

# SECTION 20

## PROPERTY RIGHTS

### Section 20

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

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#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 20?

You will need to consider s. 20 in assessing legislation, a policy or a program where it:

- provides for acquisition, seizure or forfeiture of a person's property under civil or criminal law;
- confers on a public authority a right of access to private property;
- limits or terminates property rights (for example, by legislation which establishes a limitation period);
- restricts the use of private property (for example, under planning laws);
- restricts or regulates established patterns of access (especially for commercial or business purposes) to public property;
- modifies commercial or business licensing arrangements;
- implements government control over its own property (for example, resumption of land);
- deprives a co-owner of property;
- impounds or suspends registration of a motor vehicle;
- creates a charge or mortgage on land;
- creates a charge or mortgage on personal property.

These policy triggers are not comprehensive.

#### DISCUSSION

Section 20 establishes a right not to be deprived of property other than in accordance with law. This right does not provide a right to compensation. Although the Charter does not, as a matter of law, require compensation when property is acquired, you should consider in those circumstances whether compensation is required as a matter of policy. The Scrutiny of Acts and Regulations Committee will be likely to continue to comment adversely on legislation that provides for the acquisition of property without compensation, although it has been recognised by the High Court that the requirement under the federal Constitution that the Commonwealth Parliament cannot pass a law that acquires property without compensation on just terms (s. 51 (xxxi)) does not apply to the States.<sup>167</sup>

Section 20 ensures that the institution of property is recognised and acknowledges that Victoria is a market economy that depends on the institution of private property.

The scope of the right protected by s. 20 is a person's right not to be deprived of his or her property other than in accordance with law.

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<sup>167</sup> *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399.

As mentioned above, this provision is distinct from the provision in the Australian Constitution which provides property guarantees in relation to property acquired under federal law. Section 20 applies to Victorian law, not Federal law.

It is well established in international human rights law that a person must not be arbitrarily deprived of his or her property. Deprivation otherwise than in accordance with law is an example of arbitrary deprivation. The *Universal Declaration on Human Rights* was the first international instrument to codify this right in article 17, which reads:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

#### What this right means

In one sense it is quite impossible for a government to deprive a person of his or her property otherwise than in accordance with law: if a Government acts unlawfully its actions will not be effective to deprive a person of his or her *title* to, or ownership of, his or her property.

However, 'property' in s. 20 has a wider meaning than title to or ownership of property, and 'deprived' has a wider meaning than being stripped of title or ownership (discussed below on page 130).

The primary impact of s. 20 will be in relation to these wider senses of property and deprivation. To comply with the right in these contexts, the deprivation must be authorised by law.

In the vetting context this means:

- Where the common law or legislative provision deprives a person of title to, or ownership of, his or her property, you should ensure that the powers conferred by the common law or legislative provision are not arbitrary. If they are not arbitrary, nothing further is required to satisfy the right contained in s. 20. (However, you should take into account any other policy development guidelines that require, for example, provisions for notice, consultation, review and compensation. The Charter does not displace any such existing guidelines or existing legal requirements.)
- Where the common law or legislative provision authorises the deprivation of property (in the wider sense), you should ensure that the powers conferred by the common law or legislative provision are not arbitrary. If those powers cannot be exercised arbitrarily, nothing further is required to satisfy the right contained in s. 20. (Again, however, you should take into account any other policy development guidelines.)
- Where a policy authorises or requires a deprivation of property (in the wider sense), you should ensure that the policy is authorised by the common law or legislation and that the powers conferred by the law are not arbitrary.

#### 'Property'

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

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

The notion of 'property' also extends to statutory rights, particularly where they have the characteristics of traditional property rights such as permanence and transferability.

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

The above list is not comprehensive. These Charter Guidelines cannot provide policy officers with a comprehensive statement of Victorian law on the definition of property. It is important that you familiarise yourself with the range of rights and interests considered to be 'property' under Victorian law which might be relevant to s. 20.

### 'Deprived'

The term 'deprived' is not defined in the Charter.

It will include situations where:

- title to property is transferred to someone other than the owner;
- title to property is extinguished;
- a regulation has the effect of substantially depriving a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, destroying it, transferring it or deriving profits from it).

### 'Other than in accordance with law'

Section 20 only prohibits a deprivation of property that is carried out unlawfully.

To comply with this right, if a program or a policy may deprive a person of his or her property:

- the deprivation must occur under powers that are conferred by legislation or the common law; and
- if the deprivation of property occurs under discretionary powers, those powers should be confined and structured rather than arbitrary or unclear.

The second requirement is imposed because the requirement that permissible deprivations only be carried out 'in accordance with law' imports a requirement that the law not be arbitrary – that it be accessible to the public and formulated precisely enough to guide those who apply the law. Consult Measures to Improve Compliance below for ways to help ensure that these requirements are met.

### REASONABLE LIMITS

As with all of the human rights protected in the Charter, the right protected by s. 20 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

### KEY POINTS TO REMEMBER

- A person must not be deprived of his or her property unless the law provides that he or she may be.
- The right to property does not entail at state level any right to compensation upon deprivation.

### MEASURES TO IMPROVE COMPLIANCE

If you are developing any policy or legislation that might result in the deprivation of property, ensure that:

- any deprivation of property is authorised by legislation or the common law;
- the criteria that is to be used for determining when it will occur are clearly articulated; and
- the criteria will not result in any discrimination, as defined in the Charter.

### RELATED RIGHTS AND FREEDOMS

If your policy or legislation involves an issue under s. 20, you may also wish to examine whether the policy or legislation has an impact upon s. 13 which protects against the unlawful and arbitrary interference with privacy, family, home and correspondence.

