardson was still able to ask two questions per Council meeting through other people
  - Mr Richardson was taking up a significant amount of Council resources; his questions were often repetitive and had already been answered; he was personally abusive and at time threatening to councillors and staff; his communications contained arguable defamatory statements.

Department of Human Services & Department of Health (Anti-Discrimination Exemption) [2010] VCAT 1116

- The Departments of Human Services and Health applied for an exemption under Victoria's anti-discrimination law to allow them to employ up to 118 positions designated for Indigenous Victorians. This engaged the right to take part in public life.
- McKenzie DP considered that if the right did apply, under a proportionality analysis the limitation was proportionate, because:
  - it did not go further than to redress clear disadvantage, in part caused by discrimination – the purpose of the limitation
  - the number of positions was 'a small fraction of the total public sector workforce'
  - there was no less restrictive way of achieving the same purpose.

[285] *Richardson v City of Casey Council* (Human Rights) [2014] VCAT 1294 [51]-[55].

R v Chaarani (Ruling No 1) [2018] VSC 387

- Abdullah Chaarani had been charged with conspiring to do acts in preparation for, or planning, a terrorist act. Mr Chaarani's wife, Aisha Al Qattan, wanted to wear a nikab (niqab) while sitting in the public gallery in court during the trial. The nikab would completely cover her head and face except for an opening for her eyes.
- The court had previously ordered that any spectators in the public gallery must have their faces uncovered for security reasons. Mr Chaarani and his wife asked for a variation of that order, arguing that it breached Al Qattan's right to participate in public life.
- It was submitted that wearing the nikab is a fundamental way in which Al Qattan observes her faith and preventing her from spectating in the public gallery on the basis of her religious dress limited her right to participate in public life without discrimination.[286] Chaarani also submitted that Al Qattan was permitted to wear the nikab during committal proceedings without exception and that the court should accommodate religious dress unless 'overriding considerations relating to freedom and democracy, or the interests of justice prevail.'
- After balancing the rights of Al Qattan and the need to maintain court security, it was found that ordering spectators to have their faces uncovered was a reasonable limitation on the right to participate in public life.[287]

[286] *R v Chaarani (Ruling No 1)* [2018] VSC 387 [3].
[287] *R v Chaarani (Ruling No 1)* [2018] VSC 387 [26]-[27].

Property rights

Human Rights Act 2019 (Qld)

Section 24 Property rights

(1) All persons have the right to own property alone or in association with others.
(2) A person must not be arbitrarily deprived of the person's property.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**Universal Declaration of Human Rights**	Article 17
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 20
ACT	***Human Rights Act 2004***	No equivalent

What does the right protect?

The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom.

This right protects the right of all people to own property (alone or with others) and protects from having property taken arbitrarily. Property includes real and personal property (e.g. land, chattels, money), including contractual rights, leases, shares, patents and debts. Property may include statutory rights and non-traditional or informal rights (e.g. licence to enter or occupy land and right to enjoy uninterrupted possession of land), and other economic interests.[288] In *PJB v Melbourne Health (Patrick's Case)*, Bell J stated that on first principles, the terms 'property' and 'deprived' 'would be interpreted liberally and beneficially to encompass economic interests and deprivation in a broad sense'.[289]

The right includes the protection from the deprivation of property. The term 'deprived' is not defined by the HR Act. However, deprivation in this sense is considered to include the substantial restriction on a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).[290]

[288] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 183.
[289] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [87].
[290] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 184.

The right protects against both formal and de facto expropriation of property, including substantial restriction on a person's use or enjoyment of their property.[291] This position was stated as follows by the ECtHR:

> *in determining whether there has been a deprivation of possessions, it is necessary not only to consider whether there has been a formal taking or expropriation of property, but also to look beyond appearances and investigate the realities of the situation complained of… it has to be ascertained whether that situation amounted to a de facto expropriation*.[292]

The right may place **positive obligations** on public entities to take steps to prevent deprivation of property.[293]

The right to property may extend beyond existing property rights to a legitimate expectation, but it does not protect a mere hope of obtaining property to which the person is not yet entitled,[294] nor does it protect a right to acquire property.[295]

There is no right to compensation for a person deprived of their property.[296]

Relevant resources

- **European Court of Human Rights *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property* (30 April 2020)**

Internal limitations

The scope of this right is limited by an internal limitation: a person has the right to not be ***arbitrarily*** deprived of their property. This can be understood as an internal limitation,[297]

[291] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 183-184. See *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327; *Zwierzynski v Poland* [2001] VI Eur Court HR 183, 219 [69]; *Sporrong and Lonnroth v Sweden* (1982) 52 Eur Court HR (Ser A) 24-35 [63]; *Brumarescu v Romania* [2001] I Eur Court HR 157.

[292] *Zwierzynski v Poland* [2001] VI Eur Court HR 183, 219 [69].

[293] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 184.

[294] *Prince Hans-Adam II of Liechtenstein v Germany* (European Court of Human Rights, Grand Chamber, Application No 42527/98, 12 July 2001) [83]; *Von Maltzan v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 71916/01, 71917/01 and 10260/02, 2 March 2005) [74(c)]; *De Napoles Pacheco v Belgium* (1978) 15 Eur Comm HR 143, 159.

[295] *Rasmussen v Poland* (European Court of Human Rights, Fourth Section, Application No 38886/05, 28 April 2009) [71].

[296] Explanatory Notes, Human Rights Bill 2018 (Qld) 22. See also *Halwood Corp (in liq) v Roads Corp* [2008] VSC 28.

[297] The question of whether arbitrariness is an internal qualifier (whether the right is limited) or an internal limitation (whether a limitation is justifiable) is unsettled in other jurisdictions and is yet to be addressed in a Queensland court. However, relevant case law dealing with arbitrariness in the Victorian Charter supports this approach: *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [109]-[110]; *PBU V Mental Health Tribunal* (2018) 56 VR 141, 179 [124]; *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [31]-[32].

which means that it is relevant to whether a limitation on a right can be justified. Case law has defined arbitrariness in a human rights context as:

- conduct that is capricious, unpredictable, or unjust
- interferences with rights that are unreasonable (in the sense of not being proportionate to the aim).[298]

Limitations on section 24(2) property rights must be proportionate and not capricious, unpredictable, unjust and unreasonable.

Policy triggers

- A policy or statutory provision that provides for the acquisition, seizure or forfeiture of a person's property under civil or criminal law (for example, confiscations proceedings).
- A policy or statutory provision that gives a public entity a right of access to private property.
- A policy or statutory provision that implements government control over its own property (for example, resumption of land).
- A regulation that increases fees or fines under a legislative regime.

Case examples

Victoria is the only other Australian jurisdiction to protect property rights, but the right is framed differently to the right protected in Queensland legislation.

Case law from international jurisdictions should also be read with care, as property rights may be drafted and interpreted differently in other jurisdictions.

Queensland College of Teachers v Teacher MXQ [2025] QCAT 60

- The respondent was a teacher who had his teacher registration suspended by the Queensland College of Teachers after engaging in a physical altercation with a student.
- The tribunal noted, while the right to property under section 24 does not extend to future acquisitions or future income, there is authority which demonstrates that interferences with licenses or permits to operate a business or carry out regulated activities may breach the license-holder's property rights 'which are essentially the economic interests connected with his chosen profession'.[299]
- Similarly, while there is no suggestion that the opportunity to earn an income from being authorised to teach in schools is a protected property right, 'it is at least

[298] *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].
[299] *Queensland College of Teachers v Teacher MXQ* [2025] QCAT 60 [32]-[33]

arguable that the loss of his teacher registration in this case could be regarded as affecting the applicant's protected property rights'.[300]

- Ultimately, the tribunal was not required to decide the question of whether the respondent's human rights had been violated.

Vanilla Rentals v Tenant [2023] QCAT 519[301]

- The dispute before QCAT involved the termination of the respondent's tenancy agreement by the applicant. The respondent contended that a number of her rights had been engaged by the dispute and the hearing process, including the right to property under section 24.
- The tribunal found that a residential tenancy agreement amounted to a legal interest in real property, and was therefore 'property' for the purpose of section 24. It also found that until the tenancy was terminated, which would only occur when the respondent had left the premises or the tribunal made a termination order, the respondent 'owned' property.[302]
- In assessing whether the tribunal issuing a termination order would constitute an arbitrary deprivation of property, the tribunal concluded that the issue of a termination of a tenancy and the issue of a warrant of possession is not arbitrary and therefore the right to property was not engaged.[303]

Burleigh Town Village Pty Ltd (3) [2022] QCAT 285

- The applicant, which owns a manufactured home park, sought an exemption from certain provisions of the *Anti-Discrimination Act 1991* (AD Act) on the basis that the purpose of the park is the provision of special accommodation for persons aged 50 or older. Previous exemptions had been granted to allow the restriction of home ownership to over 50s. However, these had been granted prior to the commencement of the HR Act, which placed new obligations on the tribunal's decision-making and interpretation of the AD Act.
- In reaching its decision, the tribunal considered the limitations that granting the exemption would have on the rights to recognition and equality before the law under section 15, freedom of association under section 22, and property under section 24.
- With regards to the rights of people younger than 50 to own property, the tribunal was not satisfied that the proposed age limit would not be a legitimate or proportionate limitation on the right to own property.[304]
- Instead, it was concerned with the rights of existing residents to sell their property to whomever they chose.[305] Section 24(2) of the HR Act protects persons from the

[300] *Queensland College of Teachers v Teacher MXQ* [2025] QCAT 60 [35]
[301] This matter is also considered above under the right to protection from torture and cruel, inhuman or degrading treatment (section 17).
[302] *Vanilla Rentals v Tenant* [2023] QCAT 519 [55]
[303] *Vanilla Rentals v Tenant* [2023] QCAT 519 [56]-[60]
[304] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [135]
[305] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [136]

arbitrary deprivation of their property which, the tribunal noted, includes preventing a person from exercising their property rights in a way that is 'practical and effective'.[306] It concluded that the protections of section 24(2) included the right to not be arbitrarily deprived of the true value or benefit of a person's property, and that granting the exemption would allow the applicant to prevent the sale of a property to a person who might be prepared to pay the proper market value, on the basis of their age.[307] As a result, it did not accept that the limitation on the property rights of residents was proportionate to the stated objective of providing affordable housing in a community environment for older people.[308]

- Alongside a similar conclusion that the exemption would impose a limitation on the right to equality that was not proportionate,[309] the tribunal refused the application.

PJB v Melbourne Health (Patrick's Case) (2011) 39 VR 373; [2011] VSC 327

- Patrick had a mental illness and had been an involuntary patient in a hospital for over ten years. He owned a house and wanted to live independently in the community. The hospital felt this would lead to a deterioration in his physical and mental health and applied to have an administrator appointed over his estate with a view to selling his house.
- The appointment of an administrator engaged the property rights protected by section 20 of the Victorian Charter. Bell J stated that the decision

> *vested complete and exclusive management and control of his property in the administrator, now and for the future, including the power to sell it in Patrick's name. Appointing the administrator took that management and control, and that power of sale, away from Patrick and transferred to the administrator for the duration of the order. In my view, that was a de facto deprivation of property* .[310]

- Furthermore, Bell J found that VCAT was a **public entity** when deciding to appoint an administrator and was therefore obligated under the Charter to act compatibly with human rights.[311] However, it was found that the appointment was not reasonable or demonstrably justifiable, as appointing an unlimited administrator was 'virtually the most rather than the least restrictive option which was reasonably available' to achieve the generalised purpose of improving Patrick's medical treatment and long-term accommodation options.[312] On this basis, the appointment was incompatible with human rights and therefore unlawful, resulting in Bell J setting aside Melbourne Health's application to VCAT for the order of appointing an administrator in respect of Patrick's estate.[313]

---

[306] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [138]
[307] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [151]
[308] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [157]
[309] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [126]
[310] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [92].
[311] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [370].
[312] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [371]-[373].
[313] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [375].

James and Others v UK (1986) 8 Eur Court HR (Ser A) 123

- The applicants in this matter were trustees of a multi-property estate passed under the will of Hugh Grosvenor, 2nd Duke of Westminster. They argued they were deprived of their reversionary ownership of approximately 250 residential properties, in breach of their right to protection of property under Article 1 of Protocol No. 1 of the ECHR, due to the tenants exercising their statutory right under the *Leasehold Reform Act 1967* (LR Act) to buy outright their leasehold property and convert it to freehold.
- The LR Act enabled leasehold residential properties to be converted to freeholds without objection if the occupiers followed the prescribed procedure. The purpose of this was to compensate lessees for expensive property loss or the cost of lease renewal that was experienced by each lessee over a long period.
- Article 1 of Protocol No. 1 of the ECHR provides that persons should not be deprived from their peaceful enjoyment of their possessions except in the public interest and subject to conditions provided for by law. Accordingly, the key issue of the ECtHR to consider was whether the trustees' deprivation of property was in the public interest.
- The ECtHR acknowledged that, ordinarily, the 'deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be in "the public interest."'[314] However, the ECtHR found that 'the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.'[315] Further, it was held that 'the taking of property effected in pursuance of legitimate social, economic or other policies may be in the public interest, even if the community at large has no direct use or enjoyment of the property taken.'[316]
- Further, the ECtHR found that the LR Act's limitation on the trustee's right to property was in the public interest because it was intended to reform existing law that was said to be 'inequitable to the leaseholder' and '[e]liminating what are judged to be social injustices is an example of the functions of a democratic legislature.'[317] Consequently, it was determined that the limitation was legitimate and proportionate because:

  > *[t]he margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the state or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one.*[318]

[314] *James and Others v UK* (1984) 8 Eur Court HR 123 [40].
[315] *James and Others v UK* (1984) 8 Eur Court HR 123 [40].
[316] *James and Others v UK* (1984) 8 Eur Court HR 123 [45].
[317] *James and Others v UK* (1984) 8 Eur Court HR 123 [47].
[318] *James and Others v UK* (1984) 8 Eur Court HR 123 [47].

Owners Corporation No 1 SP37133 v Jand Investments Pty Ltd (Owners Corporation) [2012] VCAT 1164

- This matter concerns the use of a central area shared between three lot owners for the purpose of parking, deliveries, customers, and tradespeople. Jand Investments was using the central area to park cars once the warehouse of his car servicing business was full, obstructing the area for use by the other lot owners. After complaining to the Owners Corporation without reaching resolution, the complaint was taken to VCAT to make a determination on the parking issue and to consider whether the right to property under section 20 of the Charter applied to this proceeding.
- In considering whether the right to property was engaged, VCAT cited the District Court of Queensland case *Independent Finance Group Pty Ltd v Mytan Pty Ltd* (2001) QCA in deciding that the right for a lot owner to use common property equally with other lot owners, although a valuable right, 'is not a right of property'.[319]
- Accordingly, there was found to be no contravention of the Victorian Charter and VCAT ultimately decided there was no breach of the Owners Corporation's rules. Each lot owner had not been allocated a particular parking space, any attempt to reserve spaces would be in breach of the rules and a request to implement no parking in the central area was refused.

[319] *Owners Corporation No 1 SP37133 v Jand Investments Pty Ltd (Owners Corporation)* [2012] VCAT 1164 [16]; *Independent Finance Group Pty Ltd v Mytan Pty Ltd* (2001) QCA 306.

Privacy and reputation

Human Rights Act 2019 (Qld)

Section 25 Privacy and reputation

A person has the right –

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 17
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 13
ACT	***Human Rights Act 2004***	Section 12

What does the right protect?

The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy manifests the underlying value of human beings as autonomous individuals with power over their actions.[320]

The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their:

- physical and mental integrity
- freedom of thought and conscience
- legal personality
- sexuality
- family and home
- individual identity (including appearance, clothing and gender).

The task of identifying a person's home is to be approached in a reasonable and practical way,[321] relying on a person demonstrating 'sufficient and continuous links with a place'.[322]

[320] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 459.

[321] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 119.

[322] *Director of Housing v Sudi* [2010] VCAT 328 [32]-[34].

The term 'family' recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ.

Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation. The right to privacy imposes a **positive obligation** on states to 'adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.'[323] Further, the Human Rights Committee has stated that 'this right is required to be guaranteed against all such interferences and attacks whether they emanate from state authorities or from natural or legal persons'[324]

Section 25(b) provides that a person has a right not to have their reputation unlawfully attacked. This right has not received a lot of consideration by other Australian human rights jurisdictions, including its interaction with Australian defamation law.

Relevant resources

- **CCPR General Comment No. 16: Article 17 (Right to Privacy), The right to respect of privacy, family, home and correspondence, and protection of honour and reputation**

Internal limitations

The scope of this right is limited by an internal limitation: a person has the right not to have their privacy, family, home or correspondence ***unlawfully*** or ***arbitrarily*** interfered with. This can be understood an internal limitation,[325] which means that it is relevant to whether a limitation on a right can be justified. Case law has defined **arbitrariness** in a human rights context as

- conduct that is capricious, unpredictable, or unjust
- interferences with rights that are unreasonable (in the sense of not being proportionate to the aim).[326]

[323] Human Rights Committee, *General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17 of the International Covenant on Civil and Political Rights)*, UNHRC 32nd sess (8 April 1988) [1].
[324] Human Rights Committee, *General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (*Article 17 of the International Covenant on Civil and Political Rights*), UNHRC 32nd sess (8 April 1988) [1].
[325] The question of whether arbitrariness is an internal qualifier (whether the right is limited) or an internal limitation (whether a limitation is justifiable) is unsettled in other jurisdictions and is yet to be addressed in a Queensland court. However, relevant case law dealing with arbitrariness in the Victorian Charter supports this approach: *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [109]-[110]; *PBU V Mental Health Tribunal* (2018) 56 VR 141, 179 [124]; *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [31]-[32].
[326] *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].

Limitations on section 25 privacy rights must be proportionate and not capricious, unpredictable, unjust and unreasonable. 'Arbitrary interference' can also extend to interference provided for under the law.[327]

Given that the human rights meaning of arbitrary includes a consideration of proportionality, it is therefore necessary to step through the questions in section 13(2) of the HR Act in order to determine whether a measure is arbitrary.

The reference to lawfulness in the right to privacy in section 25(a) and 25(b) has been interpreted in the context of the ICCPR to mean that where an interference with privacy is provided for by law, it will not be 'unlawful'.[328]

Policy triggers

- A policy or statutory provision that involves surveillance of persons for any purpose (for example, CCTV).
- A policy or statutory provision that deals with collection and/or publication of personal information (for example, results of surveillance, medical tests, electoral roll).
- A policy or statutory provision that regulates a person's name, private sexual behaviour, sexual orientation or gender identity.
- A policy or statutory provision that provides or amends requirements relating to the storage, security, retention and access to personal information.
- A policy or statutory provision that requires mandatory reporting of injuries or illnesses.
- A policy or statutory provision that deals with interfering with or inspecting mail and other communications, or preventing or monitoring correspondence between categories of people.
- A policy or statutory provision that provides for mandatory disclosure or reporting of information (including disclosure of convictions).
- A policy or statutory provision that establishes powers of entry/search (including personally invasive powers).
- A policy or statutory provision that provides for compulsory physical examination or intervention (for example, DNA, blood, breath or urine testing).
- A policy or statutory provision that regulates tenancies or evictions.
- A policy or statutory provision that provides for the removal of children from a family unit or a family intervention order.

[327] Human Rights Committee, *General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17 of the International Covenant on Civil and Political Rights*), UNHRC, 32nd sess (8 April 1988) [4].
[328] UN Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (5 November 1992) [8.3] ('*Toonen v Australia*').

Case examples

R v Dobrenov [2023] QDC 258

- Following a road traffic collision between the applicant and Mr Dobrenov, police seized his vehicle and retrieved from it a USB stick containing dashcam footage and pre-crash data from the Airbag Control Module, which included vehicle speed, engine speed, and accelerator pedal percentage.
- Mr Dobrenov contended that the police acted incompatibly with his right to privacy under section 25 by seizing the USB stick and Airbag Control Module data.
- The court relied on extensive jurisprudence from Canada which considers the question of whether data stored in a car is private information. It noted that data from a car, which records the last five seconds of a collision, is different from personal information stored on a phone.[329] It also commented that driving on a public road is a highly regulated activity which is open to public view, and that any witnesses to the collision would have seen the information recorded by the Airbag Control Module.[330]
- The court concluded that, having regard to the fact that the Airbag Control Module contained up to five seconds of pre-crash data and the dashcam footage related to the collision, Mr Dobrenov did not have a reasonable expectation of privacy in the data.[331]

BJ [2022] QCAT 326[332]

- CH was employed by a provider of services and support to BJ and had filed applications for the appointment of a guardian and an administrator for BJ. Following the dismissal of the applications by the Queensland Civil and Administrative Tribunal, BJ filed an application seeking the tribunal's authorisation to share information about the proceedings with the Disability Royal Commission and a news media company.
- CH sought to have her identity withheld from any authorised publication on the basis that she made the application as part of her employment and that it was likely that a reputationally damaging account would be presented by BJ.
- The tribunal considered three rights which could be affected by the decision, including the right to privacy and reputation under section 25 and the right to freedom of expression under section 21.[333] It considered BJ's right to freedom of expression and ultimately concluded that the public interest and BJ's own interests outweighed the potential adverse impact on CH's right to privacy and reputation.[334]

[329] *R v Dobrenov* [2023] QDC 258 [63]
[330] *R v Dobrenov* [2023] QDC 258 [66]
[331] *R v Dobrenov* [2023] QDC 258 [65]
[332] This matter is also considered above under the right to freedom of expression (section 21).
[333] *BJ* [2022] QCAT 326 [19]
[334] *BJ* [2022] QCAT 326 [37]

BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs [2023] QSC 266

- BZN was a social worker accused of sexually assaulting a child while employed in a residential care facility. The Department of Children, Youth Justice and Multicultural Affairs conducted an investigation which found the alleged harm to be substantiated.
- During its investigation, the respondent accessed personal information about BZN'S background and employment, including his child protection history in relation to physical abuse perpetrated by his father.
- BZN challenged this decision in court, arguing that, among other things, the decision was unlawful because it was incompatible with his human rights and/or because the respondent had not given proper consideration to his right to privacy and reputation under section 25.
- In reaching its conclusion the court noted that the right to privacy is not absolute and includes freedom from arbitrary interference which, it stated, 'extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate'. Further, 'arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.[335]
- The court also observed that the right to privacy is 'a broad right, with many dimensions' and that it 'includes informational privacy but also extends to physical and mental integrity'.[336]
- The court found that BZN's right to privacy was engaged because the respondent had accessed confidential or private information about him and because the investigation and assessment process had compromised his mental health which represented an interference with his mental integrity.[337]
- However, the court concluded that the interference with BZN's right to privacy was not arbitrary in the circumstances and, as a result, his rights were not limited.[338]

Re Beth [2013] VSC 189

- Beth (a pseudonym), a 16-year-old girl, was removed from her parents' care by Queensland authorities as an infant and subsequently placed into the care of the Secretary of the Department of Human Services (Victoria) ('Secretary'). The Secretary was Beth's guardian from the age of four pursuant to the *Children, Youth and Families Act 2005* (Vic) ('CYF Act'). The intellectual difficulties suffered by Beth, as well as a

[335] *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [230]
[336] *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [231]
[337] *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [243]-[244]
[338] *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [247]-[248]

dysfunctional family background involving significant sexual abuse and violence, severely tested the Secretary's capacity to adequately care for her. Further, the accommodation options available to Beth through the CYF Act were found to be 'materially inadequate or inappropriate for a variety of reasons.'[339] The Secretary therefore applied to the court seeking restrictive intervention orders for the appropriate accommodation, care and monitoring of Beth. This involved authorising the Secretary and those acting under her direction to place Beth in a residential care facility and authorising staff to use reasonably necessary measures, including reasonable use of force and lock up facilities, to care for her.

- In this matter, it was noted that although the orders sought were in Beth's best interests, they involved a substantial restriction on her liberty that would 'subject her to a form of ongoing managed detention'.[340] The court therefore considered whether the restrictive intervention orders that limited Beth's right to privacy (as well as other rights) were justified and the least restrictive means reasonably available to achieve the purpose of adequately caring for and accommodating Beth.
- The court found that the orders authorising the use of restrictive interventions were a reasonable limitation on Beth's right to privacy (as well as other rights) because the orders were limited in duration, provided for progress reports and required independent supervision of the order. In reaching this conclusion, his honour Osborn JA acknowledged that 'the probability is that if the orders are not made Beth will suffer substantial involuntary confinement either within SWS [secure welfare service] or the youth justice system.'[341] The orders sought were therefore granted, subject to appropriate conditions to be agreed by all parties.

DPP V Kaba [2014] VSC 52[342]

- The defendant was stopped by police for a random check of his licence and vehicle registration. There was no suspicion involved in the stop. He exited the car but did not produce his licence and was subsequently detained by police who continued to ask him verbal questions which he refused to answer. The defendant was subsequently charged with using offensive language and assault in the course of his arrest.
- At trial, the Magistrate refused to admit the evidence of the police officer who conducted the random stop and registration check, on the grounds that the stop was unlawful because the *Road Safety Act 1986* (Vic) did not confer any power on police to take such action, and because the stop, and subsequent verbal questioning, had breached the defendant's right to freedom of movement and privacy under the Charter.
- The DPP applied to the Supreme Court for judicial review of the Magistrate's decision to exclude the evidence.

[339] *Re Beth* [2013] VSC 189 [6].
[340] *Re Beth* [2013] VSC 189 [9].
[341] *Re Beth* [2013] VSC 189 [202].
[342] This case is also considered under the right to freedom of movement (section 19).

- On judicial review, the Supreme Court considered that the random stop was lawful under the Road Safety Act, but that the subsequent questioning became coercive and breached the defendant's right to freedom of movement and right to privacy.
- Justice Bell held that, up to a certain point, police questioning does not unlawfully interfere with the rights and freedoms of individuals. Police questioning does unlawfully interfere with these rights and freedoms, however, 'the line of permissible questioning is crossed when the questioning becomes coercive, that is, when the individual is made to feel he or she cannot choose to case co-operating or leave'.[343]
- In drawing the line between voluntary and coerced questioning, Justice Bell stated that courts will consider the duties of the police to protect the community and prevent crime, as well as the imbalance of power between police in uniform and ordinary members of the community.
- The police have ordinary powers to ask questions to prevent crime and protect the community. However, this power is limited to the extent that it does not interfere with individual rights of liberty, privacy and freedom of movement.
- The reasonable person test applies when judging the limit of police interference to these rights; that is, if it can objectively be said that individuals are made to feel that he or she cannot choose to cease co-operating or leave in those circumstances, the police may have breached their rights.
- The original decision was quashed and the proceeding remitted to the Magistrate. The Magistrate then re-considered to admit the evidence, taking into account the finding that the police questioning was in breach of the defendant's rights.

Caripis v Victoria Police (Health and Privacy) [2012] VCAT 1472[344]

- The applicant attended a climate change protest where Victoria Police filmed and took photographs of the event and retained the images and video footage. The applicant appears in four segments of video footage, with her image visible for less than 20 seconds. The footage and seven still photographs were retained in a locked cupboard. No record existed of the identities of the people in the footage or the photographs, not even their names.
- The applicant complained to the Privacy Commissioner – who referred the complaint to VCAT – that the retention of the images and footage was an interference with her right to privacy under the *Information Privacy Act 2000* (Vic) and the Victorian Charter, that the video and photographs interfered with her right to privacy, were no longer required by the Victorian Police and in accordance with the Information Privacy Act, should be destroyed or de-identified.
- Victoria Police submitted that: the photographs and video footage did not reveal personal information nor identify the applicant; the photographs and video footage were still needed by Victoria Police for intelligence, planning and briefing purposes; and the *Public Records Act 1973* (Vic) required retention of the photographs and

[343] *DPP v Kaba* [2014] VSC 52 [459].
[344] This case is also considered under the right to peaceful assembly and freedom of association (section 22).

footages as records 'documenting the planned Police response to events such as demonstrations' for seven years.

- VCAT accepted the arguments of Victoria Police.
- In relation to the Victorian Charter ground, VCAT found that the applicant's right to privacy was not engaged and Victoria Police's retention of footage was not unlawful.[345] This finding was made on the basis that the threat to the applicant's privacy was not of sufficient seriousness and she could not have had a reasonable expectation of privacy regarding the taking, publication and retention of images and footage because: she engaged in a public act with the full knowledge that others may be present, the photographs did not focus on her, she is only identifiable in two brief segments of the video footage, protest organisers and other attendees were also taking/publishing photos from the protest, no other personal data relating to the applicant was collected by Police, etc.

Castles v Secretary to the Department of Justice & Ors [2020] VSC 310[346]

- Ms Castles was undergoing treatment for in vitro fertilisation (IVF) for over a year when she was sentenced to three years imprisonment for social security fraud at the age of 45. Importantly, Ms Castles would become ineligible to continue IVF treatment at Melbourne IVF Clinic (the clinic) from when she turned 46 (prior to her release from prison) however, her requests to leave prison to undergo treatment at the clinic had repeatedly been refused. This refusal was therefore the basis of Ms Castle's application seeking declaratory and injunctive relief to resume treatment while serving her sentence.
- Ms Castles submitted that the Secretary of the Department of Justice was obligated under section 38(1) of the Victorian Charter to act compatibly with, and give proper consideration to, Ms Castles human rights when deciding whether or not to approve the IVF treatment and exercising discretion to issue a permit to enable Ms Castles to undergo treatment. Ms Castles argued that failing or refusing to permit her to undergo IVF treatment arbitrarily interfered with her right to privacy and family under section 13(a) of the Victorian Charter (as well as the right to humane treatment when deprived of liberty), submitting that '[s]he cannot take any steps to manage or improve the way her infertility is affecting her and her family unless the defendants permit her to access IVF treatment.'[347] The defendants however, submitted that this right was not engaged because Ms Castles was essentially seeking to assert a right to found a family and that this right is not recognised in the Charter.
- Emerton J held that the right does not include the right to begin a family. Under the Article 8 of the ECHR, the obligation to respect a person's private and family life has been extended to include respecting their decision to become a genetic parent. However, the Victorian Charter's Explanatory Memorandum clearly states that Parliament did not intend for the protection of families and children provided by the

[345] *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472 [100].
[346] This case is also considered under the right to protection of families and children (section 26) and the right to humane treatment when deprived of liberty (section 30).
[347] *Castles v Secretary to the Department of Justice & Ors* [2020] VSC 310 [46].

Victorian Charter to contain a right to begin a family. Emerton J held that this statement indicated that the Victorian 'Charter rights which might otherwise have encompassed rights to ART (artificial reproductive technology), recognition of legal parentage and adoption should be construed as not encompassing such rights.'[348]

- Ultimately, the Court found that Ms Castles did have the right to continue her IVF treatment, although this was based on a proper construction of a provision in the *Corrections Act 1986* (Vic) and engagement with the right to humane treatment when deprived of liberty, rather than the right not have privacy and/or family unlawfully or arbitrarily interfered with.[349]

McAdam v Victoria University (Anti-Discrimination) [2011] VCAT 1262

- This case provides an example of the type of conduct which will not constitute an attack on a person's reputation, and therefore not come within the right in section 25(b) of the HR Act.
- The applicant was a PhD candidate who argued that her reputation was attacked by the conduct of staff in Victoria University's psychology department. Among other things, the applicant claimed that a report of the School of Psychology's Post-Graduate Research Committee which outlined concerns about her PhD pre-candidature proposal constituted an attack on her reputation.
- Judge Davis considered that it did not constitute such an attack, because the Committee's views were expressed only to a limited circle of people and were a necessary part of the academic process of constructing and refining a PhD proposal.

UN Human Rights Committee, *Views: Communication No 1482/2006*, 93rd sess, UN Doc CCPR/C/93/D/1482/2006 (25 July 2008) ('*M.G. v Germany*')

- M.G. became involved in legal proceedings with her father and other relatives following the divorce of her parents in 1981. In 2004, members of M.G.'s family initiated proceedings in Ellwangen Regional Court seeking a cease and desist order in relation to certain statements made by M.G., as well as pecuniary damages. The Regional Court subsequently ordered M.G., without first seeing or hearing her in person, undergo a medical examination to assess her capacity to take part in the legal proceedings and appointed a psychiatrist to 'undertake all examinations he deems necessary to assess the physical and mental state of [M.G.]'.[350] This order was made following M.G.'s behaviour in the proceedings, including making frequent and voluminous submissions which was negatively affecting her health and life as a whole, in addition to raising doubts of the court as to her capacity.
- M.G. challenged the order of the Regional Court, firstly to the Stuttgart Higher Regional Court and then to Federal Constitutional Court. After her complaints were rejected without reasons, M.G. complained to the Human Rights Committee (HRC) on

[348] Castles v Secretary to the Department of Justice & Ors [2020] VSC 310 [72].
[349] *Castles v Secretary to the Department of Justice & Ors* [2020] VSC 310 [194].
[350] UN Human Rights Committee, *Views: Communication No 1482/2006*, 93rd sess, UN Doc CCPR/C/93/D/1482/2006 (25 July 2008) [2.2] ('*M.G. v Germany*').

the basis that she had exhausted all domestic remedies and that the order of the Regional Court threatened to breach her right to protection from cruel, inhuman or degrading treatment or punishment, right to a fair hearing and right to privacy and reputation.

- M.G.'s complaint was ultimately found admissible by the HRC only on the grounds of alleged breaches of her right to privacy, in conjunction with her right to a fair hearing by making the order without first conducting an oral hearing. In relation to M.G.'s right to privacy, the Committee observed that 'to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy'.[351] This observation was made on the basis that the interference with M.G.'s privacy was disproportionate to the end sought and therefore arbitrary, amounting to a violation of her right under article 17 of the ICCPR.[352] In reaching its decision, the HRC ordered Germany to provide M.G. with effective remedy including compensation and to prevent similar violations in the future.

[351] UN Human Rights Committee, *Views: Communication No 1482/2006*, 93rd sess, UN Doc CCPR/C/93/D/1482/2006 (25 July 2008) [10.1] ('*M.G. v Germany*').
[352] UN Human Rights Committee, *Views: Communication No 1482/2006*, 93rd sess, UN Doc CCPR/C/93/D/1482/2006 (25 July 2008) [10.2] ('*M.G. v Germany*').

Protection of families and children

Human Rights Act 2019 (Qld)

Section 26 Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.

(3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the **state** as soon as practicable after being born.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 23(1) Article 24(1)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 17
ACT	***Human Rights Act 2004***	Section 11

What does the right protect?

This right protects families and children. At international law, this right requires the **state** to recognise and protect marriage and the family as special institutions.[353] Section 26(1) entitles families to protection by both the state and society.

'Family' is not to be 'narrowly interpreted or confined',[354] but should be 'given a broad interpretation to include all those comprising the family as understood in the society of the state party concerned'.[355] This includes taking cultural traditions into consideration when defining the term family.[356]

Families take many forms and the right accommodates the various social and cultural groups in Queensland whose understanding of family may differ.

---

[353] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 634.

[354] *Director of Housing v Sudi* (2010) 33 VAR 139; [2010] VCAT 328 [33].

[355] Human Rights Committee, *General Comment No 16 (1988): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17 of the International Covenant on Civil and Political Rights)*, UNHRC, 32nd sess (8 April 1988).
[5], see also *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 146.

[356] Human Rights Committee, *Views: Communication No 549/1993*, 55th sess, UN Doc CCPR/C/51/D/549/1993 (30 October 1995) [10/3] ('*Hopu et al v France*').

The UN Human Rights Committee has noted that the protection of family is considered as:

> *not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations*.[357]

However, rights to begin a family have been found not to be protected by equivalent sections in the Victorian Charter.[358]

Section 26(2) recognises that children have the same rights as adults, but with additional protections because they are children. One of the underlying principles of the *International Convention on the Rights of the Child* is that the best interests of the child should be a primary consideration in all actions concerning children. The Human Rights Committee have said:

> *the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required his or her status as a minor, on the part of his or her family, society and the State*.[359]

The UN Committee on the Rights of the Child state that 'the right to special measures of protection belongs to every child because of his status as a minor.'[360] At international law, the **state** has a duty to protect children by preventing interference by authorities and private parties (including parents e.g. in situations of child abuse and neglect), but also must enact positive measures for when children require special protection (e.g. death or disappearance of parents, poverty and hunger, physical or mental disability).[361]

Section 26(3) protects the right to a name and to birth registration. No similar right exists in the Victorian Charter or the ACT Human Right Act. The right operates alongside the *Births, Deaths, and Marriages Registration Act 2003* and requires the **state** to ensure registration services are available.

---

[357] Human Rights Committee, *Views: Communication No 1179/2003*, 81st sess, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004) [6.4] ('*Ngambi et al. v France*').
[358] *Castles v Department of Justice* (2010) 28 VR 141; [2010] VSC 310,159 [62].
[359] Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.7] ('*Bakhtiyari et al. v Australia*'); Human Rights Committee, *Views: Communication No 2081/2011*, 117th sess, UN Doc CCPR/C/117/D/2081/2011 (29 September 2016) [7.10] ('*D.T. et al. v Canada*').
[360] UN Committee on the Rights of the Child, *General Comments No 17 (2013), on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31 of the International Covenant on the Rights of the Child),* 62nd sess, UN Doc CRC/C/GC/17 (17 April 2013) [4].
[361] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 669.

Relevant resources
• **CCPR General Comment No. 19: Article 23 (The family)** • **CCPR General Comment No. 17: Article 24 (Rights of the child)** • ***Convention on the Rights of the Child*** • **Committee on the rights of the child (CRC)** • **CCPR General Comment No. 16: Article 17 (Right to Privacy): The right to respect of privacy, family, home and correspondence, and protection of honour and reputation** • **Implementation Handbook for the Convention of the Rights of the Child.** • **CRC General Comments No's 1-25**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that regulates family contact for those in the care of public entities or enabling intervention orders to be granted between family members.
- A policy or statutory provision that provides for adoption and surrogacy.
- A policy or statutory provision that deals with removal of a child from a family unit or separating a child from parents/guardians/other adults responsible for their care.
- A policy or statutory provision that relates to the treatment of children in the criminal justice process.
- A policy or statutory provisions that relates to family violence.

Case examples

SBN v Department of Children, Youth Justice and Multicultural Affairs [2022] QCAT 321

- The applicant was a mother who had raised an application to review a contact decision made by the Department. The decision was intended to facilitate contact between the applicant's children and did not concern contact between the applicant and her children.
- The tribunal was required to determine if the applicant was 'a person affected by the decision'.
- With reference to section 26(1) of the HR Act, which states that families are the fundamental group unit of society and are entitled to be protected by society and the State, the tribunal concluded that, given this obligation to support the family and

also the potential return of the subject child to the applicant, the applicant was a person affected by any decision concerning contact with the child.[362]

LM v Director-General, Department of Justice and Attorney-General [2022] QCAT 333[363]

- The applicant, who identified as an Aboriginal and Torres Strait Islander, worked in the health sector, was a foster carer, and was undertaking a Nursing degree. Following a conviction for Common Assault, the applicant's Blue Card was cancelled. As a result she was unable to continue as a foster carer, unable to complete her nursing degree, and her employment with Queensland Health was terminated.
- The tribunal accepted that, under the HR Act, it was required to consider whether any hardships caused by its decision also affected human rights.[364] Accordingly, a number of rights were considered.
- With regard to the protection of the family unit under section 26(1), the tribunal noted that the protection of family bonds did not need to depend on 'whether the parents are biological parents, adoptive parents or (especially long term) foster parents'. While not commenting further, the tribunal highlighted that the right should be considered in such circumstances.[365]
- Ultimately the tribunal concluded that the limitation on this right, and others, was justified in part because of the rights of children under section 26(2) to have decisions made in their best interests.[366] The Department's decision to cancel her Blue Card was confirmed.

BA, DC, FE v State of Queensland [2022] QCAT 332

- The three complainants were children with complaints about their detention in a watch house, the conditions of their detention, and failure to fully segregate children from adult detainees. The matter, concerning alleged age discrimination and human rights limitations, was referred to the QCAT by the Queensland Human Rights Commission.
- Before making directions for the progress of the matter, the tribunal had to determine a number of preliminary matters, including whether the proceedings were properly constituted, in that the complainants were under the age of 18 years and no person had been authorised to act on behalf of them.
- The tribunal concluded that, for one of the children, a litigation guardian was required for his complaint to proceed, due to his inability to directly instruct his lawyer as a result of his age and other vulnerabilities.[367]

---

[362] *SBN v Department of Children, Youth Justice and Multicultural Affairs* [2022] QCAT 321 [18]-[20]
[363] This matter is also considered below under the cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28).
[364] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [410]
[365] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [398]-[399]
[366] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [447]-[449]
[367] *BA, DC, FE v State of Queensland* [2022] QCAT 332 [30]-[31]

- The tribunal acknowledged that this requirement would likely limit the child's rights to recognition and equality before the law (section 15), protection of children and families (section 26), and a fair hearing (section 31). His rights would be especially limited if no litigation guardian could be appointed, which could result in him being unable to seek redress.[368]
- However, it was the tribunal's view that the limitation was justified because it was 'consistent with a free and democratic society based on human dignity, equality and freedom because its purpose was to ensure a fair hearing for all parties based on reliable and informed instructions from a party competent to give instructions'.[369]
- The tribunal noted that the public interest in ensuring litigation can reliably proceed outweighs the complainant's interest in ensuring his complaint is heard.[370]

Bakhtiyari et al. v Australia, No. 1069/2002

- Mrs Bakhtiyari and her children were detained in the Woomera Immigration Detention Centre, South Australia; they had applied for protection visas based on Mr Bakhtiyari's status, but had been refused. Mr Bakhtiyari was living in Sydney and waiting for the outcome of legal proceedings that would decide if he were to be deported.
- The Human Rights Committee found that removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17(1) and 23(1) of the Covenant (ICCPR) .[371]
- In this case, they also found that the children had suffered demonstrable, documented and on-going adverse effects of detention (particularly the two eldest sons) up until the point of their release. In circumstances where that detention was 'arbitrary and in violation of article 9(1) of the Covenant'[372] and '…the measures taken by the **state** party had not…been guided by the best interests of the children, and thus revealed a violation of article 24(1) of the Covenant'.[373]

J R Mokbel Pty Ltd v DPP [2007] VSC 119

- Mrs Mokbel had signed an undertaking to pay $1 million to the court if her husband breached his bail conditions. Mrs Mokbel was subsequently taken into custody when her husband breached his bail conditions after being charged with drug trafficking offences. Mrs Mokbel applied to the Supreme Court under section 26 of the *Confiscation Act 1997* (Vic) (the Act) seeking permission for the applicant company, of

[368] *BA, DC, FE v State of Queensland* [2022] QCAT 332 [42]-[43]
[369] *BA, DC, FE v State of Queensland* [2022] QCAT 332 [44]
[370] *BA, DC, FE v State of Queensland* [2022] QCAT 332 [45]
[371] Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.6] ('*Bakhtiyari et al. v Australia*').
[372] Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.3] ('*Bakhtiyari et al. v Australia*').
[373] Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.7] ('*Bakhtiyari et al. v Australia*').

which she was the sole shareholder and director, to sell property in order to raise the $1 million required for her release from custody. Dealings in the property had previously been restrained under section 18 of the Act.