### HISTORY OF THE SECTION

The ICCPR does not contain a provision that protects against arbitrary deprivation of property, although articles 2(1), 24(1) and 24 of the ICCPR prohibit discrimination on various grounds, including property. Section 20 also reflects part of the content of article 17 of the Universal Declaration on Human Rights.

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

### BIBLIOGRAPHY

Case Law

1. *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399.

# SECTION 21

## RIGHT TO LIBERTY AND SECURITY OF PERSON

### Section 21

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

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 21?**

You will need to consider s. 21 in assessing legislation, a policy or a program particularly where it:

- permits any public authority to detain an individual, whether or not he or she is suspected of committing an offence, for a period that is more than transitory;
- authorises a person with a mental illness to be detained for treatment in a mental health facility;
- allows the detention of a person in order to prevent the spread of a contagious disease;
- allows the detention of a person in order for the person to 'sober up';
- makes it an offence for a person to fail to remain at a place (for example, for further questioning or to conduct a search or test by a police officer or other official);
- allows a public authority to cordon an area and control movement within that area;
- relates to the management of security of persons within correctional facilities;
- grants a power of arrest.

## DISCUSSION OF SECTION 21

Section 21 achieves two main purposes. It protects an individual's right to liberty and security. It also sets out the minimum rights of individuals who are arrested or detained to minimise the risk of arbitrary or unlawful deprivation of liberty by restricting the valid reasons for detention. It also ensures that detained persons are provided with information about the reason for the detention and told that they have opportunities to challenge the lawfulness of their detention.

This section does not confer a right to compensation for any breach of s. 21. Nor is s. 21 intended to extend to such matters as a right to bodily integrity or personal autonomy, or a right to access medical procedures.

In summary, the rights protected by s. 21 are:

- the right to liberty and the right not to be subjected to arbitrary arrest or detention;
- the right to security;
- the right to be informed of the reasons for arrest and any charges;
- the right to be brought promptly before a court;
- the right to be tried within a reasonable time or to be released from detention;
- the right to be released pending trial, subject to certain guarantees;
- the right to challenge the lawfulness of the detention;
- the right not to be detained for the failure to fulfil a contractual obligation.

As with all of the human rights in the Charter, the rights protected in s. 21 may be subject under law to reasonable limitations in accordance with s. 7 of the Charter.

More information on each of these rights is outlined below.

## Right to liberty

### When does it apply?

The right to liberty may be interfered with by all forms of detention including detention for the purpose of criminal justice, medical or psychiatric treatment, and treatment of contagious diseases.<sup>168</sup>

Any detention that is more than transitory will be covered under this section.<sup>169</sup>

Under Victorian law, a person may be detained for a range of purposes and durations.<sup>170</sup>

To detain a person means to keep that person in custody. Lawful arrest is one of the ways a person may be lawfully detained. Arrest is lawful where it is made under a warrant, by infringement warrant or by court order. At common law, a person is considered to be under arrest when it has been made plain by what is said or done by a police officer that the person is no longer a free person.<sup>171</sup>

Some other examples of lawful detention are where a statute authorises:

- a person to be held for questioning by an investigating official;
- a person to be held in a prison, police gaol, youth training centre or residential centre;
- an intellectually disabled person to be held as a security resident in a residential institution;
- a mentally ill person to be held as an involuntary or security patient in an approved mental health service;
- a young person to be apprehended and detained to prevent self-harm from inhaling

168 *UN Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 130 (2003) [1].*

169 *Austin & Anor v. Commissioner of Police for the Metropolis* [2005] EWHC 480 (QB) citing *R (Gillan) v. Commissioner of the Police of the Metropolis* [2004] 3 WLR 1144.

170 One such purpose may be to protect the community. For example, legislation may provide for the granting of an extended supervision order to protect the community from a risk of further harm by certain convicted offenders. In 2007, the Sentencing Advisory Council released a discussion paper titled '*High Risk Offenders: Post-Sentence Supervision and Detention*'. The Victorian Government has made a commitment to address the issues outlined in that paper.

171 *R v. O'Donoghue* (1988) 34 A Crim R 397.

a volatile substance.

As these examples illustrate, a person may be detained for punitive purposes (for example, in prison) and non-punitive purposes (for example, a mentally ill person), and either for lengthy periods of time (for example, in prison) or for short periods of time for a limited purpose (for example, in detention by an inspector to obtain a person's name and address).

What does it mean?

The first three sub-sections of s. 21 all relate to the right to liberty. These rights, which were modelled on article 9(1) of the ICCPR, are all expressions of the same basic principle: every person has a right to physical liberty and should not be arrested or detained unless, first, the law provides that he or she may be so arrested or detained and, second, those administering the law do so in accordance with established procedures.

Thus, a breach of s. 21 will only occur if someone has been arrested or is detained and either or both of these conditions have not been met.

### Legality

An arrest or detention will be in breach of the Charter when it is not 'on grounds and in accordance with procedures, established by law'. This means that arrest and subsequent detention ought to be specifically authorised and sufficiently circumscribed by law. Secondly, the law itself and the enforcement of that law must not be arbitrary.

The expression 'on grounds ... established by law' refers to domestic law. The United Nations Human Rights Committee has said that domestic law should conform with international human rights standards to meet the requirements of article 9(1) (s. 21(1)–(3)).<sup>172</sup>

Legal and policy officers should ensure that they are familiar with current Victorian law on when an arrest will be lawful.

<sup>172</sup> *Kenmache v. France* (No.3) (1994) 296C Eur Court HR (ser A).

### 'Arbitrary'

An arrest or detention that is unlawful is likely also to be arbitrary. However, the converse is not true. An arrest or detention may be arbitrary even though it is lawful; this may be so if the law is vague, over-broad, or is in violation of other fundamental standards such as the right to freedom of expression.

The term 'arbitrary' does not only mean that a detention is 'against the law'. Arbitrariness includes elements of inappropriateness, injustice and lack of predictability.<sup>173</sup>

Detention that initially complies with s. 21 may become arbitrary if it continues without being justified.<sup>174</sup> (It is therefore necessary that a detained person be able to challenge the lawfulness of their detention, not just at the outset, but at regular intervals throughout any extended period of detention.)

In the context of remand in custody, the UN Human Rights Committee has said:

'... remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence.'<sup>175</sup>

Arbitrary detention has also arisen before the UN Human Rights Committee in the context of immigration detention. In a series of cases, the committee has found the Australian Government's policy of indefinite detention of asylum seekers is a breach of article 9 of the ICCPR.<sup>176</sup>

<sup>173</sup> *Van Alphen v. The Netherlands*, Human Rights Committee, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (15 August 1990) [5.8].

<sup>174</sup> *Spakmo v. Norway*, Human Rights Committee, Communication No. 631/1995, UN Doc. CCPR/C/67/D/631/1995 (11 November 1999) [6.3].

<sup>175</sup> *A v. Australia*, Human Rights Committee, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) [9.2]. Another example of where remand in custody may be necessary is to prevent a breach of the peace.

<sup>176</sup> The most recent decision is the case of *D & E v. Australia*, Human Rights Committee, Communication No. 1050/2002, UN Doc. CCPR/C/14/D/27/1977 (9 August 2006).

For the purposes of these Charter Guidelines, these decisions are useful in respect of the comments made by the committee about the meaning of 'arbitrary detention'. The committee has said that for detention to avoid being characterised as 'arbitrary':

- it should **not continue** beyond the period for which a state party can provide appropriate justification;
- where a person is initially detained for a limited period for a specific purpose, there must be an **appropriate justification** to continue to detain him or her after this purpose no longer applies;
- where there are **less intrusive measures** that can achieve the same end they should be used, for example, the imposition of reporting obligations, sureties or other conditions.

Similar principles could apply to Victorian laws providing for detention or the enforcement of those laws.

Some additional examples of what might constitute arbitrary arrest or detention are the following:

- Where an arrest is made in order to achieve an unlawful purpose, the resulting detention may be arbitrary.
- An arrest or form of detention may be unlawful (and thereby arbitrary) even though it is carried out in consequence of a statutory power.
- The exercise of a statutory power may be considered unlawful (and thereby arbitrary) where it is carried out pursuant to a mandatory requirement without regard to the merits of the case.
- Where law enforcement officers carry out an arrest that is unwarranted in the individual circumstances (for example, where there is no cause to do so), the arrest or detention will be unlawful and may also be arbitrary because the decision to arrest was without a rational foundation.

There are therefore a number of ways in which an otherwise valid power of arrest or detention, or its exercise, may be considered arbitrary:

- **Continuation of detention:** Although the initial power to detain a person may be valid, the detention may become arbitrary if there is no sufficient reason for continuing to detain the person. An individual should not be kept in detention as a matter of convenience.
- **Improper exercise of power:** Although law enforcement officials may have a statutory power to detain a person, the detention may be arbitrary if it is not carried out for a valid reason (for example, if the ostensible reason is a sham) or where there is insufficient cause to detain an individual (for example, the detaining officer may not genuinely or reasonably hold the belief that a crime is imminent, which may be required under the legislation).
- **Lack of procedural safeguards:** Detention may become arbitrary where there is a lack of procedural safeguards which protect against it becoming arbitrary.

### Right to security

Section 21 protects the right to security. This right applies independently to the right to liberty, which is also protected under s. 21.

#### When does it apply?

The right to security applies to persons inside and outside detention. For example, it is likely to be invoked where a correctional facility fails to protect a prisoner against an attack by a dangerous prisoner or where the police fail to act on complaints of domestic violence or fail to act on death threats.

#### Scope of the obligation

The scope of this obligation remains unsettled in international human rights law.

It would appear to require a person's physical security to be protected by a public authority in circumstances where the public authority is aware that the person's physical security may be under threat.<sup>177</sup>

<sup>177</sup> *Delgado Paez v. Colombia*, Human Rights Committee, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (23 August 1990).

The threat may arise from a public authority itself, or from a private actor.

The level of awareness required to trigger this right is not clear. The UN Human Rights Committee has said:

'It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them.'<sup>178</sup>

Some guidance may be found in the commentary in these Charter Guidelines on the positive obligation of a public authority to safeguard the right to life. You may wish to refer to the discussion in s. 9 of these Charter Guidelines in relation to that obligation.

In relation to the right to life, the European Court of Human Rights has said the following about the level of awareness required to trigger the positive obligation to protect the right to life:

'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 or individuals from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which, judged *reasonably*, might have been expected to avoid that risk.'<sup>179</sup>

The European Court of Human Rights has also noted that the scope of the obligation to protect a person's life must be interpreted in a way that does not impose an impossible or disproportionate burden on the state, '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.'<sup>180</sup>

<sup>178</sup> Ibid [5.5].

<sup>179</sup> *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [116]; (1989) 29 EHRR 245 [116].

<sup>180</sup> *Kiliç v. Turkey* (2000) III Eur Court HR 75 [63]; (2001) 33 EHRR 58 [63]. See also *Mahmut Kaya v. Turkey Mahmut Kaya v. Turkey* (2000) III Eur Court HR 149 [86] and *Osman v. United Kingdom* (1998) VIII Eur Court HR 3124 [116]; (1989) 29 EHRR 245 [116].

Applying this reasoning to the right to security, if a public authority is aware that there is a real and serious threat to a person's physical security (which is a broader concept than a person's life), they should do everything that they can reasonably and practically do, within their resources, to protect that person from the threat.