- Mrs Mokbel submitted that the right to protection of families and children under section 17 of the Victorian Charter (the equivalent of HR Act section 26) was relevant for the court when exercising its discretion under the Act, due to the disruption to her family and children caused by the imprisonment of both parents.
- In deciding the matter, Hargrave J considered the evidence which demonstrated that a majority of the property had been acquired using proceeds of crime and held it would be inconsistent with policy objectives of the Act to make the orders sought by Mrs Mokbel. Regarding section 17 of the Victorian Charter, it was held that giving effect to the scheme established by the Act, which was enacted to protect all Victorian families from the effects of illegal drugs on the family unit, was determined to be of greater importance than protecting the individual families who will be affected by the Act's operation. It therefore followed that one family's right to protection may be limited by the general need to protect all families in the community.

Certain Children (No 2) [2017] VSC 251

- The Victorian Supreme Court considered lawfulness of the decision of the Victorian Government to establish a youth justice centre in a section of the Barwon maximum security adult prison.
- The court found that the state government had breached the Victorian Charter, specifically, section 17(2), which stipulates that every child is entitled to protection based on their best interests. The court referred to this as the paramount consideration in the case of juvenile detention concerning vulnerable children.
- The court was not convinced that the state appreciated the true nature of the engaged rights, and the fact that it is 'fundamental that vulnerable children from disadvantaged circumstances be rigorously protected by the law'.
- In particular, the court observed that the focus of both the Victorian Charter and the *Children, Youth and Families Act 2005* (Vic) is on the child's opportunity to continue to develop and should not be treated like adults.

Castles v Secretary to the Department of Justice [2010] VSC 310[374]

- Ms Castles was a prisoner at HM Prison Tarrengower. She was undergoing IVF treatment at the Melbourne IVF Clinic prior to her imprisonment and had requested approvals and permits to continue her IVF treatment.
- In this case, Emerton J held that section 17 of the Victorian Charter (the equivalent of HR Act section 26) did not include the right to begin a family.
- Under the European Convention on Human Rights, the obligation to respect a person's private and family life (article 8) had been extended to include respecting their decision to become a genetic parent.

[374] This case is also considered under the right to privacy and reputation (section 25) and the right to humane treatment when deprived of liberty (section 30).

- However, the Charter's Explanatory Memorandum clearly states that Parliament did not intend for the protection of families and children provided by the Charter to contain a right to begin a family.
- Emerton J said that the Explanatory Memorandum indicated that 'Charter rights which might otherwise have encompassed rights to ART (artificial reproductive technology), recognition of legal parentage and adoption should be construed as not encompassing such rights'.[375]

Application for Bail by HL (No 2) [2017] VSC 1

- This case involved a 16-year-old boy who was charged with a number of offences, including committing an offence while on bail. The court considered if the Victorian Charter was relevant to determining an application for bail and that full effect must be given to relevant rights, but done so within the scheme of the *Bail Act 1977* (Vic). In undertaking this consideration, Elliot J found there was no ambiguity or competing interpretations of the provisions in the *Bail Act* through which the court was able to give an interpretation more consistent with the Victorian Charter.
- Despite this, Elliot J considered the boy's rights under the Charter, as well as the remand centres in which he was to be held and the treatment he would receive there, to determine that this would impact on his right of protection in his best interests as a child and right to be treated with humanity and dignity while deprived of liberty. However, the ultimate decision regarding the granting of bail remained the same.
- The Victorian Supreme Court therefore indicated that the state is required to ensure the survival and development of a child to the maximum extent possible. In the context of youth justice, it will generally not be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.[376]

Hugg v Driessen [2012] ACTSC 46

- Ms Hugg was charged and convicted of driving a motor vehicle on a road with a high level of alcohol in her breath. Ms Hugg plead guilty and was fined $1,100, was ordered to pay $67 in court costs and a $50 levy, as well as being disqualified from holding a drivers licence for 18 months.
- Ms Hugg later appealed the decision on the basis that the sentencing judge failed to giver regard to material considerations when determining the length of licence disqualification. The focus of the appeal was that Ms Hugg is a single mother of two children whose care for her children and ability to earn a living realistically required her to drive a car and that the sentencing judge failed to take into account the hardship likely to be suffered by a single mother with two children and a job without a car.
- The disqualification was set aside and the appeals judge took into account the rights for the interests of the child when ordering a new disqualification period of nine months.

[375] Castles v Secretary to the Department of Justice [2010] VSC 310 [72].
[376] *Application for bail by HL (No 2)* [2017] VSC 1 [122]

- This case affirmed the need to make proper arrangements for children as a relevant factor in sentencing a parent.[377] ACT courts are directed to consider 'the probable effect that any sentence or order under consideration would have on any of the offender's family or dependents'.[378] This must be interpreted to be compatible with the human rights which have been specifically adopted by the ACT.

ZZ v Secretary to the Department of Justice [2013] VSC 267

- This matter concerns an applicant who was denied an assessment notice under the *Working with Children Act 2005* (Vic) (WWC Act) and an accreditation enabling him to drive a commercial passenger vehicle under the *Transport (Compliance and Miscellaneous) Act 1983* (Vic) (TCM Act), which were both required for employment as a bus driver. The applicant argued that his rights under the Charter were breached and the right for children to be protected from harm under section 17(2) was also relevant.
- Bell J considered that an interpretation of section 13(2) of the WWC Act should not go as far as preventing a person from working in their chosen employment where there would be no real risk of harm to children. In his view, the 'unjustifiable risk' tests provided by both the WWC Act and the TCM Act appropriately balanced children's right to protection against a person's right to work.

NN and IN v Department of Child Safety, Youth and Women [2020] QCAT 146

- This matter involved considering merits review of an application made in 2019 by the Department of Child Safety, Youth and Women for guardianship of a child ('L' – a pseudonym). This also involved consideration of the right to protection of families and children under the HR Act, where the non-biological foster-family members of L opposed the application which would restrict their contact arrangements.
- Member Roney QC analysed the meaning of the term 'family' in the context of the *Child Protection Act 1999* (Qld), with reference to the UN Human Rights Committee comments and the Victorian Charter.
- Member Roney held that in light of the commencement of the HR Act, 'family' was to be given a broad interpretation that is consistent with international human rights jurisprudence, which includes extended and non-conventional family structures.
- In providing for this definition of 'family' Member Roney referred to the explanatory material accompanying the Victorian Charter:

> *[T]hat the term 'families' be given a meaning that recognises the many different types of families that live in Victoria, all of whom are entitled to protection. The term 'family' should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of 'family' in Australian society.*[379]

[377] See also *Aldridge v R* [2011] ACTCA 20 [34]
[378] *Crimes Act 1914* (Cth) section 16A(2)(p).
[379] *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 146 [25].

- Although this was not a final decision, the Member's consideration of 'family' was supported with reference to guides developed by the Queensland Human Rights Commission on the interpretation of 'family' in other jurisdictions.

Cultural rights – generally

Human Rights Act 2019 (Qld)

Section 27 Cultural rights – generally

> All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 27
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 19(1)
ACT	***Human Rights Act 2004***	Section 27(1)

What does the right protect?

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. Section 27 affirms the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or with others who share their background. It is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. A person may have been denied the right in this section if their enjoyment of the right is substantially restricted.

The UN Human Rights Committee has said in relation to the inclusion of the words 'must not be denied' that:

> *Although article 27 (of the ICCPR) is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a state party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the state party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the state party.*[380]

While section 27 contains the words 'in community with other persons', the right is held by individuals. This approach is supported by the fact that section 11(2) of the HR Act states that

[380] UN Human Rights Committee, *General Comment No 23: The rights of minorities (Article 27 of the International Covenant on Civil and Political Rights*), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) 3 [3.1].

only individuals have human rights. While the right provides an individual a right to culture, it does in the sense that it provides an individual with a right to share their culture, religion, and language with other people from their background.

The term 'culture' is not defined in the HR Act. The Human Rights Committee stated that 'culture manifests itself in many forms'.[381] Culture is broadly interpreted as 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). While section 27 of the HR Act is based on Article 27 of the ICCPR (not Article 15(1)(a) of the ICESCR), the breadth of activities referred to by the ICESCR Committee may assist to give content to the understanding of 'culture' within section 27.[382]

The High Court has given a broad interpretation to what constitutes a 'religion'. The right to declare and practise religion overlaps with the more detailed freedom of religion provided by section 20 of the HR Act.

'Race' also has broad meaning, which may include: colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.

Relevant resources

- **CCPR General Comment No. 23: Article 27 (Rights of Minorities)**
- **CESCR General Comment No. 21: Article 15 (Right of everyone to take part in cultural life)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that limits the observance of any religious practices, regardless of the religion.
- A policy or statutory provision that restricts the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group.
- A policy or statutory provision that limits or prohibits communication in languages other than English, including through the provision of information.

[381] Human Rights Committee, *General Comment No 23: Rights of minorities (Article 27 of the International Covenant on Civil and Political Rights),* 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [7].
[382] Committee on Economic, Social and Cultural Rights, *General Comment No 21 (2009): Right of everyone to take part in cultural life (Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights*), UN ESCOR, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009).

- A policy or statutory provision that restricts the provision of services or trade on religious holidays.
- A policy or statutory provision that regulates cultural or religious practices around the provision of secular public education.
- A policy or statutory provision that provides government information only in English and allows for access to services only by English speaking persons.
- A policy or statutory provision that licences or provides a restriction on the preparation and serving of food.

Case examples

MEC for Education: Kwazulu-Natal v Pillay [2008] 1 SA 474 (Constitutional Court)

- Ms Pillay and her daughter Sunali observe South Indian and Hindu practices, including the wearing of a gold nose stud as part of a tradition honouring daughters becoming responsible adults. Sunali was originally permitted by her school to wear the nose stud until it had healed but was directed to remove it after this time. After Sunali did not remove the nose stud, the school requested that Ms Pillay write a letter explaining why Sunali should be allowed to continue wearing the stud.
- The school's Governing Body consulted with experts on human rights and Hindu tradition to determine the school was not obliged to allow Sunali to wear the nose stud. The Department of Education also supported the school's approach.
- After Sunali was threatened with disciplinary action if she did not remove the stud, Ms Pillay took the matter to the Equality Court who held that the school's approach was, on the face of the facts, discriminatory but the discrimination was not unfair because it aligned with the school's Code of Conduct. The Equality Court's reasoning was that Ms Pillay had agreed to the Code when choosing to send Sunali to the school and she did not inform the school before sending Sunali to school with the nose stud.
- On appeal to the High Court, it was held Sunali was discriminated against unfairly and there were less restrictive means available to the school to achieve its objective of creating uniformity and maintaining discipline through the Code of Conduct, such as explaining that Sunali's religion and culture entitles her to wear the nose stud. The school appealed this decision however, the court highlighted that the school's view was that the religious practice would be exempt if it was mandatory but would not be exempt if it was not mandatory and Sunali had not established the practice was a mandatory requirement for her religious adherence. The court held this was inconsistent with previous cases exemptions were granted and therefore the reason given by the school to refuse to grant an exemption to Sunali was unfair. The court decided in Ms Pillay and Sunali's favour and ordered the Code of Conduct be amended to allow for the granting of exemptions in the case of religious and cultural practices, although Sunali was no longer attending the school at this time.
- Importantly, the court said in deciding this case that:

> *[A] cultural practice … is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community*.[383]

- On this understanding, it will be important to establish that a particular practice is shared within at least a part of the relevant cultural community, rather than being an individual's personal preference.

Diergaardt et al. v. Namibia, Communication No. 760/1997

- The Rehoboth were a community of cattle-raising farmers who are the descendants of the indigenous Khoi people of southern Africa and Afrikaans settlers. They moved from the Cape region to territory in present-day Namibia in 1872 and were governed by their 'paternal laws', being granted self-government by the South African parliament in 1976 after an agreement on the administration of the Rehoboth district had been suspended since 1924. Facing significant political pressure in 1989 and to comply with UN Security Council resolution nr.435 (1978), the Rehoboth transferred their legislative and executive powers into the Administrator-General of South West Africa, a transfer that expired on 20 March 1990. On 21 March 1990, Namibia gained independence and the Constitution came into force.
- Namibia did not recognise the independence of the Rehoboth community and expropriated all communal land under schedule 5 of the Constitution. Communal land and property ownership was the foundation of the Rehoboth way of life and Namibia denying the Rehoboth this effectively eliminated the community's means of subsistence. It was argued in this complaint that the expropriation of all collectively-owned communal land on which the Rehoboth culture and community is exclusively bound up with, 'robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity.'[384] It was submitted that this constituted a violation of CCPR article 27 (rights of minorities). In support of this claim, it was argued that cattle raising is an essential part of the Rehoboth community's culture and the lands traditionally used by its members for grazing were no longer in their de facto exclusive use.
- Article 27 provides the right for members of a minority to enjoy their culture and protection to a particular way of life in connection with the land, including through economic activities like hunting and fishing. However, the Committee held that a violation of article 27 had not been made out because although there was a connection between the Rehoboth community and the lands covered in their claims which dated approximately 125 years, 'it was not the result of a relationship that would have given rise to a distinctive culture.'[385] The Committee was also of the view

[383] *MEC for Education: Kwazulu-Natal v Pillay* [2008] 1 SA 474 [147] (Constitutional Court).
[384] Human Rights Committee, *Views: Communication No 760/1997*, 69th sess, UN Doc CCPR/C/69/D/760/1996 (*Diergaardt et al. v Namibia*) [3.1].
[385] Human Rights Committee, *Views: Communication No 760/1997*, 69th sess, UN Doc CCPR/C/69/D/760/1996 (*Diergaardt et al. v Namibia*) [10.6].

that despite the Rehoboth community holding distinctive properties in relation to historical forms of self-government, the complainants had not demonstrated how these factors were based on the community's way of raising cattle. Ultimately, it was held that the Rehoboth could not demonstrate:

> *that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands… Their claim [was], essentially, an economic rather than a cultural claim and [did] not draw the protection of article 27*.[386]

[386] Human Rights Committee, *Views: Communication No 760/1997*, 69th sess, UN Doc CCPR/C/69/D/760/1996 (*Diergaardt et al. v Namibia*) 18 (individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring)).

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Human Rights Act 2019 (Qld)

Section 28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

(1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.

(2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community –

(a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

(b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and

(c) to enjoy, maintain, control, protect and develop their kinship ties; and

(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

(3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

Where does the right come from?

Jurisdiction	Law	Article / section
International	***United Nations Declaration on the Rights of Indigenous Peoples***	Article 8 Article 25 Article 29 Article 31
International	***International Covenant on Civil and Political Rights***	Article 27
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 19(2)
ACT	***Human Rights Act 2004***	Section 27(2)

What does the right protect?

This right recognises that Aboriginal peoples and Torres Strait Islander peoples have a rich and diverse culture. There are many hundreds of distinct Aboriginal groups and Torres Strait Islander groups in Australia, each with geographical boundaries and an intimate association

with those areas. Many of these groups have their own languages, customs, laws and cultural practices.

The *Acts Interpretation Act 1954* (Qld) includes the following definitions:[387]

> **Aboriginal people** means people of the Aboriginal race of Australia.
>
> **Aboriginal tradition** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.
>
> **Island custom**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.
>
> **Torres Strait Islander** is a person who is a descendant of an Indigenous inhabitant of the Torres Strait Islands.

Section 28 explicitly protects the right to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture.

As with section 27, section 28 gives rights to individuals as part of a cultural group. Indigenous peoples hold the rights set out in section 28 'as individuals', though the rights should be seen through a collective prism in the sense that they are rights held in common by a people. The UN Human Rights Committee has stated that the right is said to be exercised both individually and 'in community with others'.[388]

Aboriginal peoples and Torres Strait Islander peoples must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment. All these terms have particular meaning. Section 28 of the HR Act is modelled on the articles mentioned above in the ICCPR and UNDRIP. Those articles, as well as associated United Nations commentaries and decisions

[387] *Acts Interpretation Act 1954* (Qld) schedule 1 (definitions of 'Aboriginal people', 'Aboriginal tradition', 'Island custom' and 'Torres Strait Islander').
[388] Human Rights Committee, *General Comment No 23: Rights of minorities (Article 27 of the International Covenant on Civil and Political Rights),* 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [3.1].

act as a good starting point to understand the nature of the various rights contained in section 28. Section 28 has not been considered in detail by Queensland courts.

For example, **cultural heritage** may include both physical places and objects, in addition to intangible practices and knowledge. The Human Rights Committee state that:

> *culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples…the enjoyment of those rights may require positive legal measures of protection and measures to ensure that effective participation of members of minority communities in decisions which affect them*.[389]

Some of the rights in section 28 include verbs such as 'maintain', 'control', 'protect' and 'develop'. While these words carry different meanings, they may all be considered to have a common element of agency or control.[390]

The HR Act does not protect the right to self-determination as part of section 28. However, the HR Act preamble recognises that the right to self-determination is of 'particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland'. This means that in interpreting section 28 it may be necessary to interpret some terms in light of the right to self-determination.[391] For example, section 28 protects 'traditional cultural expression'. In defining this term, it may be that what constitutes a particular 'traditional cultural expression' can only be determined by Aboriginal peoples and Torres Strait Islander people themselves.

Section 28(3) includes the right for Aboriginal peoples and Torres Strait Islander peoples not to be subjected to forced assimilation or destruction of their culture. This may include depriving Indigenous peoples of their integrity as a distinct people, dispossessing Indigenous peoples of their land and other resources, and forced population transfers.

Relevant resources

- ***CCPR General Comment No. 23: Article 27 (Rights of Minorities)***

Internal limitations

As noted above, section 28 has not been considered in detail by Queensland courts.

[389] Human Rights Committee, *General Comment No 23: Rights of minorities (Article 27 of the International Covenant on Civil and Political Rights),* 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [7].
[390] Tobias Stoll, 'Intellectual Property and Technologies: Article 31' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 299, 307 [3.3].
[391] *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of 'provision'); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AQS v Cross* (2012) 248 CLR 378, 389 [24]; *Wacando v Commonwealth* [1981] HCA 60; (1981) 148 CLR 1, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

However, the scope of this right may be said to be limited by an internal limitation: section 28(2) says that Aboriginal peoples and Torres Strait Islander peoples must not be 'denied' their cultural rights. This may be seen as an internal limitation, which means that it is relevant to whether a limitation on a right can be justified. Prior consultation with indigenous people may be relevant to whether a person has been 'denied' their rights under section 28.

Policy triggers

- A policy or statutory provision that prohibits the use of a traditional language.
- A policy or statutory provision that allows or limits the ability of Aboriginal or Torres Strait Islander persons to continue to take part in a cultural practice, or otherwise interferes with their distinct cultural practices.
- A policy or statutory provision that interferes with the relationship between Aboriginal or Torres Strait Islander persons and land, water and resources.
- A policy or statutory provision that relates to the protection of Aboriginal and Torres Strait Islander cultural heritage, including Aboriginal and Torres Strait Islander human remains and secret or sacred objects.
- A policy or statutory provision (and decisions made under the policy or provision) that relates to mining exploration, including for example whether, how much and what type of consultation is required with Indigenous people about the conservation and protection of the relevant land.
- A policy or statutory provision (and decisions made under the policy or provision) about the management of Queensland parks and forests, including whether, how much and what type of consultation is required with Indigenous peoples about the conservation and protection of the relevant land.

Case examples

DR and YO v Department of Child Safety, Seniors and Disability Services [2023] QCAT 333

- The applicants were foster carers challenging a decision to remove three Aboriginal and Torres Strait Islander children from their care following allegations of mistreatment.
- The children originally lived in western Queensland, where they have extensive family and cultural ties, but had relocated interstate with their foster carers. Their mother lived in coastal Queensland, near to the children's aunt who had been provisionally approved by the Department as their new carer.
- The tribunal found in favour of the applicants. In making its decision, the tribunal considered that a number of rights would be potentially impacted, including the

cultural rights of Aboriginal peoples and Torres Strait Islander peoples under section 28.[392]

- It concluded that there was no evidence that a decision to return the children to live interstate would interfere with their rights to enjoy their culture or restrict their ability to maintain and strengthen their culture or spiritual relationship with the land which they have a connection with.[393]
- The tribunal accepted that its decision would restrict the children's ability to develop their kinship ties with family in Queensland, but concluded that this limitation was reasonable and justifiable, while noting that it was compelled to act on the basis that the safety, wellbeing and best interest of a child are paramount.[394]

LM v Director-General, Department of Justice and Attorney-General [2022] QCAT 333[395]

- The applicant, who identified as an Aboriginal and Torres Strait Islander, worked in the health sector, was a foster carer, and was undertaking a Nursing degree. Following a conviction for Common Assault, the applicant's Blue Card was cancelled. As a result she was unable to continue as a foster carer, unable to complete her nursing degree, and her employment with Queensland Health was terminated.
- The tribunal accepted that, under the HR Act, it was required to consider whether any hardships caused by its decision also affected human rights.[396] Accordingly, a number of rights were considered.
- With regard to the applicant's cultural rights as an Aboriginal and Torres Strait Islander, the tribunal accepted that, these rights may be limited by a decision which would, in effect, deny her a working with children clearance. The applicant had, in her work as an Advanced Indigenous Healthcare Worker, established good relationships with members of the community and had cultivated a bond with her local community through culture.[397]
- Ultimately the tribunal concluded that the limitation on this right, and others, was justified in part because of the rights of children under section 26(2) to have decisions made in their best interests.[398] The Department's decision to cancel her Blue Card was confirmed.

Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5) [2022] QLC 4

- As part of objections made to the thermal coal mine proposed by Waratah Coal Pty Ltd, an application was made seeking orders for the court to take on country evidence from four of the First Nations witnesses and to conduct site inspections.