### Information to be provided upon arrest or detention

Section 21(4) imposes certain informational requirements in respect of persons arrested or detained.

This sub-section modifies the equivalent ICCPR right under article 9(2) by extending the requirement to a person who is *detained*. Article 9(2) of the ICCPR applies only to a person who is arrested. The significance of this modification is that even if a person is only detained (and not arrested), in Victoria they must still be told why they are being detained. This should happen at the time he or she is first detained. If there are to be any proceedings to be brought against a person detained, a public authority must 'promptly' inform the person of them.

The information to be provided is twofold:

- the reason for the arrest or detention, even if those grounds would be obvious to the person (for example, if he or she were caught 'red-handed'); and
- any proceedings to be brought against him or her.

The requirement in the Charter that there be no arbitrary detention will mean that a public authority must have information evidencing a reasonable suspicion to support the detention.<sup>181</sup> This right (in s. 21(4)) requires the public authority to provide this information to the person detained.

<sup>181</sup> *O'Hara v. United Kingdom* (2001) X Eur Court HR 121; (2002) 34 EHRR 32.

### 'Prompt' presentation and pre-trial detention

Section 21(5) requires that a person who is arrested or detained on a criminal charge must be promptly brought before a court, brought to trial without unreasonable delay, and released if neither requirement is met.

#### What is 'prompt presentation'?

In the context of international human rights law, the UN Human Rights Committee has said that time-limits for 'prompt' presentation of persons under this provision are a matter of domestic law; however, delays in presenting a detained person before a court should not exceed a few days.<sup>182</sup>

The European Commission on Human Rights has taken the view that the period of time should not ordinarily be longer than four days.<sup>183</sup>

#### What is 'unreasonable delay'?

The Charter requires that a person be brought to trial without unreasonable delay.

This right overlaps considerably with s. 25(2)(c) of the Charter, which seeks to ensure that a person accused of criminal charges is tried without unreasonable delay. The distinction between the two rights is that s. 21(5) regulates the length of pre-trial *detention*, whereas s. 25(2)(c) regulates the total length of time that passes before a person's trial, whether or not he or she is detained on remand or has been granted bail.

In international human rights law, there is no fixed time limit for when detention can be viewed as occurring 'without unreasonable delay'.

Whether a period of pre-trial detention meets the requirements in s. 21 will depend on a range of factors:

- the seriousness of the alleged offence;
- the nature and severity of the possible penalties;

- the danger that the accused will abscond if released;
- whether the authorities have been diligent in the conduct of the proceedings, considering the complexity and special characteristics of the investigation; and
- whether delays are due to the conduct of the accused or are due to the prosecution.

#### Right to release pending trial

Sub-section 6 of s. 21 provides that a person awaiting trial must not be automatically detained in custody. Rather, the person has a right to be released on bail subject to giving a guarantee to appear for trial, and at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

You will need to consider this provision if you are vetting the *Bail Act 1977* (Vic.) or preparing any subsequent amendment to that Act, or assisting in the development of a policy or program that seeks to give effect to the Bail Act.

Section 21(6) will be engaged by a provision that establishes a presumption against bail for a particular category of offence or offender. It will also be engaged by a provision that precludes bail for a particular category of offence or offender.

Note however that the right to be released pending trial may be limited under s. 7 of the Charter. Pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, at any other stage of the judicial proceeding or for execution of judgment. It may also be necessary to avert interference with witnesses and other evidence, or to avert the commission of other offences.<sup>184</sup>

182 *UN Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 130 (2003) [2].*

183 *Brogan v. United Kingdom* (1988) 145 Eur Court HR (ser B) (55); (1989) 11 EHRR 117.

184 *WBE v. The Netherlands*, Human Rights Committee, Communication No. 432/1990, UN Doc. CCPR/C/46/D/432/1990 (23 October 1992) [6.3].

### Judicial review of the legality of detention

Section 21(7) provides that a person who is deprived of liberty by arrest or detention, for whatever reason, has the right to challenge the lawfulness of his or her detention.

The section requires a court to make a decision on such an application without delay and to order the person's release if it finds that the detention is unlawful. Executive review of the legality of detention (for example, by a Minister) will not be sufficient to comply with this right.<sup>185</sup>

The right to challenge the legality of detention encompasses the principle of *habeas corpus*, which is well established in the common law. It applies regardless of whether the deprivation of liberty is actually lawful.

In international human rights law it has been recognised that the substance of the right in article 9(4) of the ICCPR cannot be realised without access to a lawyer.

Although the right under s. 21(7), as with all the rights in the Charter, can be subject to reasonable limits, it seems unlikely that any provision that absolutely excluded review by the courts (or rendered it practically impossible) would be reasonable or, perhaps, lawful.

### Imprisonment for failure to perform a contractual obligation

Section 21(8) establishes a freedom from imprisonment for inability to fulfil a contractual obligation. This provision was primarily designed to address so-called 'debtors' prisons.

The term 'contractual obligation' includes monetary debts arising from private civil law obligations. It will probably not include infringement notices such as public transport fines.

### REASONABLE LIMITS ON THE RIGHTS PROTECTED IN SECTION 21

As with all of the human rights protected in the Charter, the rights protected in s. 21 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

#### KEY POINTS TO REMEMBER

- Section 21 both protects a person's right to liberty and security, and sets out the minimum rights of individuals who are arrested or detained.
- The right to liberty applies to all forms of detention.
- Any arrest or detention must be lawful and must not be arbitrary.
- An arrest or detention that is unlawful is likely to also be arbitrary. However, an arrest or detention may be arbitrary even though it is lawful.
- For a person's arrest or detention to be lawful it must be authorised.
- To avoid arbitrary arrest or detention, enforcement officers should only arrest or detain someone in accordance with established procedures.
- The right to security applies both inside and outside detention. It means that a person's physical security must be protected in circumstances where a public authority is aware that it may be under threat.
- Any person who is arrested or detained must be told (a) the reason for the arrest or detention; and (b) about any proceedings to be brought against him or her.

<sup>185</sup> *Torres v. Finland*, Human Rights Committee, Communication No. 291/1998, UN Doc. CCPR/C/38/D/291/1988 (5 April 1990) [7.2].

- A person who is arrested or detained on a criminal charge must be promptly brought before a court, brought to trial without unreasonable delay, and released if neither requirement is met. You should consult the discussion section on these requirements if they are relevant to your policy or legislation.
- A person has a right to be released pending trial, subject to certain guarantees. These are outlined in s. 21(6) and discussed above. This right may be limited, for example, to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or avert the commission of other offences.
- Any person who has been arrested or detained has the right to challenge the lawfulness of his or her detention in court, without delay;
- A person must not be imprisoned only because he or she cannot fulfil a contractual obligation.

## MEASURES TO IMPROVE COMPLIANCE

### Right to liberty:

If you are developing a policy or program involving the arrest or detention of individuals, consider taking the following steps:

- Set out clearly the circumstances in which the power may be used and who may effect the arrest or detention.
- Ensure that the discretion to arrest or detain is prescribed in terms that are consistent with the objective of the policy.
- Ask yourself whether there are clearly defined, express criteria for determining when an individual can be detained.
- Consider including in the policy:
  - a provision for officers to receive training as to the circumstances when the power can be used; and
  - a mechanism by which practice guidelines are developed and disseminated for officers exercising powers of arrest or detention.

The legislation should:

- ensure that the enforcement officer gives a person who is arrested or detained (**‘the detainee’**) sufficient information about the reasons for arrest or detention;
- ensure that sufficient information is provided to the detainee about any proceedings to be brought against him or her;
- ensure that a detainee may seek judicial review of the legality of the detention; and
- establish minimum standards and conditions to which the detainee may be subjected.

Assess your policy or practice against the following criteria:

- Are the grounds for arrest or detention prescribed by law?
- Will the arrest or detention be made in accordance with proper procedures?
- Is the arrest or detention necessary and reasonable in the circumstances (for example, to prevent flight or a breach of the peace, prevent a rapid spread of disease, avoid interference with evidence or prevent the recurrence of a crime)?
- Is the length of time that the person may be arrested or detained justifiable in the circumstances?

### Judicial review of the legality of detention

- Include a provision in new Bills and policy proposals that provides for judicial oversight of detention and ensure that it is possible for detained persons to make an application for judicial review if there is a change in basis for, or the conditions of, their detention.

### Right to security

- Ensure that you have guidelines in place for dealing with threats to a person's physical security (including persons in a custodial facility) that comply with the Charter obligations under s. 21 and s. 9.

## RELATED RIGHTS AND FREEDOMS

Situations that engage s. 21 may also raise issues in relation to the following rights in the Charter:

- protection from torture and cruel, inhuman or degrading treatment (s. 10);
- humane treatment when deprived of liberty (s. 22);
- children in the criminal process (s. 23);
- fair hearing (s. 24); and
- rights in criminal proceedings (s. 25).

## HISTORY OF THE SECTION

Section 21 is modelled on articles 9 and 11 of the ICCPR. However, unlike article 9 of the ICCPR, s. 21 does not confer a right to compensation for breach of the right.

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

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# SECTION 22

## HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY

### Section 22

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

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 22?**

You will need to consider s. 22 in assessing legislation, a policy or a program where it:

- enables a public or private authority to detain individuals;
- relates to the conditions under which an individual may be detained;
- concerns standards and procedures for treatment of individuals who are detained, including the range of custody and supervision services (for example, use of force, dietary choice, access to private shower and toilet facilities);
- permits the enforcement authorities to hold individuals for any length of time;
- authorises enforcement officers to hold individuals in a place with limited facilities or services for the care and safety of detainees;
- enables enforcement officers to undertake personal searches of individuals detained in custody or detainee visitors. (Enforcement officers include law enforcement officers but also officers, commonly known as 'inspectors' and 'authorised officers', who are appointed and authorised to exercise powers of entry, investigation, search, inspection, monitoring, detention, seizure, confiscation and the issuing of notices.);

These policy triggers are not comprehensive.

#### **DISCUSSION OF SECTION 22**

Section 22 requires a public authority to treat all persons in detention with humanity and dignity. The clause also requires the segregation of persons accused of offences from persons who have been convicted of offences.

This clause is essentially concerned with ensuring that the conditions under which people are detained in Victoria conform to internationally accepted standards. International standards on the conditions for detention are set out in a number of human rights instruments which are discussed below. A detention does not include every restraint on liberty; for example, intervention orders restraining a person from contacting others or visiting certain places would be unlikely to be considered 'detention'. The New Zealand Court of Appeal has defined detention as 'a substantial intrusion on personal liberty'.<sup>186</sup>

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186 *Police v. Smith and Herewini* [1994] 2 NZLR 306.

## Section 22 (1): Right to humane treatment

The right to humane treatment when deprived of liberty is a universally accepted human right. Its purpose is to recognise the particular vulnerability of persons in detention and to ensure that they are treated humanely.