[392] *DR and YO v Department of Child Safety, Seniors and Disability Services* [2023] QCAT 333 [77]
[393] *DR and YO v Department of Child Safety, Seniors and Disability Services* [2023] QCAT 333 [81]
[394] *DR and YO v Department of Child Safety, Seniors and Disability Services* [2023] QCAT 333 [82]-[84]
[395] This matter is also considered above under the right to protection of families and children (section 26).
[396] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [410]
[397] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [393]-[397]
[398] *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333 [447]-[449]

- The court acknowledged that, in deciding whether to make the orders or not, it was required to act compatibly with the HR Act.[399] It also accepted that the cultural rights of Aboriginal peoples and Torres Strait Islander peoples under section 28(2) were engaged by the decision.[400]
- The court heard that, in order to comply with cultural protocols:

    - *evidence should be given orally at the place which is being discussed given the level of cultural sensitivity and importance of the topic;*
    - *it is best to be discussed in the company of other members of the community who are knowledge or Lore keepers for particular topics due to the way that knowledge is held collectively;*
    - *it is best given in the presence of Elders; and*
    - *a proper explanation of particular topics cannot be done without showing or demonstrating a particular place or impact or landscape on Country and this explanation can't be done any other way.*[401]

- The court accepted that refusing the request would be a limit on the ability to enjoy and maintain the witnesses' cultural heritage, specifically with regards to how traditional knowledge is imparted, and that confining them to written statements would stop them from observing those cultural protocols.[402]
- In assessing the proportionality of a limit on the witnesses' section 28(2) rights, the court considered Waratah's proposition that the purpose of the limit was to avoid the commitment of time and resources involved in taking evidence on country. While it was possible that evidence could be given via videoconferencing technology, the court accepted that this would limit the witnesses' ability to fully observe the ceremonial aspects of imparting traditional knowledge.[403]
- The court also highlighted the collective nature of the rights in section 28 which protect the rights of Aboriginal and Torres Strait Islander 'to do specified things *with other members of their community*'.[404]
- It was concluded that the limit on the cultural rights of the witnesses, and of their community, would not be reasonable and demonstrably justifiable when weighed against the public and private interests in minimising the inconvenience and cost of litigation. As such, the orders were made to take evidence on country.[405]

Cemino v Cannan and Ors [2018] VSC 535

- Zayden Cemino, a Yorta Yorta man from Echuca in northern Victoria, was charged with 25 criminal offences over a six-month period. He applied to the Echuca Magistrates Court to have his matter transferred to the Koori Court (specialist Indigenous

[399] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [17]
[400] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [18]
[401] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [19]
[402] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [22]
[403] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [29]
[404] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [35]
[405] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4 [44]-[45]

Australian court) in Shepparton, as there was no Koori Court in Echuca. The Magistrate refused the application, deciding that the matter should be heard within the locality of where the offences were alleged to have occurred. Mr Cemino sought judicial review of this decision, partly on the basis of an error in law made by the court by acting unlawfully under section 38(1) of the Victorian Charter, or alternatively, contravening section 6(2)(b) by not considering his rights under the Charter.

- Ginnane J held that the Magistrate failed to properly exercise his discretion and ordered a different Magistrate at Echuca to rehear the application. In deciding this, Ginnane J rejected the ground of review that the Magistrate acted unlawfully under section 38(1), as the decision was made under judicial power, rather than administrative, meaning the court was not a public authority bound by the Charter.
- However, Ginnane J considered that court's function is to only enforce rights that relate to court proceedings following an intermediate construction of section 6(2)(b) of the Charter. Ginnane J therefore held that the Magistrate erred because he was required to consider the function of the court in relation to Mr Cemino's right to equality before the law and his cultural rights as an Aboriginal man when deciding to refuse transferring the proceeding to the Koori Court.
- This matter confirmed that courts must consider the distinct cultural rights of Aboriginal people under the Charter when making a decision in relation to an Aboriginal person's request to be heard in the Koori Court (relevant to the exercise of the court's discretion to transfer proceedings).

Donnell v Dovey [2010] FamCAFC 15

- This case concerned the 8-year-old son of an Aboriginal (Waka Waka) mother and Torres Strait Islander father. The boy lived with his mother following the separation of his parents and later, his eldest-half sister and her husband, after the death of his mother in a car accident. Both the boy's sister and father sought orders that he live with them and at trial, the Federal Magistrate ordered the boy live with his father in the Torres Strait, with his relocation to be introduced gradually. This was despite the fact the boy had little contact with his father. His sister appealed the decision.
- This case relied heavily on consideration of the concept of 'kinship' within Aboriginal culture, in that it differs from that used in non-Aboriginal culture. Aboriginal kinship networks are generally understood to extend broadly into the community, beyond a person's immediate family. On appeal, the Full Court found the trial judge's assessment on the concept of 'suitable parent' was made in the absence of any direct evidence on this point concerning Waka Waka traditions and in reference

> *to the norms of dominant European/white-Australian culture – which is taken for granted and for which expert evidence is never required. (We say there was no direct evidence on this point because the only 'cultural evidence' was that given by O's [the boy's] sister. She did not address the issue of 'suitable parent', this being his Honour's own construct.)* [406]

[406] *Donnell v Dovey* (2010) 42 Fam LR 559.

- The Full Court ultimately ordered the matter be referred to another Federal Magistrate for retrial. In doing so, the Full Court made explicit remarks about Judicial Officers dealing with family law cases involving Indigenous children, in that officers exercising family law jurisdiction are expected to take judicial notice of the fact that there are differences in how Aboriginal and non-Aboriginal people approach the concept of 'family', recognising that the practices and beliefs of different Aboriginal groups are not uniform.

Clark-Ugle v Clark [2016] VSCA 44

- The appellant in this matter was a former employee of the Farmlingham Aboriginal Trust (the Trust), established under the *Aboriginal Lands Act 1970* (Vic) (the AL Act). The appellant was a member of the committee who lost his role after the Supreme Court declared all positions vacant and appointed receivers.
- The appeal was based on grounds that the trial judge had not interpreted the AL Act compatibly with human rights pursuant to section 32(1) of the Victorian Charter and that his rights were engaged under section 19(2)(d) regarding the right of Aboriginal persons to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. It was submitted that the trial judge did not consider the relevant provisions of the AL Act compatibly with his rights under the Victorian Charter as a resident member of the Trust.
- The court ultimately found that the appellant's rights under the Charter were not engaged and therefore the interpretative provision of section 32(1) was not enlivened, meaning the trial judge was not required to interpret the provisions of the AL Act compatibly with human rights. Further, it was held that section 19(2)(d) did not distinguish between residents and non-residents (in relation to connection with land and waters) and that the enjoyment of cultural rights is not dependent on residency.
- The right does not, and does not purport to, distinguish between Aboriginal persons who live on the land with which they have a connection under traditional laws and customs and other Aboriginal persons who do not live on the land with which they have a connection under traditional laws and customs, but whom maintain a distinctive spiritual, material and economic relationship with that land nevertheless.

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5) [2022] QLC 4

- This was an application for 'on country' evidence to be heard in relation to objections to an application for a mining lease and an environmental authority to develop a thermal coal mine in the Galilee Basin.
- One of the objections made was the impact that the mine would have on the cultural rights of the Aboriginal and Torres Strait Islander peoples in Queensland, including the Yidinji Nation (Cairns), Erub and Poruma (Torres Strait).
- The objections included the effects of climate change and the associated impacts of seas rising and a warmer climate on Aboriginal and Torres Strait Islander's traditional way of life.

- The applicants sought orders for the Land Court to take 'on country' evidence from four First Nations witnesses, which had not previously occurred in mining lease objection hearings. The application was based on cultural preference and practice for imparting traditional knowledge, having already provided the court with written evidence in chief.
- The Land Court found that the witnesses' cultural rights under the section 28 of the HR Act would be unreasonably limited if their evidence was confined to written evidence.
- In deciding the application, the President of the Land Court stated:

> *I have balanced the collective right to enjoy and maintain culture against the public and private interests in minimising the inconvenience and cost of litigation. Confining the First Nations witnesses to the written statements is a limit to their right, and that of their community, to maintain their culture about how they transmit traditional knowledge. I am not persuaded that limit is reasonable and demonstrably justifiable in the circumstances of this case.*[407]

[407] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4 [44]

Right to liberty and security of person

Human Rights Act 2019 (Qld)

Section 29 Right to liberty and security of person

(1) Every person has the right to liberty and security.
(2) A person must not be subjected to arbitrary arrest or detention.
(3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
(5) A person who is arrested or detained on a criminal charge –
  (a) must be promptly brought before a court; and
  (b) has the right to be brought to trial without unreasonable delay; and
  (c) must be released if paragraph (a) or (b) is not complied with.
(6) A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear –
  (a) for trial; and
  (b) at any other stage of the judicial proceeding; and
  (c) if appropriate, for execution of judgment.
(7) A person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must –
  (a) make a decision without delay; and
  (b) order the release of the person if it finds the detention is unlawful.
(8) A person must not be imprisoned only because of the person's inability to perform a contractual obligation.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 9
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 21
ACT	***Human Rights Act 2004***	Section 18

What does the right protect?

The right to liberty and security entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law.

The Human Rights Committee has commented that '[l]iberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights'.[408]

> 'The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.
>
> The **fundamental value which the right to liberty and security expresses is freedom**, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy.'
>
> Bell J in *Kracke v Mental Health Review Board (General)* 2009 VCAT 646 [664]-[665]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110]

The right sets out a number of procedural rights for persons who are arrested or detained.

Section 29(1)-(7) are based on Article 9 of the ICCPR. Subsections (1)-(3) protect individuals against unlawful or arbitrary deprivations of their liberty. Subsections (4)-(6) help to reduce the risk to persons deprived of their liberty of being subjected to inhumane treatment and therefore protect the security of their person. Section 29(7) protects the right of a person who has been deprived of their liberty to apply to a court for a declaration or order regarding the lawfulness of their detention.

Section 29(8), which contains the right not to be imprisoned by reason only of inability to perform a contractual obligation, is based on Article 11 of the ICCPR which is both an **absolute right** and **non-derogable** right at international law.

[408] Human Rights Committee, *General Comment No 35: Liberty and security of person (Article 9 of the International Covenant on Civil and Political Rights)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [2].

The right to security means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm. The right to security applies independently of the right to liberty and applies whether or not the individual is detained. It includes bodily and mental integrity, or freedom from injury to the body and mind. The Human Rights Committee has said that has the right to security of person is intended to protect persons against intentional infliction of bodily and mental injury, regardless of whether the person is arrested or detained.[409]

The concept of detention includes not only detention in a prison but all forms of detention, including detention for the purposes of mental illness or medical treatment, as well as detention in a range of facilities such as mental health facilities, hospitals, disability services or other types of detention facilities. A temporary restriction of movement caused by police exercising stop and search powers, or other significant delay not involving any significant restraint, will not amount to a deprivation of liberty: 'The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance'.[410]

Relevant resources

- **CCPR General Comment No. 35: Article 9 (Liberty and security of person)**

Internal limitations

The scope of this right is limited by an internal limitation: a person has the right not to be subject to **arbitrary** arrest or detention. This can be understood as an internal limitation,[411] which means that it is relevant to whether a limitation on a right can be justified.

The Explanatory Notes to the HR Act states when it comes to the right to liberty the 'concept of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law'.[412] This is in line with case law which defines arbitrariness in a human rights context as:

[409] Human Rights Committee, *General Comment No 35: Liberty and security of person (Article 9 of the International Covenant on Civil and Political Rights),* 112th sess (16 December 2014) [3], [9]; Human Rights Committee, *Views: Communication No 195/85*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Páez v Colombia*') [5.5]; Human Rights Committee, *Views: Communication No 916/60*, 75th sess, UN Doc CCPR/C/75/D/916/2000 (22 July 2002) ('*Jayalath Jayawardene v Sri Lanka*').

[410] *Kracke v Mental Health Review Board* [2009] VCAT 646 [664]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110].

[411] The question of whether arbitrariness is an internal qualifier (whether the right is limited) or an internal limitation (whether a limitation is justifiable) is unsettled in other jurisdictions and is yet to be addressed in a Queensland court. However, relevant case law dealing with arbitrariness in the Victorian Charter supports this approach: *Re Kracke and Mental Health Review Board* [2009] VACT 646 [109]-[110]; *PBU V Mental Health Tribunal* (2018) 56 VR 141, 179 [124]; *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [31]-[32].

[412] Explanatory Notes, Human Rights Bill 2018 (Qld) 24.

- conduct that is capricious, unpredictable, or unjust
- interferences with rights that are unreasonable (in the sense of not being proportionate to the aim).[413]

Limitations on section 29(2) rights must be proportionate and not capricious, unpredictable, unjust and unreasonable.

The Human Rights Committee state that arrests or detentions:

> *may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful…the notion of arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*.[414]

The scope of this right is also limited by internal **qualifiers**:

- A person must not be deprived of their liberty 'except on grounds and in accordance with procedures established by law'.[415] 'Lawfulness' is understood in the strict sense of either statute law or common law.[416]
- A person who is arrested or detained on a criminal charge has the right to be brought to trial 'without unreasonable delay'.[417] There is no fixed time limit for when a delay in bringing a person to trial can be considered to be unreasonable. However, the Human Rights Committee has said that a number of factors will likely be relevant, including; the seriousness of the alleged offence; the nature and severity of the possible penalties; the complexity of the case; whether the authorities have been diligent in the conduct of the proceedings; and the reason for any delays that may have occurred.[418]

Policy triggers

- A policy or statutory provision that authorises a person with a mental illness to be detained for treatment.
- A policy or statutory provision that allows for the detention of a person on safety grounds, such as when they are intoxicated.
- A policy or statutory provision that provides powers of arrest.

---

[413] *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].
[414] Human Rights Committee, *General Comment No 35: Liberty and security of person (Article 9 of the International Covenant on Civil and Political Rights),* 112th sess (16 December 2014) [11], [12].
[415] HR Act section 29(3).
[416] Explanatory Notes, Human Rights Bill 2018 (Qld) 24.
[417] HR Act section 29(5)(b).
[418] Human Rights Committee, *General Comment No 35: Liberty and security of person (Article 9 of the International Covenant on Civil and Political Rights),* 112th sess (16 December 2014) [37].

- A policy or statutory provision that provides for detention on remand or release on bail conditions.
- A policy or provision which involve the continued supervision and detention of persons convicted of serious criminal offences after the end of their sentence.
- A policy or provision that applies an indefinite sentence for certain, serious offences.

Case examples

Attorney-General for the State of Queensland v Grant (No.2) [2022] QSC 252

- Mr Grant was a 78-year-old convicted sex offender who had served his prison sentence and was due for release. However, due to his medical conditions and limited mobility, there were difficulties finding somewhere suitable for him to live which would have enabled the provision of necessary support while protecting the community.
- The court considered the human rights impact of a continued detention order, which would have kept Mr Grant in prison indefinitely despite having served his sentence, and a supervision order, which would have allowed Mr Grant to live in the community with restrictions.
- The court concluded that making a continued detention order would engage the right to liberty under section 29(1) of the HR Act and the right to protection from arbitrary detention under section 29(2).[419] Similarly, the making of a supervision order, which would govern where Mr Grant could live, where he could go, and what he could do each day, would engage his rights under section 29(1).[420]
- If the continued detention order were made only because of the decision of Queensland Corrective Services not to provide suitable and humane conditions for Mr Grant's accommodation and the discriminatory effect of policies that unnecessarily impeded his access to food and health services, then his continued detention in prison would arguably be arbitrary.[421]
- The court made a supervision order, based in part on the principle that individual liberty should be constrained to no greater extent than is warranted by the statute that authorises the constraint.[422]

Carolan v the Queen [2015] VSCA 167

- In Victoria, the right to liberty of convicted sex offenders who have already served their sentences may be limited under relevant legislation (the *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSDOA) and the *Serious Sex Offenders Monitoring Act 2005*) for the purpose of community protection.
- In this case, Mr Carolan was subject to an indefinite sentence due to a significant and lengthy history of sexual offending. His application for review of the indefinite

[419] *Attorney-General for the State of Queensland v Grant (No.2)* [2022] QSC 252 [114]
[420] *Attorney-General for the State of Queensland v Grant (No.2)* [2022] QSC 252 [115]
[421] *Attorney-General for the State of Queensland v Grant (No.2)* [2022] QSC 252 [111]
[422] *Attorney-General for the State of Queensland v Grant (No.2)* [2022] QSC 252 [165]

sentence and to discharge the sentence pursuant to the *Sentencing Act 1991* (Vic) was refused by the County Court.

- On appeal, Mr Carolan argued the Director of Public Prosecutions did not provide evidence of the steps to be taken in order to manage the risk posed by him if his sentence was discharged, which was said to breach sections 21 and 38 of the Victorian Charter (right to liberty and security of person and conduct of public authorities, respectively).
- The Court of Appeal found the Chief Judge erred in his finding that the existence of the SSDOA regime of supervision and detention did not allow for the conclusion that Mr Carolan would not be a serious danger to the community, particularly in the absence of any evidence of what the relevant authorities would do once his sentence had been discharged. Further, the court held that the Adult Parole Board's statutory functions under the SSDOA regime were adequate to allow a discharge of the sentence under the *Sentencing Act 1991*, especially due to the 'extraordinary' nature of indefinite sentences and their utility as a solution in only 'exceptional cases.'[423]
- When assessing the degree of risk posed to the community by a sex offender in making a supervision order under the SSDOA, the court can consider statutory regimes that mitigate the risk to the community other than preventative detention. Courts may therefore consider such risk controls when weighing up whether the right to liberty has been justifiably limited.

Police Toll Enforcement v Taha; State of Victoria v Brookes [2013] VSCA 37

- In the first instance, the respondents had failed to make instalment order payments in respect of outstanding fines. The fine order was subsequently quashed and the Magistrate ordered that they be imprisoned under section 160(1) of the *Infringements Act 2006* (Vic). The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.
- Both respondents had a disability. They applied for judicial review of the decision.
- The court accepted the submissions that the Victorian Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law. Further, it was held the Magistrate was subject to a **positive obligation** when making an order of imprisonment to enquire about the existence of any special circumstances that might justify reducing the severity of the order.

MH6 v Mental Health Review Board (General) [2008] VCAT 846

- The applicant in this matter, Mr J, suffered a serious brain injury in 1982 and was later imprisoned for indecent assault. He was subsequently subject to an involuntary treatment order under the *Mental Health Act 1986* (Vic) (MH Act) for mental illness following his imprisonment and had been admitted to a specialised rehabilitation facility for adults with acquired brain injuries and psychiatric illness. Mr J applied to

[423] *Carolan v the Queen* [2015] VSCA 167 [61]-[63].

the Mental Health Review Board to be discharged. However, the Board held that his continued involuntary treatment under the MH Act was necessary.

- Mr J applied to VCAT for review of the Board's decision.
- VCAT confirmed the involuntary treatment order under the MH Act following evidence which indicated that the applicant would be a risk to himself and others if released, including by sexually inappropriate behaviour towards women. The applicant's behaviour only stabilised under the structured, supervised environment of the high security psychiatric treatment facility to which he was confined. The order was necessary to fulfil the applicant's treatment needs and was thereby in his interests and a reasonable limitation on the right.

Kracke v Mental Health Review Board [2009] VCAT 646

- Mr Kracke was a 37-year-old man subjected to medical treatment without his consent. He had been diagnosed as mentally ill and required to take psychotropic medication, which have adverse side effects. Mr Kracke had been trying to convince the medical authorities to let him stop taking them.
- VCAT found that 'it is an obvious interference with a person's dignity and integrity to give them medical treatment without their consent.[424]
- Extreme kinds of treatment of mentally ill patients can rise above the minimum level of severity and violate their right not to be subjected to inhuman or degrading treatment.[425] 'The right to refuse unwanted treatment respects the person's freedom to choose what should happen to them, which is an aspect of their individual personality, dignity and autonomy.'[426] The right is especially important in the context of treating someone for mental illness.[427]
- Giving someone involuntary treatment seriously limits their interest in personal integrity and autonomy, and in making medical decisions about matters affecting them.[428] Making a community treatment order engages the patient's right to freedom from medical treatment without their full, free and informed consent.[429]
- It was considered in this case that involuntary treatment orders allow for detention first and the involuntary medical treatment of patients second. In the first instance, the right to freedom of movement (section 12 Victorian Charter, section 19 HR Act) and right to liberty (section 21 Victorian Charter, section 29 HR Act) were **engaged** by the detention of Mr Kracke. However, in the second instance in respect of involuntary medical treatment, VCAT found that Mr Kracke's treatment did not engage the right to freedom from torture (section 10(a) Victorian Charter, section 17(a) HR Act) because the nature of the treatment was not deliberately 'inhuman treatment covering very serious and harmful suffering.'[430] Similarly, the treatment was not

[424] *Kracke v Mental Health Review Board* [2009] VCAT 646 [548].
[425] *Kracke v Mental Health Review Board* [2009] VCAT 646 [542].
[426] *Kracke v Mental Health Review Board* [2009] VCAT 646 [569].
[427] *Kracke v Mental Health Review Board* [2009] VCAT 646 [570].
[428] *Kracke v Mental Health Review Board* [2009] VCAT 646 [735].
[429] *Kracke v Mental Health Review Board* [2009] VCAT 646 [738].
[430] *Kracke v Mental Health Review Board* [2009] VCAT 646 [734].

considered to be cruel, inhuman or degrading (section 10(c) Victorian Charter, section 17(b) HR Act).[431]

- However, in this case VCAT ultimately found that despite Mr Kracke's treatment engaging his right to personal integrity and autonomy in making personal medical decisions (section 10(c) Victorian Charter):

> *nothing in the present case comes near an actual or potential violation of Mr Kracke's right not to be treated in an inhuman or degrading way…that right is not engaged in the circumstances of the present case*.[432]

Re Beth [2013] VSC 189

- Beth (a pseudonym), a 16-year-old girl, was removed from her parents' care by Queensland authorities as an infant and subsequently placed into the care of the Secretary of the Department of Human Services (Victoria) ('Secretary'). The Secretary was Beth's guardian from the age of four pursuant to the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') and the intellectual difficulties suffered by Beth, as well as a dysfunctional family background involving significant sexual abuse and violence, severely tested the Secretary's capacity to adequately care for her. Further, the accommodation options available to Beth through the CYF Act were found to be 'materially inadequate or inappropriate for a variety of reasons.'[433] The Secretary therefore applied to the court seeking restrictive intervention orders for the appropriate accommodation, care and monitoring of Beth. This involved authorising the Secretary and those acting under her direction to place Beth in a residential care facility and authorising staff to use reasonably necessary measures, including reasonable use of force and lock up facilities, to care for her.
- In this matter, it was noted that although the orders sort were in Beth's best interests, they involved a substantial restriction on her liberty that would 'subject her to a form of ongoing managed detention'.[434] The court therefore considered whether the restrictive intervention orders that limited Beth's right to liberty and security of person (among others) were justified and the least restrictive means reasonably available to achieve the purpose of adequately caring for and accommodating Beth.
- The court found that the orders authorising the use of restrictive interventions were a reasonable limitation on Beth's rights because the orders were limited in duration, provided for progress reports and required independent supervision of the order. In reaching this conclusion, his honour Osborn JA acknowledged that 'the probability is that if the orders are not made Beth will suffer substantial involuntary confinement either within SWS [secure welfare service] or the youth justice system.'[435] The orders sought were therefore granted, subject to appropriate conditions to be agreed by all parties.