This right complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment. However, it is engaged by much less serious (mis)treatment or punishment than torture.<sup>187</sup>

### When does it apply?

In the context of international human rights law, the UN Human Rights Committee has observed that this right applies not just to persons detained under the criminal law, but also to persons detained elsewhere (for example, in an approved mental health service) under the laws and authority of the government.<sup>188</sup>

Under Victorian law, a person may be detained for a range of purposes and durations. For example, a person may be detained as punishment for committing an offence, for a brief period for a limited purpose (for example, detention by an inspector to obtain a person's name and address) or for non-punitive purposes, (for example, for mental health treatment).

In respect of criminal detention, the right applies to pre-trial detention as well as detention after conviction. The UN Human Rights Committee has made clear that this right applies to all detention facilities within a state's jurisdiction.<sup>189</sup> The definition of a 'public authority' in the Charter means that the right to humane treatment when deprived of liberty will be likely to apply in respect of privately contracted detention facilities operating in Victoria.

This right applies to anyone detained, whether he or she is an adult or child.

### What does it require?

The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint in addition to that resulting from the deprivation of liberty.<sup>190</sup> (Additional hardship imposed as part of an internal disciplinary measure within a prison would need to meet the requirements of s. 7 as a permissible limitation or restriction upon the right.) The UN Human Rights Committee has emphasised that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment.<sup>191</sup>

Some rights are unavoidably restricted in a closed environment. For example, a person's freedom of movement, elements of freedom of expression and communication, and some elements of privacy are inevitably restricted in a closed environment. Family life is also necessarily interfered with for those in detention as detention requires separation from family members and renders detainees inevitably incapable of carrying on family life in a normal manner. Mindful of this, international human rights law requires that to the extent that family life can be maintained (for example, through letters and regular visits by family members) it should be. Measures that may interfere in the maintenance of a family relationship that are undertaken as a form of punishment, or for administrative convenience, (for example, denying a prisoner communication with his or her family members) should be avoided.

187 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, 186.

188 *UN Human Rights Committee, General Comment 21, Article 10* (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 153 (2003) [2].

189 *Ibid.*

190 *Ibid* [3].

191 *Ibid.*

Individuals who are detained must be provided with services that will satisfy their essential needs. The UN Standard Minimum Rules for the Treatment of Prisoners establish minimum standards on a range of matters, including conditions of accommodation; food of adequate quality; facilities for personal hygiene; standard of clothing and bedding; opportunities for exercise and availability of medical services; contacts with the outside world; access to books and regulation of methods and procedures for discipline and punishment (including the prohibition of certain forms of punishment).<sup>192</sup> All these matters were taken into consideration by the ACT Human Rights Commissioner when she conducted an audit of Quamby Youth Detention Centre during the first year of operation of the ACT *Human Rights Act*.<sup>193</sup>

In considering whether legislation, a policy or a program provides for humane detention, attention should be given to the conditions, circumstances and purpose of the detention. The purpose and duration of the detention will be relevant. For example, humane treatment in the context of detention in a correctional facility will require, among other things, the provision of appropriate food. But clearly such a requirement is not necessary if someone is detained only for a very short period of time.

A detainee's right to be treated humanely has been held to be violated in cases before the UN Human Rights Committee (generally in cases not involving Australia) where the detainee was:

- held in 'incommunicado' detention for any length of time (an aggravated form of detention where a person is denied access to family, friends and others);<sup>194</sup>
- refused medical attention or there was a failure to address deteriorating mental health;<sup>195</sup>
- subjected to ridicule;<sup>196</sup>
- denied reading facilities and not allowed to listen to the radio;<sup>197</sup>
- confined to his or her cell for an unreasonably long period of time;<sup>198</sup>
- required to prepare prison food in unsanitary conditions;<sup>199</sup>
- subject to restricted correspondence with family;<sup>200</sup>
- prevented from being present at the birth of a child;<sup>201</sup>
- held in a small cage awaiting court appearance.<sup>202</sup>

192 While these rules are not formally binding on signatory states they have most often been used when interpreting the application of article 10 of the ICCPR, which pertains to humane treatment.

193 Human Rights Office (ACT), *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005 (see more generally ACT Department of Justice and Community Safety *Human Rights Act 2004*, Twelve-Month Review – Report, June 2006).

194 *Caldas v. Uruguay*, Human Rights Committee, Communication No. 43/1979, UN Doc. CCPR/C/19/D/43/1979 (21 July 1983) [13.3].

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202 *Cabal & Passini v. Australia*, Human Rights Committee, Communication No. 1020/2001, UN Doc. CCPR/C/78/D/1020/2001 (19 September 2003) [8.3].

### Sections 22(2) and (3): Additional rights of certain detainees

Paragraphs (2) and (3) of s. 22 grant the following additional rights to 'an accused person who is detained' and a 'person detained without charge':

- to be segregated during detention from persons convicted of an offence, except where reasonably necessary; and
- to be treated in a way that is appropriate for a person who has not been convicted.

These rights follow from the principle of the presumption of innocence in criminal law: a detainee who has not yet been tried is entitled to a different treatment regime than convicted detainees.<sup>203</sup>

#### Right to segregation

The Charter provides a right to segregation. The right is for an accused person who is detained, or a person detained without charge, to be segregated from convicted persons. Section 21(2) provides, however, that the right applies 'except where reasonably necessary'.

#### What does 'except where reasonably necessary' mean?

The phrase 'except where reasonably necessary' does not appear in the equivalent ICCPR right (article 10).

In the ICCPR, the right to be segregated applies 'save in exceptional circumstances'.

It might be reasonably necessary not to segregate an accused from a convicted prisoner where, for example, convicted prisoners work as food servers or cleaners in a remand unit in which accused persons are held.<sup>204</sup>

Note also that the requirement for segregation does not necessarily require that the two groups of detainees (accused persons and convicted persons) are housed in separate buildings, provided that contact between the two groups of detainees is kept to a strict minimum.<sup>205</sup>

In respect of children, you should refer to the section of these Charter Guidelines on s. 23. (Accused children, or children detained without charge, are to be separated from adult detainees. However, this right does not apply to convicted children.)