---

[431] *Kracke v Mental Health Review Board* [2009] VCAT 646 [734].
[432] *Kracke v Mental Health Review Board* [2009] VCAT 646 [568].
[433] *Re Beth* [2013] VSC 189 [6].
[434] *Re Beth* [2013] VSC 189 [9]
[435] *Re Beth* [2013] VSC 189 [202].

Biddle v State of Victoria [2015] VSC 275

- Mr Biddle was arrested by three police officers in his home without a warrant under section 123 of the *Family Violence and Protection Act 2008* (Vic) for an alleged breach of an intervention order taken out against him. In the course of the arrest, a struggle broke out between the police officers and Mr Biddle, resulting in him being pepper sprayed.
- One key issue at trial was whether the police had informed Mr Biddle that he was under arrest. Failure to comply with this obligation when arresting a person will render the arrest and detention of the person unlawful and may be a violation of the right to be informed at the time of arrest of the reason for the arrest under section 21(4) of the Victorian Charter (section 29(4) HR Act).
- In his judgment, Kaye JA was satisfied that one of the police officers, more than once, informed the plaintiff he was under arrest for breach of an intervention order. Kaye JA noted that the amount of information required to be conveyed to the person arrested is dependent upon the circumstances in which the arrest is made. In this case, he was satisfied that each time the police officer attempted to explain to the plaintiff the fact and reason for his arrest, the plaintiff reacted angrily, swore and abused the police officer, preventing him from providing the plaintiff with any further explanation or description of the offence for which he was being arrested.[436]
- Accordingly, a police officer will have discharged the obligation under the right to inform the arrestee in circumstances where the court is satisfied that the police officer informed the plaintiff they were under arrest for an offence, but the abusive behaviour of the detainee prevented the police officer from providing further explanation or communicating any more.

Re Application for Bail by Dickson [2008] VSC 516

- This matter concerned the right to be brought to trial without unreasonable delay under section 21(5) of the Victorian Charter (section 29(5) HR Act). The bail applicant was charged with 25 counts of armed robbery and 4 counts of attempted armed robbery offences. The applicant was facing approximately two years and three months between the date of his arrest and the trial. Further, the applicant was in custody while serving revoked parole for an unrelated sentence and was therefore unlikely to be released even if bail was granted.
- In his application for bail before the Supreme Court, the bail applicant argued that being held in custody for an unreasonable period of time should warrant the granting of bail regardless of any other circumstances. It was submitted that section 21(5) of the Victorian Charter required the relevant provisions of the *Bail Act 1977* (Vic) (Bail Act) to be interpreted to give full effect to the right to be brought to trial without unreasonable delay.
- The Supreme Court stated that because the meaning of 'unreasonable delay' is not defined, it should be regarded as 'descriptive given the particular circumstances'.[437]

[436] *Biddle v State of Victoria* [2015] VSC 275 [246].
[437] Re *Application for Bail by* Dickson [2008] VSC 516 [13].

For a delay to be considered unreasonable, it should not have occurred through the fault of the arrestee or detainee. In reaching this conclusion, Larsy J considered that although the length of the delay in this matter could support a finding of unreasonableness, it could not be considered in isolation. It was relevant to consider that the applicant's period in custody would be spent serving pre-existing sentences or parole breaches (not simply pre-sentence detention), which meant the delay was 'significantly less prejudicial to the applicant than might normally be expected.'[438]

- Further, it was held that the right to be brought to trial without unreasonable delay does not require the Bail Act to be interpreted to allow an accused to be released on bail, regardless of an established unacceptable risk and the right has to be considered within the relevant provisions of the Bail Act.[439]
- The application for bail was therefore refused, in part, due to a finding that the provisions in the Victorian Charter did not materially affect the role of delay in this particular application.

R v Ahmad Niazi [2008] VMC 3

- Mr Niazi was charged with multiple drug trafficking and possession offences. The serious nature of the charges meant that, under the *Bail Act 1977* (Vic), bail would be refused unless Mr Niazi could demonstrate that 'exceptional circumstances' exist and the court is satisfied he does not post an 'unacceptable risk' of breaching bail conditions if released.
- It was argued that exceptional circumstances could be established due to the individual or combined effects of Mr Niazi being a carer of his ill and elderly mother, his family circumstances, his lack of prior criminal history, the availability of sureties and the delay in the trial of the charges.[440] Of these factors, the court accepted that the significant delay in the case of over two years before the charges would be heard was 'of paramount importance when considering whether "exceptional circumstances" exist.'[441] While the court affirmed that exceptional circumstances vary from case to case, it was held that a delay of 18 months to two years in the present case did constitute exceptional circumstances and would be unreasonable under the sections 21(5) and 25(2) of the Victorian Charter. Mr Niazi's application for bail was therefore granted, subject to a number of conditions.
- The prosecution had a strong case on a charge of drug trafficking for which the defendant was likely to serve a significant custodial sentence. Despite this, the rights were found to enact the common law right to be tried without unreasonable delay, and the delay in the case of over 2 years before the charges would be heard, informed the meaning of the 'exceptional circumstances' that led to bail being granted.

[438] *Re Application for Bail by Dickson* [2008] VSC 516 [22].
[439] *Re Application for Bail by Dickson* [2008] VSC 516 [15].
[440] *R v Ahmad Niazi* [2008] VMC 3 [5].
[441] *R v Ahmad Niazi* [2008] VMC 3 [12].

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

- The applicant had been in solitary confinement for a period of seven years.
- The applicant sought a judicial review challenge (with human rights grounds attached) that related to decisions of the Queensland Corrective Services (QCS) to issue a Maximum Security Order (MSO) (including a direction not permitting association with other prisoners) for a further six months. The effect of these decisions was to continue his accommodation in solitary confinement and prevent him associating with other persons.
- The Queensland Supreme Court declared that the decision breached the prisoner's right to be treated humanely when deprived of liberty under section 30 of the HR Act and that QCS failed to discharge the onus of demonstrating that the limitation was proportionate. QCS were found to have acted unlawfully in respect of the obligations under the HR Act to act and make decisions that are compatible with human rights as well as to give proper consideration to human rights when making decisions.
- The applicant argued that the failure of the respondent to take steps to identify and apply changes to the applicant's treatment regime by which his circumstances could be improved, constituted treatment which contravened section 29 of the HR Act. This is because, the applicant argued, notwithstanding his liberty has been removed by the conviction and sentence he is serving, he retained a "residual liberty" while detained and that this right had been limited by QCS by way of the issuance of the MSO.
- The court found that the right was **not** engaged in such circumstances because, for the court to find that the MSO restricted the residual liberty of the applicant, it would have to do one of two things:
    - to release the applicant from prison if the court found that the detention was unlawful; or
    - it would lead the court to assess various levels of imprisonment and a determination of which is most appropriate for a particular prisoner. This could result in the release of the applicant into the general population of the prison.
- Both situations were held to be unacceptable because the court would be said to be exercising a substitutionary and not a supervisory power, which is not the role of the court under the HR Act.
- The decision in *Owen-D'Arcy* provides a summary of the international and Australian common law jurisprudence on the concept of 'residual liberty'.[442]
- Further, the court described the difference between section 29 and section 30 of the HR Act as follows:

> *Section 29 is concerned with the fact of detention or deprivation and not the circumstances of detention or deprivation. When a person has been detained then section 30 applies. It applies to persons who have been deprived of liberty by reason*

[442] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [202]-[205]

of conviction and sentence and to persons who are detained awaiting trial. Section 29 says nothing about the treatment of persons who have been detained.[443]

[443] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [197]

Humane treatment when deprived of liberty

Human Rights Act 2019 (Qld)

Section 30 Humane treatment when deprived of liberty

(1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.

(3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 10(1) Article 10(2)(a)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 22
ACT	***Human Rights Act 2004***	Section 19

What does the right protect?

The right recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

The right generally complements the right in section 17 of the HR Act (protection from torture and cruel, inhuman or degrading treatment or punishment). The right to humane treatment when deprived of liberty is concerned with protecting people in detention and avoiding unreasonable interference with other rights. The right places a **positive obligation** on the **state** to ensure persons deprived of liberty are treated with dignity and humanity.

The right to humane treatment when deprived of liberty applies not only to persons detained under the criminal law but also to persons detained elsewhere under the laws and authority of the State. For example, this includes mental health facilities, detention camps and correctional institutions within the State's jurisdiction, but does not include Federal Government detention facilities (such as immigration detention) operating in Queensland.

People deprived of their liberty will inevitably have other rights limited because of their detention. This includes the rights to movement (section 19), freedom of expression (section 21) and privacy and reputation (section 25). The right to humane treatment in section 30

means that individuals who are detained should not be subject to any hardship or constraint that is in addition to those inevitable constraints resulting from the deprivation of their liberty (that is, a person who is detained should retain all their human rights subject only to the restrictions that are unavoidable in a closed environment).[444]

Deprivation of liberty is to be distinguished from mere restrictions on freedom of movement. The difference is 'one of degree or intensity, not one of nature and substance'.[445]

The right to humane treatment places an obligation on the **state** to ensure all detention facilities are sufficiently resourced and kept to an appropriate standard. In their Audit on the operation of ACT Correctional Facilities, the ACT Human Rights Commission observed that any 'inhumane treatment cannot be justified on the grounds of lack of resources or financial difficulties'.[446]

The right covers specific incidents of ill-treatment but may also cover conditions of detention generally.[447] The UN Standard Minimum Rules for the Treatment of Prisoners (the *Nelson Mandela Rules*) provides some guidance on standards for humane treatment of adult prisoners on a range of matters, including conditions of:

- accommodation
- food of adequate quality
- facilities for personal hygiene
- standard of clothing and bedding
- opportunities for exercise and availability of medical services
- contacts with the outside world
- access to books
- regulation of methods and procedures for discipline and punishment.

Sections 30(2) and (3) include specific rights for persons who are detained without charge or who are on remand without conviction – requiring that they be segregated during detention from persons convicted of an offence (except where reasonably necessary) and that they be treated in a way that is appropriate for a person who has not been convicted. These rights follow naturally from the presumption of innocence.

---

[444] Human Rights Committee, *General Comment No 21: Humane treatment of persons deprived of their liberty (Article 10 of the International Covenant on Civil and Political Rights),* 44th sess (10 April 1992) [3]. See also Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 200.
[445] *Kracke v Mental Health Review Board* [2009] VCAT 646 [664]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110].
[446] ACT Human Rights Commission, *Human Rights Audit on the operation of ACT Correctional Facilities under Corrections legislation* (Audit No 3, August 2007) 34.
[447] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 200.

Relevant resources

- **CCPR General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)**
- **United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela Rules)**
- **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)**

Internal limitations

Section 30(2) contains an internal limitation: that a person detained must be segregated from people who have been convicted, 'unless reasonably necessary'. This recognises that the importance of segregation can be balanced against other social goals that meet the general limitation test in section 13 of the HR Act.

Policy triggers

- A policy or statutory provision that provides for the detention of individuals and the conditions under which they may be detained.
- A policy or statutory provision that sets out the standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to private shower and toilet facilities).
- A policy or statutory provision that provides search powers of those who are detained.

Case examples

Certain Children (No 2) [2017] VSC 251[448]

- The court considered the treatment of detained children, following an event at a youth detention centre, when a number of children were transferred to a section within Barwon Adult Correctional Facility that had been 'rezoned' as a youth detention facility.
- The main limitations on the rights of the children arose from the location of the unit within a maximum security adult jail, extensive lockdown periods in cells designed for adult men, the use of handcuffs when children were released from their cells, the presence of adult prison security staff, guards with capsicum spray and extendable batons, and the children's uncertainty about the kind of treatment they would receive.
- The court found that these limitations on the right to humane treatment when deprived of liberty, as well as other rights, were not reasonable and justifiable because, among other reasons, the affected rights protected important values; the

[448] This case is also considered under the right to protection from torture, cruel, inhuman and degrading treatment (section 17) and the right to protection of families and children (section 26).

purpose of the limitations was essentially managerial; and other, less restrictive, ways of achieving the stated purposes were available.

Castles v Secretary to the Department of Justice [2010] VSC 310[449]

- The Supreme Court of Victoria considered whether the decision to deny an incarcerated woman access to IVF treatment was consistent with her right to access health services under the *Corrections Act 1986* (Vic) (Corrections Act), and her rights under the Victorian Charter to privacy and family and to humane treatment when deprived of liberty.
- Prior to her incarceration, Ms Castles had been receiving IVF treatment and requested approval to continue to access IVF at her own cost, as she would shortly become ineligible for treatment by reason of her age.
- The Secretary of the Department of Justice denied Ms Castles' request, on the grounds that she 'does not have an entitlement to this form of medical treatment' and cited, among other things, resource constraints and the precedent that may be set by allowing Ms Castles to access IVF treatment.
- Ms Castles relied on her right under the Corrections Act to 'have access to reasonable medical care and treatment necessary for the preservation of health'[450] and also her Victorian Charter rights to privacy and protection of family, as well as the rights to equality and to humane treatment in detention.
- The outcome of the case was decided on the basis of the provision under the Corrections Act, but there was significant commentary about the right to humane treatment in detention, in particular, that:

> *prisoners should not be subjected to hardship or constraint other than that which results from the deprivation of liberty and accepted that access to health care is a fundamental aspect of the right to dignity. Like other citizens, prisoners have a right to…a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.*[451]

- The court cited the Office of the High Commissioner for Human Rights, in stating: 'persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment'.[452]
- The court stated that the right to access health services under the Corrections Act 'must be construed consistently with the requirement that prisoners be treated with humanity and with respect for their human dignity'.[453]

[449] This case is also considered under the right to privacy and reputation (section 25) and the right to protection of families and children (section 26).
[450] *Corrections Act 1986* (Vic) section 47(f).
[451] *Castles v Secretary to the Department of Justice* [2010] VSC 310 [108].
[452] *Castles v Secretary to the Department of Justice* [2010] VSC 310 [100].
[453] *Castles v Secretary to the Department of Justice* [2010] VSC 310 [127].

DPP v J P H (No 2) [2014] VSC 177

- The Supreme Court considered whether the detention order regime under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) was consistent with the right to humane treatments when deprived of liberty.
- The Act provides for the ongoing detention of offenders who have served custodial sentences for certain sexual offences and present an unacceptable risk of harm to the community.
- Section 115 of the Act states that persons detained under the Act are unconvicted prisoners, who 'must be treated in a way that is appropriate' to that status and 'must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences'.[454]
- Section 115(3) sets out certain exceptions:

> (3) An offender may be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences –
>
> (a) if it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation and other group activities of this kind; or
>
> (b) if it is necessary for the safe custody or welfare of the offender or prisoners or the security or good order of the prison; or
>
> (c) if the offender has elected to be so accommodated or detained.[455]

- The Court found that section 115 reflects the principles embodied in the right and is protective of these rights. The Court also described section 115(3) as providing for 'reasonable limitations' on the right.

Queensland Human Rights Commission unresolved complaints reports – hotel quarantine and prisoner isolation

- Section 88 of the HR Act requires the Queensland Human Rights Commissioner to prepare a report on human rights complaints accepted by the commissioner for resolution in circumstances where the complaint has not been resolved by conciliation or otherwise.[456] The commissioner may publish information about a complaint contained in the report.[457] The purpose of this is to allow the Queensland Human Rights Commission (QHRC) to publish information about the complaints, along with any recommendations, to improve how public entities act compatibly with human rights in the future.
- The QHRC has published two unresolved complaints reports in relation to the right to humane treatment when deprived of liberty under section 30 of the HR Act.
- The first report (published 15 October 2020) concerned a complaint made against Queensland Health (QH) and the Queensland Police Service (QPS) about conditions in

[454] *Sex Offenders (Detention and Supervision) Act 2009* (Qld) section 115(1)-(2).
[455] *Sex Offenders (Detention and Supervision) Act 2009* (Qld) section 115(3)(a)-(c).
[456] *Human Rights Act 2019* (Qld) section 88(1).
[457] *Human Rights Act 2019* (Qld) section 90.

Queensland hotel quarantine.[458] The QHRC considered that, by preventing the complainant from accessing fresh outside air during her 14-day quarantine, QH and QPS limited the complainant's right to humane treatment when deprived of liberty under section 30 of the HR Act.

- The second unresolved complaint report (published 2 February 2021) concerned complaints by a young Aboriginal woman against Queensland Corrective Services (QCS), Serco Australia Pty Ltd (who were managing the prison within which the woman was accommodated) and West Moreton Hospital and Health Service.[459] The report focused on the complaint regarding the woman being accommodated in isolation from other detainees for a period of greater than 14 days pursuant to the then-current QCS policy which was developed in accordance with QH guidelines to prevent the transmission of COVID-19. The QHRC acknowledged that the policies and procedures implemented by QCS to date have been consistent with Queensland's obligations under the right to life and the right to security of the person and that a period of isolation of up to 14 days is a reasonable and proportionate limitation on the right to humane treatment when deprived of liberty. The QHRC also acknowledged that the relevant policy had been updated contemporaneous with QH advice prior to the woman making her complaint. The QHRC considers that the right to humane treatment when deprived of liberty is limited by a period of isolation stretching beyond 14 days and would require demonstrable justification.
- The QHRC made recommendations in both reports to ensure that the relevant public entities act and make decisions compatible with human rights.

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

- The applicant had been in solitary confinement for a period of seven years.
- The applicant sought a judicial review challenge (with human rights grounds attached) that related to decisions of the Queensland Corrective Services (QCS) to issue a Maximum Security Order (MSO) (including a direction not permitting association with other prisoners) for a further six months. The effect of these decisions was to continue his accommodation in solitary confinement and prevent him associating with other persons.
- The Queensland Supreme Court declared that the decision breached the prisoner's right to be treated humanely when deprived of liberty under section 30 of the HR Act and that QCS failed to discharge the onus of demonstrating that the limitation was proportionate. QCS were found to have acted unlawfully in respect of the obligations under the HR Act to act and make decisions that are compatible with human rights as well as to give proper consideration to human rights when making decisions.
- Unlike sections 17(b) and 29 of the HR Act, the question of whether the right in section 30 was engaged was not contested.

[458] Queensland Human Rights Commission, *Hotel quarantine: Unresolved complaint report under section 88 of the Human Rights Act 2019* (15 October 2020).
[459] Queensland Human Rights Commission, *Prisoner isolation: Unresolved complaint under section 88 of the Human Rights Act 2019* (2 February 2021).

- The respondent accepted that the applicant was subject to hardship or constraint beyond the hardship or constraint that all prisoners experienced by virtue of being deprived of their liberty. While the applicant had some interaction with other people within the prison, it was said that the interaction was unlikely to rise to the level of "meaningful human contact" within the meaning of that term as it appears in the *Nelson Mandela Rules*.
- In discussing the nature of right in section 30, the court said that the right directs authorities to treat people 'humanely' and that 'to be treated humanely requires some level of benevolence or compassion and the infliction of the minimum of pain'.[460]

[460] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [245]

Fair hearing

Human Rights Act 2019 (Qld)

Section 31 Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.

(3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 14(1)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 24
ACT	***Human Rights Act 2004***	Section 21

What does the right protect?

The right affirms the right of all individuals to procedural fairness when coming before a court or tribunal. The concept of a fair hearing is concerned with procedural fairness (as opposed to substantive fairness regarding the merits of a specific decision).[461] It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

The underlying value of the right to a fair hearing is said to be in relation to defining the relationship between the individual and the **state** and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the state must prove its case without recourse to the suspect.[462]

When thinking about whether a court or tribunal is competent, independent and impartial, the following factors may be relevant:

[461] *Knight v Wise* [2014] VSC 76 [36].
[462] *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [146] (Warren CJ).

- it is established by law
- it is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings
- it is free to decide the factual and legal issues in a matter without interference
- it has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings
- it presents the appearance of independence
- its officers have security of tenure.