#### Right to humane treatment

You should refer to the discussion on page 141 for what is meant by humane treatment.

### REASONABLE LIMITS ON THE RIGHTS IN SECTION 22

As with all of the human rights protected in the Charter, the rights in s. 22 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. Note that lack of material resources or financial difficulties have not been considered to be a justification for inhuman treatment. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

<sup>203</sup> *UN Human Rights Committee, General Comment 9, Article 10 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 131 (2003) [4] and UN Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 153 (2003) [9].*

<sup>204</sup> These facts arose in the case of *Pinkney v. Canada*, Human Rights Committee, Communication No. 27/1977, UN Doc. CCPR/C/14/D/27/1977 (29 October 1981). The UN Human Rights Committee found that the arrangements were not a breach of article 10(2)(a) of the ICCPR.

<sup>205</sup> *Pinkney v. Canada*, Human Rights Committee, Communication No. 27/1977, UN Doc. CCPR/C/14/D/27/1977 (29 October 1981) [30].

### KEY POINTS TO REMEMBER

- A public authority must treat all persons in detention with humanity and dignity.
- The conditions under which people are detained in Victoria should conform to internationally accepted standards. These standards are discussed on page 142.
- The right to humane treatment applies to all persons (children and adults) under detention. It requires that individuals who are detained ought not to be subject to any hardship or constraint other than that resulting from the deprivation of liberty.
- Persons detained ought to be provided with services that will satisfy their essential needs.
- An accused person who is detained is entitled to a different treatment regime than a convicted detainee. This includes segregation from convicted prisoners while in detention, except where it is reasonably necessary not to segregate. Convicted detainees are nonetheless entitled to the full enjoyment of the rights in the Charter, subject to any reasonable limitations on these rights under section 7.
- Refer to s. 23 for the rights of children in the criminal process.

### MEASURES TO IMPROVE COMPLIANCE

If you are developing legislation or a policy or a program that involves detention, you should refer to the conditions and circumstances of detention outlined in the international standards of detention. The international standards are part of international law and may be used when interpreting human rights under s. 32(2) of the Charter.

These international standards are set out in the following instruments:

- UN Standard Minimum Rules for the Treatment of Prisoners;
- UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment;

- UN Code of Conduct for Law Enforcement Officials;
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- UN Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment;
- UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

Various international human rights instruments also set out minimum requirements in relation to child detainees. This is discussed in relation to s. 23 of the Charter.

These instruments are all available on the Internet.<sup>206</sup>

You will also need to consider whether training is required to enable staff to comply with the legislation, policy or program you are reviewing or developing.

If you are reviewing a policy, a program or legislation that creates an exception to the requirements for segregation of prisoners ensure that any exception is 'reasonably necessary'.

### RELATED RIGHTS AND FREEDOMS

Section 22 is closely related to the following sections of the Charter:

- Protection from torture and cruel, inhuman or degrading treatment (s. 10);
- Right to liberty (s. 21);
- Children in the criminal process (s. 23).

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<sup>206</sup> These documents are all available at <<http://www.ohchr.org/>>, which is the website of the United Nations Office of the High Commissioner for Human Rights.

The following additional rights should be checked if your policy or legislation raises an issue under s. 22:

- the right to life (s. 9);
- the protection of families and children (s. 17).

## HISTORY OF THE SECTION

Section 22 is modelled on article 10 of the ICCPR. Sections 22(2) and 22(3) of the Charter broaden article 10 of the ICCPR by extending the protections to *persons who have been detained without charge*. Section 22(2) also modifies article 10 of the ICCPR by requiring that an accused is segregated *except where reasonably necessary*. The ICCPR requires an accused to be segregated *unless in exceptional circumstances*.

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

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16. <http://www.ohchr.org>

# SECTION 23

## CHILDREN IN THE CRIMINAL PROCESS

### Section 23

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

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#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 23?

Note that a 'child' is defined under s. 3 of the Charter as a person under 18 years of age. You will need to consider s. 23 in assessing legislation, a policy or a program particularly where it:

- enables a public or private authority to detain children;
- permits enforcement authorities to hold children for any length of time;
- authorises enforcement authorities to hold children in amenities that have limited facilities or services for the care and safety of detainees;
- enables enforcement authorities to undertake personal searches of a convicted child in detention;
- impacts on the design of detention centres or relates to the conditions under which children are detained in a public or private institution, either before or after conviction;
- provides for the sentencing of children;
- provides for sentencing of offenders which may impact on detained children (such as the place where an adult prisoner is detained);
- affects the speed at which a child may be brought to trial (such as alteration to practices or internal procedures for case management in the Office of Public Prosecutions or the courts);

- relates to remand or bail;
- establishes or alters programs in prisons, youth training centres or residential centres;
- otherwise regulates the custodial care of children.

These policy triggers are not comprehensive.

#### DISCUSSION OF SECTION 23

As previously noted, s. 22 of the Charter requires persons deprived of liberty (irrespective of the purpose of that deprivation) to be treated with humanity and respect for the inherent dignity of the human person. Section 22 also makes requirements with respect to segregation and appropriate treatment for accused persons and persons detained without charge.

As human beings, children are entitled to all of the rights in the Charter (unless the right includes an eligibility condition which they do not meet, for example, the right to vote under s. 18(2) of the Charter), including the right outlined in s. 22.

Section 23 specifies additional requirements for the humane treatment of children who are detained in the criminal process. These rights apply to children who are detained in the criminal process, unlike s. 22, which applies to a person detained regardless of the purpose of the detention.