The concept of a 'criminal offence', like many concepts used in the HR Act, may be interpreted as having its own meaning (separate from any other definitions under state law).[463] It is likely that the right will be **engaged** in the criminal context once a person is charged with a criminal offence.[464] In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant.

The term 'civil proceeding' is not defined in the HR Act. It may also be given an autonomous meaning and case law suggests that civil proceedings include legal processes that uphold, determine or protect civil rights or obligations.[465] Civil proceedings are 'not confined to proceedings of a judicial character'[466] and can extend to 'civil proceedings which are of an administrative character'[467] including 'proceedings of many boards, tribunals and administrative decision-makers'.[468]

Mere inconvenience (for example, to the defendant) is not enough to show that the right to a fair hearing has been limited.[469]

What constitutes a 'fair' hearing will depend on the facts of the case and will require the weighing of a number of public interest factors, including the rights of the accused and the victim (in criminal proceedings) or of all parties (in civil proceedings).

Case law has determined that what is 'fair' in the context of a criminal proceeding will involve a triangulation of the interests of the victim, the accused, and the community.[470] In other words, a fair trial does not require a hearing with the most favourable procedures for the accused. It must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime.

[463] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019), 212.
[464] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019), 212.
[465] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019), 214.
[466] *Kracke v Mental Health Review Board* [2009] VCAT 646, [417].
[467] *Kracke v Mental Health Review Board* [2009] VCAT 646, [417].
[468] *Kracke v Mental Health Review Board* [2009] VCAT 646, [415].
[469] *Knight v Wise* [2014] VSC 76.
[470] *R v A (No 2)* [2002] 1 AC 45.

Case law suggests that one of the essential requirements for a fair hearing is the principle of 'equality of arms', meaning that each party must be given a reasonable opportunity to present their case.[471] This will ordinarily involve being informed of the case to be advanced by the opposing party and having an opportunity to respond.[472] The Human Rights Committee has stated equality of arms means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[473]

Case law also highlights that the right to a fair hearing has an implied right that there will be no unreasonable delay to a civil proceeding.[474] The reasonableness of any delay will depend on all the circumstances of the case, including for example: the length of the delay, any waiver of the time periods, the reasons for the delay, any prejudice suffered by the applicant, as well as the nature and complexity of the case and the behaviour of the parties.[475]

Relevant resources

- **CCPR General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial**

Internal limitations

The scope of this right is limited by an internal qualification.

Section 31(2) provides an exception to the right to a public hearing, whereby a court or tribunal may 'exclude members of media organisations, other persons or the general public from all or part of the hearing' if it is in the public interest or the interests or justice.

Section 31(3) provides that all judgments or decisions made by a court or tribunal in a proceeding must be publicly available. However, there is an acknowledgement that 'certain proceedings or circumstances will justify a court suppressing all or part of a judgment'.[476]

Policy triggers

- A policy or statutory provision that creates a reverse onus.
- A policy or provision which abrogates the privilege against self-incrimination.

[471] *Roberts v Harkness* [2018] VSCA 215 [48].
[472] *Roberts v Harkness* [2018] VSCA 215 [48].
[473] Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (27 July 2007) [13]; Human Rights Committee, *Views: Communication No 1347/2005*, 90th sess, UN Doc CCPR/C/90/D/1347/2005 (27 July 2005) [7.4] ('*Dudko v. Australia*').
[474] Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (27 July 2007) [37].
[475] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 220.
[476] Explanatory Notes, Human Rights Bill 2018 (Qld) 25.

- A policy or statutory provision that creates or restricts reviews of administrative decision-making and appeal processes.
- A policy or statutory provision that provides special procedures to provide safeguards for witnesses when giving evidence in a court or tribunal (such as special measures for children and other vulnerable persons).
- A policy or statutory provision that regulates the procedures for challenging the impartiality and independence of courts and tribunals.
- A policy or statutory provision that restricts the publication of cases/decisions.
- A policy or statutory provision that disadvantages or fails to take into account the particular circumstances of a litigant, for example, a litigant with a disability that impacts their ability to engage with a court or tribunal.

Case examples

Karam v Palmone Shoes Pty Ltd [2018] VSC 206

- The applicant in this matter was subject to an extended litigation restraint order under the *Vexatious Proceedings Act 2014* (Vic) (VP Act) and applied to the court to vary or revoke the order. It was argued, among other grounds, that the restraint order violated the applicant's right to a fair hearing under section 24 of the Victorian Charter (section 31 HR Act).
- The court did not accept that the restraint order violated section 24 of the Victorian Charter. It was held that this right is not absolute and can be subject to reasonable constraints aimed at achieving a legitimate purpose. It therefore followed that making a litigation restraint order under the VP Act represented a reasonable and justified limit on the right to a fair hearing, because the order had the legitimate purpose of preventing the overuse of court services by a few vexatious litigants, to ensure ongoing availability and reasonable costs for the community and other litigants.[477]

Tomasevic v Travaglini [2007] VSC 337

- Mr Tomasevic had been found guilty without conviction of threatening to kill and using threatening words in a public place. He applied for judicial review of the Victorian County Court's decision as an unrepresented litigant who sought leave out of time, resulting in the County Court dismissing his application due to the three-year delay being too great. However, the court failed to inform Mr Tomasevic of the requirement to establish exceptional circumstances and to demonstrate how the case would not be materially prejudiced by the delay.
- It was therefore argued that the County Court had breached Mr Tomasevic's right to natural justice by failing to provide him guidance, as an unrepresented litigant.

[477] *Karam v Palmone Shoes Pty Ltd* [2018] VSC 206 [30].

- The court found that trial judges as well as 'masters, magistrates, commissions and tribunals' have a positive duty to assist self-represented litigations in criminal and civil trials and in interlocutory proceedings.[478]
- The judge's overriding duty is to ensure a fair trial, but the judge must maintain neutrality, and the appearance of neutrality, and so cannot become the advocate of the self-represented litigant.
- The judge must make sure the 'accused is fully aware of the legal position in relation to the substantive and procedural aspects of the case' but without advising the accused to take a particular course.[479]

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

- Two applicants, one with a disability, were self-represented at a hearing in the Magistrates' Court in respect of offences against the *Building Act 1993* (Vic). Both applicants were found guilty and received a fine.
- At the hearing of the appeal in the County Court, the applicants were again unrepresented and the appeal was struck out. The applicants sought judicial review of the judge's orders (on the grounds of breach of natural justice and procedural fairness as well as unlawfulness under the Victorian Charter).
- The judge was found not to have applied the human rights protected by the Victorian Charter to the applicants – the right to equality before the law and the right to a fair hearing.
- The judge did not recognise the applicants as self-represented (one with a disability); appreciate there were two separate applications; explain the court procedure to the applicants; or explain to the applicants the central issue raised in their applications.[480]
- The County Court orders were set aside and the applications were remitted to be heard and determined by a different judge.

Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381

- The case involved an application by a Detective of Victoria Police for a coercive powers order under the *Major Crime (Investigative Powers) Act 2004* (Vic) (MC Act), which would allow an individual to be compelled by witness summons to attend before the Chief Examiner to provide evidence, without the protection of the privilege against self-incrimination. The Supreme Court considered what use could be made of evidence derived from compelled testimony under the MC Act and whether admitting evidence obtained on the basis of compelled testimony in a future criminal trial of a person was a justified limitation on the privilege against self-incrimination and the right to a fair hearing under the Victorian Charter.
- The court found that the coercive power could be interpreted in a way that is compatible with human rights and also consistent with the purpose of the provision.

[478] *Tomasevic v Travaglini* [2007] VSC 337[89].
[479] *Tomasevic v Travaglini* [2007] VSC 337 [131].
[480] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [156].

Warren CJ held that the purpose of the provision would not be undermined by reading it to exclude the admissibility in future criminal proceedings of 'evidence obtained pursuant to compelled testimony … unless the evidence is discoverable through alternative means.'[481]

- In short, Her Honour found that in interpreting the Act, derivative use immunity must be extended to a witness interrogated pursuant to the terms of the Act, where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. Derivative use of the evidence obtained pursuant to compelled testimony must not be admissible against any person affected by the Act unless the evidence is discoverable through alternative means.
- Her Honour noted that the applicant has shown

> *no real reason why this should not be the case in Victoria ... This is a less restrictive means of achieving the purpose of the limitation, but which also gives effect to a reasonable limitation on the right against self-incrimination*.[482]

Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes [2013] VSCA 37

- In the first instance, the respondents had failed to make instalment order payments in respect of outstanding fines. The fine order was subsequently quashed and the Magistrate ordered that they be imprisoned under section 160(1) of the *Infringements Act 2006* (Vic). The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.
- Both respondents had a disability. They applied for judicial review of the decision.
- The Court accepted the submissions that the Victorian Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law.[483] Further, it was held that in the particular circumstances of the case, the Magistrate was subject to a positive obligation when making an order of imprisonment to enquire about the existence of any special circumstances that might justify reducing the severity of the order.[484]

Bray (A Pseudonym) v The Queen [2014] VSCA 276

- The applicant in this matter was on trial in the County Court at Melbourne charged with rape. The complainant had made a statement to police and gave evidence at the committal hearing where she was cross-examined however, she died before the matter came to trial. The prosecution applied to have admitted into evidence the statement and a transcript of the evidence she gave at committal. The trial judged granted the application and rejected an argument on behalf of the accused that the

[481] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [177].
[482] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [118].
[483] *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [187].
[484] *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37 [221].

evidence should be excluded on the ground that 'its probative value [was] outweighed by the danger of unfair prejudice to the accused' within the meaning of section 137 of the *Evidence Act 2008* (Vic).[485]

- In deciding to grant leave for the appeal, the court said:

> *the critical question is: would it be necessarily unfair to have a conviction based upon evidence which cannot be the subject of cross-examination at trial? That question admits of only one answer. It would not be necessarily unfair. As has been said many times, ' defendant is entitled to a fair trial but not a perfect one'.*[486]

- The court determined that the leading evidence from a witness who cannot be cross-examined will not necessarily render a trial unfair, nor would the evidence's probative value be outweighed by its likely prejudicial effect. It was held that there are mechanisms in place to ensure a fair trial, including the capacity of the trial judge in giving strong and appropriate directions to the jury about the dangers of placing too much weight on untested statements.

Knight v Wise [2014] VSC 76

- Knight is serving a life sentence at Port Phillip Prison and was declared a vexatious litigant pursuant to section 21 of the *Supreme Court Act 1986* (Vic) (SC Act). In this matter, Knight sought to challenge a decision made by the Deputy Commissioner of Corrections in Victoria (Wise) to deny Knight permission to purchase an in-cell computer (the decision). As a vexatious litigant, Knight requires leave of the court to commence legal proceedings and the court must be satisfied the proceedings will not be an abuse of the process of the court.
- While leave was ultimately granted, the court considered one of Knight's grounds for relief which alleged that the decision breached his right to a fair hearing under section 24 of the Victorian Charter (section 31 HR Act). In examining this ground, the court considered that the right is concerned with procedural fairness of a decision which depends on all the circumstances of the case and ensures a party is afforded a reasonable opportunity to put forward their case in conditions that do not place them at a substantial disadvantage when compared to their opponent (principle of equality of arms).[487]
- On this basis, it was held that there was no evidence that Knight's lack of access to an in-cell computer would result in such a substantial disadvantage, given that he still had access to shared prison computers, secondary legal materials and relevant case documents.
- Further, the right to a fair hearing 'requires more than inconvenience' and incorporates common law rights of 'unimpeded access to the courts, an implied right to a reasonably expeditious hearing, duties to inquire, rights to legal advice and

[485] *Bray (A Pseudonym) v The Queen* [2014] VSCA 276 [5].
[486] *Bray (A Pseudonym) v The Queen* [2014] VSCA 276 [76].
[487] *Knight v Wise* [2014] VSC 76 [36].

representation and the privilege against self-incrimination'. However, many of those rights were not an in issue in the proposed proceedings.[488]

SQH v Scott [2022] QSC 16

- The applicant argued that to answer a question during a Crime and Corruption hearing 'touched' on the charges against the applicant and the applicant's partner and may impact on the applicant receiving a fair trial.
- The court found the applicant's right to fair hearing (section 31 of the HR Act) and right against self-incrimination (section 32(2)(k)) were engaged by the presiding officer's decision directing the applicant and the applicant's partner to answer the question.
- The limit was found to be justified because of the protections in place under the legislative scheme such as direct use immunity and confidentiality in response of the identity of the witness and any evidence given.
- The court found that the right to fair hearing (section 31(1) of the HR Act) was engaged by the presiding officer's decision as there was considerable overlap between section 31(1) and the right against self-incrimination (section 32(2)(k)), relying on Bell J in *Re Kracke and Mental Health Review Board* to describe the rights in section 32 as being 'additional to and in many cases more explicit than, but do not derogate from, the rights in' section 31.[489]

[488] *Knight v Wise* [2014] VSC 76 [37]-[38].
[489] See *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [373]. See also *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 425 [40].

Rights in criminal proceedings

Human Rights Act 2019 (Qld)

Section 32 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;

(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;

(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;

(e) to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;

(f) to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid under the *Legal Aid Queensland Act 1997*;

(g) to examine, or have examined, witnesses against the person;

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

(i) to have the free assistance of an interpreter if the person can not understand or speak English;

(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that requires the assistance;

(k) not to be compelled to testify against themselves or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of the child's age, and the desirability of promoting the child's rehabilitation.

(4) A person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

(5) In this section –
legal aid means legal assistance given under the *Legal Aid Queensland Act 1997.*

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 14(2)(3)(4) and (5)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 25
ACT	***Human Rights Act 2004***	Section 22

What does the right protect?

Section 32 safeguards a number of rights for people charged with a criminal offence.

- Section 32(1) upholds the presumption of innocence
- Section 32(2) enshrines a range of minimum guarantees in criminal proceedings, including the privilege against self-incrimination.
- Section 32(3) ensures that a child charged with a criminal offence has the right to a procedure that takes account of the child's age, and the desirability of promoting the child's rehabilitation.
- Section 32(4) ensures that a person convicted or sentenced under an offence can appeal to higher court.

The substantive and the procedural rights in section 32 should be read in conjunction with the right to fair hearing in section 31 as well as common law rights. For example, the right against self-incrimination (section 31(2)(k) of the HR Act) is at least as broad as the traditional common law right not to have an unfair trial and the right not to incriminate oneself.[490]

In criminal law, as a general rule, it is for the prosecution to prove a defendant's guilt, not for the defendant to prove their innocence. Section 32(1) explicitly protects the right to be presumed innocent until proved guilty. This imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle. However, sometimes the Parliament will depart from this general rule and impose either an evidential or a legal burden of proof on an accused person. This is known as reversing the onus of proof. Reverse onus provisions by their nature **limit** the right in section 32(1) of the HR Act but are not necessarily incompatible. Whether reverse burden of proof constitutes a reasonable limitation on the presumption of innocence will depend on the circumstances of the case.

[490] *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [80] (Warren CJ). See also 442 [118]; see also *Bare v Independent Broad-based Anti-Corruption Commission* (2016) 48 VR 129, 182 [160] (Warren CJ), 334 [633] (Santamaria JA).

491

An evidential burden may not limit the right in section 32(1) of the HR Act at all.[492] However, the High Court has considered that an evidential burden would reduce, not eliminate, the limit on the right.[493] Therefore, while the position remains uncertain, placing an evidential burden on the accused may be seen as limiting the right to be presumed innocent. However, this will be a substantially less significant limitation, meaning it will be more easily justified than placing a legal burden on the accused.

Section 32(2) sets out a number of minimum guarantees in criminal proceedings that are to be provided 'without discrimination'. It is likely that 'without discrimination' refers to a negative requirement, rather than providing a positive aspect incorporating a duty to promote equality. Some commentators suggest that the term picks up the definition found in the *Anti-Discrimination Act 1991*.[494] However, the words 'without discrimination', along with the right in section 15(3) of the HR Act to equality before the law, equal protection of the law without discrimination and equal and effective protection against discrimination, 'reinforce the objective, criterion-based and non-arbitrary nature' of the decision-making process required.[495]

Section 32(2)(c) protects the right for persons to be tried 'without unreasonable delay'. For the purposes of deciding whether a delay has been unreasonable, the relevant starting point is the time from when someone is charged with an offence. That official notification will occur through the service of a summons to answer charges laid, or when an accused is served with an arrest warrant.

The right of an accused to defend themselves includes the right to instruct their lawyer on the case and to testify on their own behalf and is therefore not mutually exclusive with the right to counsel of their choosing. However, an accused is entitled to reject the assistance of counsel, although this right may be limited in certain circumstances, for example, where the accused is facing a very serious charge or counsel is required to protect vulnerable witnesses.

The right not to be compelled to testify against yourself or to confess guilt reflects the common law privilege against self-incrimination. Like the right to a fair hearing, the right against self-incrimination applies to all stages of criminal proceedings, including the pre-trial process and the trial.[496]

---

[491] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 230.
[492] *R v DA* (2016) 263 A Crim R 429, 444 [48] (Ashley, Redlich and McLeish JJA).
[493] *Momcilovic v The Queen* (2011) 245 CLR 1, 220 [577] (Crennan and Kiefel JJ).
[494] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 230.
[495] *Bayley v Nixon and Victoria Legal Aid* [2015] VSC 744 [39].
[496] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 238.

A provision which nullifies the privilege against self-incrimination will limit the right to a fair hearing in section 31(1), and the right not to be compelled to testify against oneself or to confess guilt in section 32(2)(k) of the HR Act.

Section 32(3) provides that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. The right applies throughout the whole criminal process.[497] The right is primarily directed at processes and procedures that may lead to the detention of a child charged with a criminal offence, as opposed to the place or conditions of detention.[498]. In *DPP v S L* Bell J noted that

> *[t]he general principle … is that courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress and to assist him or her effectively to participate in the proceeding.*[499]

Relevant resources

- **CCPR General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that reverses the presumption of innocence.
- A policy or statutory provision that deals with the admissibility of evidence.
- A policy or statutory provision that creates a reverse onus.
- A policy or statutory provision that delays trial proceedings.
- A policy or statutory provision that restricts cross examination.
- A policy or statutory provision that deals with the provision of legal aid.
- A policy or statutory provision that restricts access to information and material to be used as evidence.
- A policy or statutory provision that limits appeal rights.
- A policy or statutory provision that regulates the procedures for investigation and prosecution of offences.
- A policy or statutory provision that deals with the provision of assistance and interpreters.

[497] *Application for Bail by HL* [2017] VSC 1 [132]; *DPP v S E* [2017] VSC 13 [15].
[498] *Certain Children (No 2)* [2017] VSC 251 [230].
[499] *DPP v S L* [2016] VSC 713 [12].

Case examples

R v Malcolm [2023] QDCPR 105

- Mr Malcolm was accused of a number of child sexual offences against the complainant, his cousin, which had allegedly taken place approximately 20 years previously. In 2019, the complainant disclosed the offending to the police and provided a formal statement.
- The complainant died before Mr Malcolm's trial and the admissibility of her statements was challenged on the basis of his right to examine, or have examined, any witnesses against him under section 32(2)(g) of the HR Act.
- Under the *Evidence Act 1977*, the court has discretion to exclude evidence if it is satisfied that admitting the evidence would be unfair to the accused.
- In considering the use of this discretion, and the necessary assessment of 'fairness', the court concluded that a person's right to examine, or have examined, a witness against them is not an unqualified right, nor is it intended to be 'guaranteed' for the purpose of criminal proceedings where a reasonable and justifiable limitation is invoked and explained.[500]
- The court further noted that to interpret the right as a guarantee, to be enforced by the courts without qualification, would be unsustainable in the context of the criminal justice system. It would mean that 'in any instance a complainant or any witness is unavailable requires proceedings to be abandoned'.[501]
- The court ultimately found the complainant's statements to be admissible.[502]

SS v Office of Fair Trading [2023] QCAT 215

- The applicant was registered as a Security Officer and Crowd Controller who was charged with rape and sexual assault. Under the *Security Provider Act 1993* (SP Act), a person with a license under the SP Act who has been charged with these offences could have their license suspended until the end of the proceeding for the charge. The applicant's license was suspended and he challenged the decision, including by contending that it breached his right to be presumed innocent until proved guilty under section 32(1) of the HR Act.
- The tribunal concluded that, by expressly enabling suspension of a license in the SP Act, based on criminal charges alone, it was Parliament's view that just being charged with an offence was a matter of such public importance that a suspension should be considered.[503]
- The tribunal accepted the respondent's submission that the decision to suspend the applicant was for the protection of the public and the preservation of faith of the

[500] *R v Malcolm* [2023] QDCPR 105 [107]
[501] *R v Malcolm* [2023] QDCPR 105 [108]
[502] *R v Malcolm* [2023] QDCPR 105 [116]-[117]
[503] *SS v Office of Fair Trading* [2023] QCAT 215 [24]

community that a person who holds such a license is an appropriate person to hold such a license where their role at a public place is principally for keeping order.[504]

R v Momcilovic [2010] VSCA 540

- The Victorian Court of Appeal found that a reverse onus in section 5 of the *Drugs, Poisons and Controlled Substances Act* (Vic) was not a reasonable and justified limit on the presumption of innocence.
- Relevant factors in considering whether a reverse onus is compatible with the right include the seriousness of the sentence likely to be imposed on conviction for the offence, whether the nature of the offence makes it difficult for the prosecution to prove an element of the offence compared to the accused disproving it, and whether the provision requires the accused to prove an exception, proviso or excuse rather than an element of the offence.
- In analysing whether limits on the presumption of innocence are reasonable and justified, the Court of Appeal identified the apparent paradox that

  > *an infringement of the presumption of innocence becomes harder to justify the more serious is the punishment to which the defendant is exposed [and] that an infringement of the presumption of innocence becomes harder to justify the less serious is the offence in question*.[505]

- The more serious the crime and the greater the public interest in securing convictions of the guilt, the more important protections of the accused become. Conversely, the less serious the crime and the public interest in securing convictions, the less compelling the reasons for denying the accused normal protection.
- Relevant factors in assessing whether a reverse onus was said to be compatible with the Victorian Charter could include the seriousness of the sentence likely to be imposed on conviction for such an offence, whether the nature of the offence makes it very difficult for the prosecution to prove an element of the offence compared to the accused disproving it, and whether the provision requires the accused to prove an exception, proviso or excuse rather than an element of the offence.
- **Note:** on appeal to the High Court,[506] the court interpreted the legislation so that section 5 did not apply and therefore the High Court did not make a binding decision about whether the limit on the right effected by section 5 was reasonable and justifiable.

R v Benbrika (Ruling No 12) [2007] VSC 524

- A group of 12 accused were to be tried together on terrorism charges. They were to be tried in a court with perspex screens separating them from their legal representatives, and each other, and with a large number of prison officers in

[504] *SS v Office of Fair Trading* [2023] QCAT 215 [25]
[505] *R v Momcilovic* [2010] VSCA 540 [148].
[506] *Momcilovic v The Queen* [2011] HCA 34.

attendance. The accused argued that they would suffer 'severe and irremediable prejudice' to their case, because the jury would likely believe that "the authorities" or "the Government" had already decided they were a danger to the community'.[507]

- The Supreme Court held that the way the trial was proposed to proceed would 'materially diminish [the accused's] right to the presumption of innocence' in the rights in criminal proceedings.[508] The Court ruled that the perspex screens be removed and restricted the number of uniformed prison officers allowed into the court room at one time.

Sabet v Medical Practitioners Board of Victoria [2008] VSC 346

- Mr Sabet sought to appeal the Medical Practitioners Board of Victoria's (the Board) decision to suspend his registration as a medical practitioner in light of complaints and charges of misconduct against him. In pursuing review of the decision under the *Administrative Law Act 1978* (Vic), Mr Sabet relied on a number of grounds, including that the Board was a 'public authority' under section 38 of the Victorian Charter (the equivalent of a public entity for the HR Act and its obligations under section 58) and was required to act compatibly with human rights and give proper consideration to relevant human rights. Mr Sabet argued the Board breached its obligations by failing to give proper consideration to the presumption of innocence under section 25(1) of the Victorian Charter (section 32(1) HR Act).
- Hollingworth J found that the Board was a 'public authority' under section 4(1)(b) of the Victorian Charter (section 9 HR Act) and was acting in administrative capacity when deciding to suspend Mr Sabet's registration. In examining the question of whether section 38 had been breached, the court employed a three-stage approach of determining, in the first instance, whether the Victorian Charter had been engaged, followed by considering whether the Board had imposed any limitations on rights and third, whether such a limitation was reasonable and justified within the circumstances set out in section 7(2) of the Victorian Charter (section 13 HR Act).
- In tackling the engagement question in the first stage, the court found that section 25, even if given a broad construction to encompass procedural matters prior to or after a criminal trial, would not sufficiently extend to disciplinary proceedings where no finding of guilt would be made. Accordingly, the Supreme Court found that the right to the presumption of innocence appears to apply only in criminal proceedings and not in circumstances where no findings of guilt are made.[509]

R v R S [2016] VCC 1464

- The respondent in this matter had been charged with seven counts of indecent act with a child under the age of 16 in contravention of section 47(1) of the *Crimes Act 1958* (Vic). However, one charge on the indictment related to 'course of conduct' which came into operation through legislative amendment under the *Crimes*

[507] *R v Benbrika (Ruling No 12)* [2007] VSC 524 [13].
[508] *R v Benbrika (Ruling No 12)* [2007] VSC 524 [29].
[509] *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 [176].

Amendment (Sexual Offences and Other Matters) Act 2014 (Vic) after the events to which the charge relates had occurred. It was therefore argued that the course of conduct scheme engaged rights in criminal proceedings and the right of retrospective laws, under sections 25 and 27(1),(2) of the Victorian Charter, respectively (sections 33, 35 HR Act).

- A key issue for the court to consider was whether sections 25 and 27 of the Victorian Charter were engaged and whether the presumption against retrospectivity was enlivened by the course of conduct scheme. The rights in criminal proceedings under section 25 of the Victorian Charter require the accused to be informed of the nature and reason for the charge. The right gives rise to a right to know the basis of the prosecution case. It is a right to know what the prosecution case against them will be so that they can prepare to meet that case.
- Kidd CJ considered that the substance of the defendant's argument was that the course of conduct scheme allowed the prosecution to now secure a conviction in circumstances where they may have previously failed to do so due to a lack of particularity. However, Kidd CJ ultimately determined that the course of conduct scheme did not create a new criminal liability because the conduct was always criminal, nor did it impose a greater penalty, meaning section 27 of the Victorian Charter was not engaged. Further, the scheme merely permitted the prosecution 'to prove the same conduct without the need to meet the common law requirement of particularisation'.[510]
- It therefore followed that the court accepted that section 25 of the Victorian Charter was not engaged, stating 'an unavoidable vagueness about particulars such as dates would not be in breach of this section'.[511] Consequently, the charge relating to the course of conduct scheme was held to be properly charged and the accused's application to have the charge permanently stayed was refused.

Bray (A Pseudonym) v The Queen [2014] VSCA 276

- The applicant in this matter was on trial in the County Court at Melbourne charged with rape. The complainant had made a statement to police and gave evidence at the committal hearing where she was cross-examined, however, she died before the matter came to trial. The prosecution applied to have admitted into evidence the statement and a transcript of the evidence she gave at committal. The trial judged granted the application and rejected an argument on behalf of the accused that the evidence should be excluded on the ground that 'its probative value [was] outweighed by the danger of unfair prejudice to the accused' within the meaning of section 137 of the *Evidence Act 2008* (Vic).
- In deciding to grant leave for the appeal, the court said:

> *the critical question is: would it be necessarily unfair to have a conviction based upon evidence which cannot be the subject of cross-examination at trial? That*

[510] *R v R S* [2016] VCC 1464 [34].
[511] *R v R S* [2016] VCC 1464 [55].

> *question admits of only one answer. It would not be necessarily unfair. As has been said many times, 'a defendant is entitled to a fair trial but not a perfect one'.*[512]

- The court determined that the leading evidence from a witness who cannot be cross-examined will not necessarily render a trial unfair and infringe on rights in criminal proceedings, nor would the evidence's probative value be outweighed by its likely prejudicial effect. It was held that there are mechanisms in place to ensure a fair trial and protect rights in criminal proceedings, including the capacity of the trial judge in giving strong and appropriate directions to the jury about the dangers of placing too much weight on untested statements.[513]

DPP v S L [2016] VSC 714

- The defendant in this case was a 15-year-old child who plead guilty to charges that included attempted murder, which meant the matter was heard in the Supreme Court, rather than the Children's Court.
- In hearing the matter, Bell J emphasised the rights of children in the criminal process (including under sections 23 and 25(3) of the Victorian Charter (sections 33 and 32(3) HR Act)) with reference to Australia's international obligations under the ICCPR and the Convention on the Rights of the Child, which reflect the fundamental principle of best interests of the child.[514] Drawing on jurisprudence from the European Court of Human Rights, Bell J noted further that

> *[t]he general principle … is that courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress and to assist him or her effectively to participate in the proceeding*.[515]

- To this end, it was held that the courts must apply the relevant Victorian Charter rights in relation to criminal proceedings involving children and their detention. Consequently, Bell J ruled that directions and sentencing hearings for the defendant should be conducted to take into account the defendant's vulnerabilities as a child in a criminal proceeding.

R V Ahmad Niazi [2008] VMC 3

- Mr Niazi was charged with multiple drug trafficking and possession offences. The serious nature of the charges meant that, under the *Bail Act 1977* (Vic), bail would be refused unless Mr Niazi could demonstrate that 'exceptional circumstances' exist and the court is satisfied he does not post an 'unacceptable risk' of breaching bail conditions if released.

[512] *Bray (A Pseudonym) v The Queen* [2014] VSCA 276 [76].
[513] *Bray (A Pseudonym) v The Queen* [2014] VSCA 276 [101].
[514] *DPP v S L* [2016] VSC 714 [6]-[7].
[515] *DPP v S L* [2016] VSC 714 [12]; *SC v United Kingdom* [2004] IV Eur Court HR 281.

- It was argued that exceptional circumstances could be established due to the individual or combined effects of Mr Niazi being a carer of his ill and elderly mother, his family circumstances, his lack of prior criminal history, the availability of sureties and the delay in the trial of the charges.[516] Of these factors, the court accepted that the significant delay in the case of over two years before the charges would be heard was 'of paramount importance when considering whether "exceptional circumstances" exist.'[517] While the court affirmed that exceptional circumstances vary from case to case, it was held that a delay of 18 months to two years in the present case did constitute exceptional circumstances and would be unreasonable under the rights to liberty and security of person and rights in criminal proceedings in sections 21(5) and 25(2) of the Victorian Charter (sections 29 and 32 HR Act). Mr Niazi's application for bail was therefore granted, subject to a number of conditions.
- The prosecution had a strong case on a charge of drug trafficking for which the defendant was likely to serve a significant custodial sentence. Despite this, the rights were found to enact the common law right to be tried without unreasonable delay, and the delay in the case of over 2 years before the charges would be heard, informed the meaning of the 'exceptional circumstances' that led to bail being granted.

SQH v Scott [2022] QSC 16

- The applicant argued that to answer a question during a Crime and Corruption hearing 'touched' on the charges against the applicant and the applicant's partner and may impact on the applicant receiving a fair trial.
- The court found that the applicant's right to fair hearing (section 31 of the HR Act) and right against self-incrimination (section 32(2)(k)) were engaged by the presiding officer's decision directing the applicant and the applicant's partner to answer the question.
- However, the limit was found to be justified because of the protections in place under the legislative scheme such as direct use immunity and confidentiality in response of the identity of the witness and any evidence given.
- The court found that the right against self-incrimination is not limited to criminal proceedings as:

> *To limit section 32(2)(k) of the HR Act to only criminal proceedings does not have regard to the cross over between the right to a fair trial in section 31 and that the right attaches to persons charged with a criminal offence. The provision has a role in protecting rights at stages before a trial which have a likely and significant impact on the trial itself.*[518]

- The court also found that the right to fair hearing (section 31(1) of the HR Act) was also engaged by the presiding officer's decision as there was considerable overlap between the two rights. The court relied on Bell J in *Re Kracke and Mental Health*

[516] *R v Ahmad Niazi* [2008] VMC 3 [5].
[517] *R v Ahmad Niazi* [2008] VMC 3 [12].
[518] *SQH v Scott* [2022] QSC 16 [325].

Review Board, which describes the rights in section 32 as being 'additional to and in many cases more explicit than, but do not derogate from, the rights in' section 31.[519]

[519] See *Re Kracke and Mental Health Review Board* [2009] VCAT 646 [373]. See also *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 425 [40].

Children in the criminal process

Human Rights Act 2019 (Qld)

Section 33 Children in the criminal process

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 10(2)(b) Article 10(3)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 23
ACT	***Human Rights Act 2004***	Section 20

What does the right protect?

Children interacting with the criminal justice system have all the same rights as adults interacting with the criminal justice system, including for humane treatment when deprived of liberty and rights in criminal proceedings. The rights contained in section 33 provide additional protections for people under 18 years old interacting with the criminal justice system in recognition of their vulnerability and legal status as minors.

Section 33(1) provides for the segregation of both accused children and children detained without charge from all adults who are detained.

Section 33(2) identifies that accused children must be brought to trial as quickly as possible. The Explanatory Notes to the HR Act makes clear that this requirement is more onerous than that of the right to be tried without unreasonable delay.[520] This is because 'as quickly as possible' means giving something priority and taking positive steps to expedite completion as distinct from an obligation to do something without unreasonable delay, which may be satisfied by 'allowing the ordinary course of events to transpire and requiring only that unnecessary or unusual delay be avoided'.[521]

[520] Explanatory Notes, Human Rights Bill 2018 (Qld) 27.
[521] *LM v Children's Court of Australian Capital Territory* [2014] ACTSC 26 [8].

Section 33(3) states children who have been convicted of an offence must be treated in a way that is *appropriate* for their age. Guidance on what is considered appropriate for children interacting with the justice system is set out in the United Nation's Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'). Age-appropriate treatment of a child in custody should consider their need for privacy, opportunities to associate with their peers and family, physical exercise, arts and leisure. In addition to these considerations, a child in custody should have access to education appropriate for their age, which can include vocational training. Other opportunities provided in youth detention facilities which support rehabilitation and curb patterns of reoffending will promote the right.

Relevant resources

- **CCPR General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)**
- **CCPR General Comment No. 17: Article 24 (Rights of the child)**
- ***Convention on the Rights of the Child***
- **UN Standard Minimum Rules for the Administration of Justice (Beijing Rules)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that provides for the detention of children for any length of time.
- A policy or statutory provision that provides for the detention of children in locations that have limited facilities or services for the care and safety of the child (for example, watch houses).
- Funding or defunding programs in youth justice facilities.
- A policy or statutory provision that relates to sentencing laws for children.
- A policy or statutory provision that relate to standards in detention centres where children will be detained.

Case examples

LM v Children's Court of the Australian Capital Territory [2-14] ACTSC 26

- In the ACT, a minor sought to have the proceedings against her stayed as an abuse of process. She argued, among other things, that the six-month delay between laying the first charge and laying the second charge breached her right to be brought to trial as quickly as possible under section 20(3) of the *Human Rights Act 2004* (ACT) (section 33(2) HR Act).

- The accused had initially been charged with the less serious offence of assault occasioning actual bodily harm and had entered a guilty plea. The DPP, however, subsequently indicated that they would not accept the guilty plea and would instead be seeking to charge the accused with the more serious offence of recklessly inflicting grievous bodily harm.
- In hearing the accused's application for a permanent stay of proceedings, the court interpreted the meaning of 'as quickly as possible' in section 20(3). It was held that the phrase 'as quickly as possible' in the right meant 'with all reasonable expedition of which the circumstances allow'.[522]
- The Magistrate said:

> *Such a meaning does impose a higher obligation than one requiring that an outcome be achieved or a result occur 'without unreasonable delay'. I see the obligation to act as quickly as possible as connoting an obligation to give something priority and to take positive steps to expedite completion, albeit within what the circumstances prevail or will allow. An obligation to do something without unreasonable delay on the other hand may be met be allowing the ordinary course of events to transpire and requiring only that unnecessary or unusual delay be avoided*.[523]

- The Magistrate concluded that, in the absence of evidence to explain the delay, the prosecution had not brought LM to trial 'as quickly as possible', and therefore there had been a breach of the rights of children in the criminal process.[524] However, the application was ultimately dismissed on the grounds the relief sought by the accused, being a permanent stay of proceedings, was not provided for in the ACT HR Act and the express power to grant relief is only given to the Supreme Court.

[522] *LM v Children's Court of the Australian Capital Territory* [2-14] ACTSC 26 [8].
[523] *LM v Children's Court of the Australian Capital Territory* [2-14] ACTSC 26 [8].
[524] *LM v Children's Court of the Australian Capital Territory* [2-14] ACTSC 26 [16].

Right not to be tried or punished more than once

Human Rights Act 2019 (Qld)

Section 34 Right not to be tried or punished more than once

A person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 14(7)
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 26
ACT	***Human Rights Act 2004***	Section 24

What does the right protect?

As part of the procedural measures ensuring the right to a fair trial, the right not to be tried or punished more than once safeguards the rule of law.[525] Section 34 upholds the rule against double jeopardy – that is, a person should not be taken to court or punished more than once for an offence of which they have already been convicted or acquitted. It provides fairness for people accused of crimes and prevents repeated attempts to convict.[526] For example, repeatedly punishing a conscientious objector for not obeying a renewed order to serve in the military may amount to punishment for the same crime if each refusal is based on the same, constant reasons of conscience.[527]

The right applies to criminal offences, including quasi-criminal and regulatory offences (e.g. parking offences).[528] The right does not prevent:

- other disciplinary measures for the same conduct that do not amount to a sanction for a criminal offence (for example, professional regulatory disbarment).[529]

---

[525] Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals and to fair (Article 14 of the International Covenant on Civil and Political Rights),* 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007).

[526] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 242.

[527] Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals (Article 14 of the International Covenant on Civil and Political Rights),* 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [55].

[528] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 243.

[529] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 426.

- a new trial where a conviction has been set aside as a miscarriage of justice.[530]
- the reopening of a case where new evidence has emerged after conviction.[531]

Relevant resources
• **CCPR General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that creates new offences.
- A policy or statutory provision that is related to the double jeopardy exceptions under the Criminal Code.

Case examples

Psychology Board of Australia v Ildiri [2011] VCAT 1036

- Ms Ildiri was a psychologist who was convicted for fraudulently invoicing the Victims of Crime Assistance Tribunal for counselling sessions that did not take place, and for failing to maintain adequate client notes.
- Ms Ildiri then faced the Victorian Civil and Administrative Tribunal (VCAT) for disciplinary proceedings relating to the same conduct. She claimed that this breached her right to not be tried or punished more than once as protected under section 26 of the Victorian Charter (section 34 HR Act).
- VCAT found that disciplinary proceedings, and resulting consequences such as disbarment, or deregistration, were aimed at protecting the public rather than punishing the practitioner, and so the right protected under the Charter was not engaged.
- The tribunal quoted *New South Wales Bar Association v Evatt*, saying that the power of the court to discipline is 'entirely protective and notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved'.[532]

Sim v Business Licensing Authority [2011] VCAT 583

- Mr Sim applied for a motor car trader licence and his application was denied.

[530] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 243-244.
[531] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 243-244.
[532] *Psychology Board of Australia v Ildiri* [2011] VCAT 1036 [93]; *New South Wales Bar Association v Evatt* [1968] HCA 20; (1968) 117 CLR 177, 183.

- VCAT said that previous convictions for unlicensed motor car trading, and a range of other activities, such as drug, dishonesty and driving offences, 'could well be relevant to the reasonableness of an expectation that there will be compliance with the *Motor Car Traders Act 1986* and regulations in the future' and demonstrated a 'continued failure to accept responsibility for [his] conduct'.[533]
- VCAT found that taking the convictions into account in this way did not engage the right not to be tried or punished more than once or amount to double punishment. VCAT was concerned about Mr Sims' refusal to accept responsibility for his criminal offending and ignorance of the law, considering the need to regulate traders and protect the public.[534]

LM (Guardianship) [2008] VCAT 2084

- VCAT was asked to decide an application for a supervised treatment order under the *Disability Act 2006.*
- LM had been charged with a number of offences before being admitted into a secure psychiatric ward because of her mental ill health and behavioural issues. VCAT had to consider whether, if a supervised treatment order was made, it would result in her detention as a result of behaviour for which she had already been convicted and released on a good behaviour bond.
- The purpose of detention under the *Disability Act 2006* was not to punish LM, but to protect LM and members of the public. VCAT found that the right not to be tried or punished more than once as protected by the Charter was not engaged.[535]

Storch v Director-General, Department of Justice and Attorney-General [2020] QCAT 152

- A self-represented applicant argued that the respondent's decision to issue him with a negative blue card notice, despite him being acquitted at trial of a charge of indecent treatment of a child, amounted to a breach of, among others, section 34 of the HR Act for him being punished more than once for an offence in relation to which he had already been convicted of. Ordinarily, the applicant would be granted a positive notice after being acquitted but the respondent was of the view that this matter was 'an exceptional case in which it would not be in the bests interests of the children for the chief executive to issue a positive notice' and was required to issue a negative notice in accordance with section 226 of the *Working with Children (Risk Management and Screening) Act 2000* (Qld).[536]
- In considering whether the section 34 was engaged, the Tribunal found that the:

> *refusal to issue a positive notice does not constitute a retrial as the Tribunal's role is not to determine whether the applicant is guilty of the charge. The*

[533] *Sim v Business Licensing Authority* [2011] VCAT 583 [38].
[534] *Sim v Business Licensing Authority* [2011] VCAT 583 [41].
[535] *LM (Guardianship)* [2008] VCAT 2084 [118].
[536] *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [25].

Tribunal's function is to undertake an analysis and evaluation of risk that would be posed to children if a positive notice was issued.[537]

- Consequently, the Tribunal confirmed the decision of the respondent to issue a negative notice, finding that the applicant's rights were either not engaged or any limitations were reasonable and justified.[538]

[537] *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [85].
[538] *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [439]-[441].

Retrospective criminal laws

Human Rights Act 2019 (Qld)

Section 35 Retrospective criminal laws

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

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Civil and Political Rights (ICCPR)**	Article 15
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	Section 27
ACT	***Human Rights Act 2004***	Section 25

What does the right protect?

The right to protection from retrospective criminal laws is both **absolute** and **non-derogable** at international law. It has been described as one of the most important principles of criminal law.[539] However, in the context of international crime, it has also been said that upholding human dignity stands higher than the need to uphold non-retroactivity.[540]

Section 35(1) protects people from being found guilty of an offence and/or punished for an action that was not an offence at the time it was committed. The criminal law must be sufficiently accessible and precise to enable a person to know in advance whether their conduct is criminal.

Section 35(2) protects people from being unfairly and harshly penalised in situations where there has been a change in the criminal law since the time they committed the offence. In

[539] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019), 437.
[540] William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019), 437.

these situations, a person is not liable to punishment that is more severe than that which existed at the time of the offence. Section 35(3) allows a person to be given a lesser penalty if the penalty for the offence was reduced after the offending, but before sentencing.

The right does not prevent retrospective changes that do not form part of the penalty or punishment of an offender, or to changes in procedural law (for example, changes in trial practice or changes to the rules of evidence).

Internal limitations

Section 35(4) allows a person to be charged and convicted for an act or omission that was a criminal offence under international law at the time the person acted, even if it wasn't an offence under domestic law in Queensland.

Policy triggers

- A policy or statutory provision that creates new offences.
- A policy or statutory provision that amends offence provisions.

Case examples

WBM v Chief Commissioner of Police [2010] VSC 219

- WBM was convicted and sentenced for offences including child pornography offences. He received 12 months imprisonment wholly suspended for 24 months. He did not breach that order and it ended in 2005. In 2007, WBM was advised that he was a registrable offender under the *Sex Offenders Registration Act 2004* (Vic) (SOR Act). WBM claimed that this breached his rights under section 27 of the Victorian Charter (section 35 HR Act) – that the right prohibited his registration and supervision under the SOR Act.
- The court found that a penalty for the purposes of the right means a 'criminal punishment' or 'sentence'.[541] The question of whether a statutory scheme, such as the one established by the SOR Act, constitutes a penalty is to be determined by whether the Act expressly characterises the requirements as a 'punishment'.
- The questions of whether an Act imposes a penalty is to be determined by the circumstances. In this case, the primary purposes of the SOR Act were to prevent reoffending and to facilitate investigation and prosecution of future offences.[542] Neither of these purposes were found to be penal.[543] In addition, the obligations placed on an offender were protective rather than penal (e.g. prohibitions on child related employment).[544]

[541] *WMB v Chief Commissioner of Police* [2010] VSC 219 [60].
[542] *WMB v Chief Commissioner of Police* [2010] VSC 219 [65].
[543] *WMB v Chief Commissioner of Police* [2010] VSC 219 [65].
[544] *WMB v Chief Commissioner of Police* [2010] VSC 219 [67].

- The application was ultimately dismissed on the basis that the provisions of the SOR Act in their application to the plaintiff did not constitute a penalty for the purposes of the Victorian Charter.[545]

R v AMP [2010] VSCA 48

- The applicant committed an offence of indecent assault in 1958. At the time, the offence had a maximum penalty of 10 years imprisonment. The maximum penalty was reduced to five years in 1967, but in 1991 an offence criminalising the same conduct was introduced, with a maximum penalty of 10 years imprisonment. That was also the maximum penalty at the time of the applicant's sentencing in 2009.
- The applicant argued that the *Sentencing Act 1991* (Vic) required the judge to sentence him on the basis that the reduction of the maximum penalty to five years imprisonment should apply.
- The Court of Appeal found that neither the *Sentencing Act 1991* nor the protection from retrospective criminal laws protected by section 27 of the Victorian Charter required the sentencing judge to do this. The five-year maximum penalty that applied between 1967 and 1991 was not relevant, as the maximum penalty that applied at the time of the offence was the same as at the time of sentencing.[546]

UN Human Rights Committee, Views: Communication No 1629/2007, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) ('*Fardon v Australia*')

- Mr Fardon was sentenced for sexual offences and served his time of imprisonment. His sentence expired in June 2003 and he had not committed any further offences. In June 2003, the *Queensland Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) came into force, and the Attorney-General of Queensland filed an application under the DPSOA for Mr Fardon to be detained for an indefinite period. Mr Fardon was detained until 2006, when the Supreme Court ordered that he be subject to a conditional supervision order and released.
- The Committee found that the DPSOA was retroactively applied to Mr Fardon and incompatible with article 15 of the ICCPR.
- Further, the Committee was of the view that, under the ICCPR, the application of laws that provide for preventative detention of sex offenders after their sentence is complete, breaches article 15(1) of the ICCPR and will also be necessarily arbitrary within the meaning of Article 9(1) of the ICCPR.[547]

Nicholas v Australia (Communication No 1080/2002)

- In 1994, Thai and Australian law enforcement officers conducted a 'controlled importation' of a trafficable quantity of heroin, which was in contravention of the federal *Customs Act 1901* (Customs Act). Mr Nicholas purchased part of the heroin,

[545] *WMB v Chief Commissioner of Police* [2010] VSC 219 [69].
[546] *R v AMP* [2010] VSCA 48 [29].
[547] *UN Human Rights Committee, Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007, (18 March 2010) ('*Fardon v Australia*') 8 [7.4].

and was then arrested and charged for state offences, as well as federal offences under the Customs Act.

- In 1995, the High Court of Australia made a decision in *Ridgeway v The Queen* that evidence of importation of narcotics should be excluded when it resulted from illegal conduct on the part of law enforcement officers.
- Mr Nicholas was granted a permanent stay of proceedings on the federal offences he was charged with, on the basis that the law enforcement officers had committed an offence when importing the heroin.
- In 1996, the federal law was changed, directing the court to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. The stay order was vacated and Mr Nicholas was tried and convicted for the federal offences.
- Mr Nicholas claimed that he was the victim of a retroactive criminal law.
- The Committee found that all the elements of the crime existed at the time the offence took place, and that Mr Nicholas was convicted according to clearly applicable law. The changed legislation did not remove the past illegality of the police's conduct in importing the heroin but directed the courts to ignore the illegality for the purpose of determining whether the evidence was admissible. There was no violation or article 15 (paragraph 1) of the ICCPR.[548]

[548] David Michael Nicholas v. Australia, Communication No. 1080/2002, U.N. Doc. CCPR/C/80/D/1080/2002 (2004) [7.7]

Right to education

Human Rights Act 2019 (Qld)

Section 36 Right to education

(1) Every child has the right to have access to primary and secondary education appropriate to the child's needs.

(2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Economic, Social and Cultural Rights (ICESCR)**	Article 13
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	No equivalent
ACT	***Human Rights Act 2004***	Section 27A

What does the right protect?

At international law, the right to education is recognised as a human right in itself, but also an 'indispensable means of realising other human rights'.[549] The Committee on Economic, Social and Cultural Rights (CESCR) outline the importance of education to empowering the economically and socially marginalised, reducing poverty, empowering women, safeguarding children from exploitative labour, promoting human rights and democracy, protecting the environment, and enabling people to participate in their communities.

The CESCR state that 'the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence'.[550] Education should be 'directed to the full development of the human personality'.[551]

[549] UN Economic and Social Council, *General Comment No 13 (1999): The Right to Education (Article 13 of the International Covenant on Economic and Social Rights),* UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [1].
[550] UN Economic and Social Council, *General Comment No 13 (1999): The Right to Education (Article 13 of the International Covenant on Economic, Cultural and Social Rights),* UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [1].
[551] UN Economic and Social Council, *General Comment No 13 (1999): The Right to Education (Article 13 of the International Covenant on Economic, Cultural and Social Rights),* UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [4].

International jurisprudence establishes that education should be available, accessible, acceptable, and adaptable:[552]

- **Availability** means educational institutions and programs that are available in sufficient quantity, and includes the availability of components required for institutions and programs to function (e.g. buildings, sanitation facilities, safe drinking water, trained teachers, adequate teaching materials, libraries, computer facilities, information technology).
- **Accessibility** means education that is accessible for everyone without discrimination. This includes physical accessibility of school locations (e.g. local schooling or distance learning programs using technology); non-discriminatory accessibility; and economic accessibility (affordable to all).
- **Acceptability** means commitment to a minimum standard of educational quality, curriculum and methods that are relevant, of good quality, and culturally appropriate.
- **Adaptability** means education that can flexibly respond to change, is open to review, and tailored to the needs of individual strengths.

Section 36 intends to provide a right to education without discrimination that is consistent with the *Education (General Provisions) Act 2006* (Qld).[553] It is framed positively, imposing a positive duty on the State. The right covers aspects of education service delivery that are within the scope of the Queensland Government.

Section 36(1) protects the right to have *access to* primary and secondary education appropriate to a child's needs (not a right to education).[554] Access is likely to carry a particular human rights meaning, likely including non-discrimination and accessibility principles described above.

Section 36(2) protects the right to have access to vocational education and training that is equally accessible to all. Vocational education and training is likely to include technical and professional education, including professional development in the workplace. The CESCR has noted the right to vocational education and training should be understood as helping 'to achieve steady economic, social and cultural development and full and productive employment'.[555]

As with section 36(1), the right protected by section 36(2) is a right of *access to* further vocational education and training (not a right to education). Again, access is likely to carry a

[552] UN Economic and Social Council, *General Comment No 13 (1999): The Right to Education (Article 13 of the International Covenant on Economic, Cultural and Social Rights),* UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [6].
[553] Explanatory Notes, Human Rights Bill 2018 (Qld) 28.
[554] As noted in the Legal Affairs and Community Safety Committee, Parliament of Queensland, Human Rights Bill 2018 (Report No. 26, February 2019) 51.
[555] UN Economic and Social Council, *General Comment No 13 (1999): The Right to Education (Article 13 of the International Covenant on Economic, Cultural and Social Rights),* UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [15].

particular human rights meaning, likely including non-discrimination and accessibility principles described above.

Relevant resources
• **CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that deals with the provision of education and training to young people in detention.
- A policy or statutory provision that regulates access to schools by children or young people in a neutral way but has a disproportionate impact on people with a particular attribute (for example, people with a disability).
- A policy or decision to exclude a student from *all* education opportunities.
- A policy or decision to exclude a particular category of student from education opportunities.
- A policy where the right to education for a particular category of person is realised less fully than another category of person.

Case examples

Section 36 has not been considered in detail by Queensland courts.

The right to education is protected in only one other Australian jurisdiction, the ACT. The right in the ACT is framed differently to the right protected in Queensland legislation.

Case law from international jurisdictions should also be read with care, as rights are framed and protected differently.

Ali v United Kingdom (European Court of Human Rights, Fourth Section, Application No 40385/6, 11 January 2011)

- Three students attending the Lord Grey secondary school in Milton Keynes (England) were suspected of lighting a fire in a classroom.
- The student in this case was excluded from 8 March 2001 until the police investigation was finished. There was no time limit placed on the exclusion, and the school extended it multiple times. During this time the school sent the student work, allowed him to come to school for exams, and referred him to alternative education.

- The police matter was finalised on 18 June 2001, and charges against the student were dropped. At this time the school tried to meet with the parents about the student returning to school. The parents did not attend. The school removed the student's name from the roll.
- In November 2001, the parents asked for the student to return to school, but his name had been removed from the roll and his place given to someone else.
- The student argued that exclusion from the school violated his right to education under the UK Human Rights Act (Protocol 1, Article 2).
- The court found that the right to education does not exclude the use of disciplinary measures such as suspension or expulsion. Nor did it require schools in the United Kingdom to offer alternative education that covered the full national curriculum to all students who have been temporarily excluded. The court found that the exclusion did not deny the student his right to education and was not disproportionate to the legitimate aim of the exclusion. The student was only excluded until the criminal investigation was complete.
- The decision of the court aligned with the earlier decision of the UK House of Lords, which had held that the exclusion of the student from school pending an investigation into alleged arson did not infringe the right education. This is because of the availability of alternative ways to receive education. For example, at another school, or by carrying out schoolwork from home for the period of the investigation. If the student had been excluded from all schools, not only from Lord Greys School, then the student would have experienced a *systemic failure* of the education system which would have breached the right protected by Protocol 1, Article 2.[556]

Head of Department, Department of Education, Free State Province v Welkom High School and Another Case [2013] ZACC 25

- In 2008 and 2009, Welkom High School and Harmony High School (South Africa) introduced pregnancy policies. These policies allowed the automatic exclusion of any student who fell pregnant. In October 2009, a grade 10 student at Harmony High School fell pregnant and was told she would not be allowed back at the school for the rest of 2010. In 2010, a grade 9 student at Welkom High School fell pregnant and was told to leave the school. For both students, the exclusions would have resulted in them missing examinations and having to repeat a year at school. The students argued that expelling or suspending a student because of her pregnancy violates her constitutional right to education.
- The court identified that this case engaged the constitutional rights to education, human dignity, privacy, bodily and psychological integrity, equal protection and benefit of the law, and protection against discrimination.
- The pregnancy policies did not allow students to be readmitted to the school in the year they gave birth. Further, male students at Welkom could be given a leave of absence for paternity purposes only if he could prove he was the father of the baby.

[556] *Ali v Head Teacher and Governors of Lord Grey School* [2006] 1 AC 363, 387.

At Harmony male students responsible for pregnancies continued their education without interruption.

- The court found the policies led to unfair discrimination on the basis of sex. They also found that the policies limited students' right to education by requiring them to repeat up to an entire year of schooling, acknowledging that many students could not afford to add an extra year of school. The policies violated students' rights to dignity, privacy, and bodily and psychological integrity by obliging them to report to school authorities when they believed they were pregnant. Other students were also required to report suspicions of pregnancy. This stigmatised pregnant students.
- In the case of the Harmony student, she was only asked to leave the school after she had returned from giving birth (three months after the birth of her child). The enforcement of the policy in this case was not rationally related to the purpose of the policy: maintaining the quality of the learning process.
- The court ordered the schools to review the pregnancy policies and give the court copies.

Velyo Velev v Bulgaria [2014] III Eur Court HR 175, 192 [31]-[34]

- Mr Velev was arrested on suspicion of unlawful possession of firearms and was detained on remand between November 2004 and April 2007. Mr Velev had never completed secondary education and therefore requested to be enrolled in the school operating in the prison where he was detained.
- After repeated attempts, Mr Velev's request was denied on the basis that he was deemed a 'recidivist' (due to a prior conviction) and his inclusion in the educational and work programmes offered would breach the requirement for different categories of inmates to be kept apart and participate separately in correctional programmes. However, Mr Velev was still awaiting trial on his second charge and argued that, absent a conviction, he could not be considered recidivist.
- After a series of appeals, the matter made its way to the ECtHR where Mr Velev argued a breach of his right to education under Article 2 of Protocol No. 1 of the ECHR by the Prison Governor's decision to deny his participation in the prison school program. On the right to education, the ECtHR found that 'although Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions.'[557] It therefore followed that the issue of whether Mr Velev was classified as 'recidivist' or not was irrelevant because

> *the relevant legislative framework provided that convicted prisoners aged 16 or older had a right, on request, to be included in educational programmes and that, in the absence of clear rules to the contrary, the provisions regarding convicted prisoners were to apply equally to remand prisoners.*[558]

[557] *Velyo Velev v Bulgaria* [2014] III Eur Court HR 175, 192 [34].
[558] *Velyo Velev v Bulgaria* [2014] III Eur Court HR 175, 192 [35].

- Further, the ECtHR said that the Government provided no practical reasons (e.g. a lack of resources at the school) nor a clear explanation regarding the legal grounds upon which the restriction on Mr Velev was placed. Consequently, the ECtHR found there had been a violation of Article 2 of Protocol No. 1 because the refusal to enrol Mr Velev in the school programme was not sufficiently foreseeable, did not pursue a legitimate aim and was not proportionate to that aim.

Orsus v Croatia [2010] II Eur Court HR 247

- The applicants in this matter were 15 school children of Roma ethnicity who were segregated in separate classes of certain primary schools within a county in Croatia on the basis of lacking proficiency in the Croatian language. These classes were alleged to have a significantly reduced curriculum in volume and scope compared to the officially prescribed curriculum which lowered Romani children's prospects of further education. The applicants brought an action under section 67 of the Administrative Disputes Act in the Čakovec Municipal Court, submitting that the separate curriculum was racially discriminating and violated their right to education (in breach of Article 14 of the ECHR and Article 2 of Protocol No. 1)
- After a series of appeals, the matter came before the Grand Chamber of the ECtHR. In its judgment, the ECtHR found the right to non-discrimination under Article 14 of the ECHR had been limited and breached in conjunction with the right to education under Article 2 of Protocol No. 1.
- In its reasons, the ECtHR said that the arrangements for Roma children provided insufficient safeguards to ensure that the state had appropriate regard of their special needs as members of a disadvantaged and minority group.[559] Further, the absence of adequate safeguards meant the ECtHR found no measures by the Croatian authorities 'capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained.'[560] As such, the applicants' placement in 'Roma-only classes at times during their primary education had no objective and reasonable justification.'[561]

[559] *Orsus v Croatia* [201] II Eur Court HR 247 [182].
[560] *Orsus v Croatia* [201] II Eur Court HR 247 [184].
[561] *Orsus v Croatia* [201] II Eur Court HR 247 [184].

Right to health services

Human Rights Act 2019 (Qld)

Section 37 Right to health services

(1) Every person has the right to access health services without discrimination.

(2) A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.

Where does the right come from?

Jurisdiction	Law	Article / section
International	**International Covenant on Economic, Social and Cultural Rights (ICESCR)**	Article 12
Victoria	***Charter of Human Rights and Responsibilities Act 2006***	No equivalent
ACT	***Human Rights Act 2004***	No equivalent

What does the right protect?

The Committee on Economic, Social and Cultural Rights (CESCR) write that 'health is a fundamental human right indispensable for the exercise of other human rights'.[562] Health supports a person's ability to live a life of dignity.[563] The right to health detailed in the ICESCR Article 12 is not a right to be healthy,[564] but a right to access goods, facilities and services necessary for a person to be healthy. This recognises that a person's capacity for full health can be limited by biological, environmental, and socio-economic factors, and by an individual's personal choices.

At international law, the right to health includes availability, accessibility, acceptability, and quality:[565]

[562] Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The highest attainable standard of health (Article 12 of the Covenant on Economic, Social and Cultural Rights),* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [10].
[563] Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The highest attainable standard of health (Article 12 of the Covenant on Economic, Social and Cultural Rights),* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [1].
[564] Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The highest attainable standard of health (Article 12 of the Covenant on Economic, Social and Cultural Rights),* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [8].
[565] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The highest attainable standard of health (Article 12 of the Covenant on Economic, Social and Cultural Rights),* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [12].

- **Availability** means a functioning health system available to the general population in sufficient quantity, including health care facilities, goods and services, and programs.
- **Accessibility** means health facilities, goods and services that are accessible for everyone without discrimination. This includes physical accessibility of health services (especially for vulnerable or marginalised groups, such as Indigenous communities, people with disabilities, women, children, older people, and people with HIV/AIDS); non-discriminatory accessibility (especially to the most vulnerable or marginalised); economic accessibility (affordable to all); and information accessibility (the right to seek, receive, and impart information about health issues, balanced against the right to have confidential health data).
- **Acceptability** means health services that respect medical ethics; are appropriate for people from different genders, cultures, and age groups; and are designed to respect confidentiality and improve health.
- **Quality** means health services that are scientifically and medically appropriate and of good quality.

While section 37 is modelled on Article 12 of the ICESCR, it is 'not intended to encompass rights in relation to underlying determinants of health, such as food and water, social security, housing and environmental factors'.[566]

The CESCR outline core obligations that should be met to protect the right to health. The two that align with the right to health services protected in section 37 of the HR Act include obligations to:

- ensure access to health facilities, goods and services without discrimination, especially for vulnerable or marginalised groups
- ensure equitable distribution of all health facilities, goods and services.[567]

Section 37(1) comprises two rights: a right to access health services, and a right not to be discriminated against in the provision of that access. 'Access' likely carries a human rights meaning, incorporating non-discrimination and accessibility principles discussed above (for example, physical accessibility, economic accessibility [affordability], and information accessibility).

Section 37(2) requires that a person must not be refused medical treatment that is immediately necessary to save their life or prevent serious impairment.

[566] Explanatory Notes, Human Rights Bill 2018 (Qld) 28.
[567] Committee on Economic, Social and Cultural Rights, *General Comment No 14: The highest attainable standard of health (article 12 of the Covenant),* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) at [43].

Relevant resources

- **CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)**

Internal limitations

This right does not have an internal limit or qualification.

Policy triggers

- A policy or statutory provision that deals with access to health care for prisoners or other persons under the care of the State.
- A policy or statutory provision that regulates the provision of health services in a neutral way but has a disproportionate impact on people with a particular attribute (for example, people with a disability).

Case examples

Section 37 has not been considered in detail by Queensland courts.

The right to health services is not protected in any other Australian jurisdiction.

Case law from international jurisdictions should be read with care, as rights are framed and protected differently.

Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (cc); 1997 (12) BCLR 1696 (27 November 1997)

- Mr Soobramoney was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. His life could be prolonged by means of regular renal dialysis. He sought dialysis treatment from the Addington State Hospital in Durban (South Africa), but wasn't admitted to the dialysis programme. The hospital only had enough resources to provide dialysis treatment for patients with chronic renal failure who were eligible for transplants.
- Soobramoney made an urgent application to a Local Division of the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis treatment and admitting him to the renal unit of the hospital. The application was dismissed. He then appealed to the South African Constitutional Court.
- The court found that the obligations imposed on the state by sections 26 and 27 of the Constitution dealing with the right of access to housing, health care, food, water and social security were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited by reason of the lack of resources.

- Given this lack of resources and the significant demands made on them by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services, an unqualified obligation to meet these needs would not at present be capable of being fulfilled.
- Soobramoney's case had to be seen in the context of the needs which the health services had to meet; if treatment had to be provided to the appellant it would also have to be provided to all other persons similarly placed. If everyone in South Africa with chronic renal failure were to be provided with dialysis treatment, the cost of doing so would make substantial inroads into the health budget.
- The provincial administration responsible for health services in KwaZulu-Natal had to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.
- A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters.
- The court also found that the words 'emergency medical treatment' (in the context of the right that 'no one may be refused emergency medical treatment') might possibly be open to a broad construction. Soobramoney sought treatment which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. However, this was not the ordinary meaning of the words 'emergency medical treatment' and, if this had been the purpose which it was intended to serve, one would have expected that to have been expressed in positive and specific terms.