The additional requirements imposed by s. 23 are:

- Non-convicted children must be segregated from adults in detention, whether or not the adults have been charged.
- Children accused of an offence must be brought to trial 'as quickly as possible'.
- Children found guilty of an offence must be treated in an age-appropriate manner.

The purpose of these forms of protection is to recognise and address the particular vulnerability of children in the criminal process.

### Section 23(1): Segregation

The Charter imposes requirements in respect of segregation (in relation to both adults and children) during the criminal process.

In summary, with respect to the segregation of *children*, any accused child (who is not convicted) or any child detained without charge must:

- be segregated from adults in detention: **s. 23(1)**;
- be segregated in detention from other children who have been convicted of offences, 'except where reasonably necessary': **s. 22(2)**. You should refer to s. 22 of these Charter Guidelines for the meaning of this phrase.

In relation to a child who is accused, note also s. 21(6) of the Charter, which provides a right to be released pending trial. Children ought not usually be detained before trial unless there is a good reason for doing so. The right to release pending trial is discussed further under s. 21(6) of these Charter Guidelines.

The Charter does not expressly require convicted children to be segregated from convicted adults. The equivalent ICCPR provision (in Article 10(3)) was omitted so that a practice by which convicted young adults (aged 18–21) are detained in correctional facilities with convicted children rather than with adults will not contravene the Charter. This omission was recommended by the Human Rights Consultation Committee:

'on the basis that the current system for the punishment of young offenders in Victoria represents the best practice. The Committee was concerned that the inclusion of the provision [that juvenile offenders shall be segregated from adults] may have the unintended consequence of requiring the automatic removal of offenders, who were under 18 when the crimes were committed, to adult prisons when they turn 18.'<sup>207</sup>

### Section 23(2): Right of an accused child to be brought to trial 'as quickly as possible'

The purpose of s. 23(2) is to recognise that a child should be detained for only the shortest appropriate time.<sup>208</sup>

There is no prescribed time limit for what will amount to being brought to trial 'as quickly as possible'. However, it is likely to be a period of time that is shorter than the time permitted under s. 21(5), which requires a person to be brought to trial 'without unreasonable delay'.

<sup>207</sup> Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 43.

<sup>208</sup> See for example *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, article 37(b)).

In the case of *Philis v Greece* the following test was used to consider the period of delay:

‘the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and ... in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.’<sup>209</sup>

**Section 23(3): Right of a convicted child to be treated in a way that is appropriate for his or her age**

The Charter requires a convicted child to be treated in a way that is appropriate for the child’s age.

In addition to the standards on detention that are referred to under s. 22 (which apply to both adults and children) the United Nations has developed special standards on the detention of children.

To comply with this section, it is recommended that you examine these standards and seek to ensure that they are complied with.

The UN standards are contained in the following documents:

- UN Rules for the Protection of Juveniles Deprived of their Liberty;
- UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

These documents can be accessed on the internet.<sup>210</sup>

These standards are founded on the premise that ‘the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles.’<sup>211</sup> The standards relate to a range of subject matters. Some of these that may be relevant under s. 23(3) are:

- children should be provided with opportunities to continue education while in detention;
- children should be provided with access to vocational training in occupations likely to prepare the child for future employment;
- children should have access to leisure activities;
- children should be able to use their own clothing in detention, to the extent possible;
- as far as possible, children should be detained in ‘open facilities’ with minimal security measures and the facilities should be small so as to facilitate access and contact between detainees and their families.<sup>212</sup>

The standards establish conditions in respect of each of these matters. For example, in relation to education they impose requirements in respect of the type, location and content of education.

209 *Philis v. Greece (No 2)* (1997) IV Eur Court HR 1074; (1998) 25 EHRR 417.

210 These documents are all available at <<http://www.ohchr.org/>>, which is the website of the United Nations Office of the High Commissioner for Human Rights.

211 *UN Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. res. 45/113, annex, 45 UN GAOR Supp. (No. 49A) at 205, UN Doc. A/45/49 (1990) s. 1.

212 These are just some of the matters covered by the standards. If you are examining legislation or developing a new policy relating to the imprisonment of children, you should obtain copies of the UN standards and review them in full.

These include the requirement that where possible, education of children of compulsory school age should take place outside the place of detention in community schools by qualified teachers. Children with learning disabilities should be provided with access to special education programs.

As discussed on page 147, the segregation of children who are convicted offenders from adult prisoners is another way in which children may be treated in an age-appropriate manner.

### REASONABLE LIMITS ON THE RIGHTS IN SECTION 23

As with all of the human rights protected in the Charter, the rights in s. 23 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

#### KEY POINTS TO REMEMBER

- The Charter recognises that children are particularly vulnerable in the criminal process.
- In addition to the general guarantees in s. 22, additional guarantees in relation to children in the criminal process are contained in s. 23.
- Whereas s. 22 applies to all persons detained, s. 23 applies only to children detained *in the criminal process*.
- Section 23 requires:
  - accused children or children detained without charge should be segregated from adults in detention;
  - children should be brought to trial as quickly as possible;
  - children should be treated in a way that is appropriate for their age. Guidance on what this may require is provided on page 148.
- All of these rights are subject to reasonable limitations that can be demonstrably justified in a democratic and free society.

### MEASURES TO IMPROVE COMPLIANCE

1. If you are developing legislation or a policy or program regarding detention or imprisonment of children, ensure that:
  - the legislation provides for the segregation of children in accordance with the requirements in ss. 22(2) and 23(1) of the Charter;
  - the conditions and circumstances of detention or imprisonment are in accordance with:
    - the international standards of detention set out in the instruments outlined under the commentary on s. 22 in these Charter Guidelines; and
    - the international standards that apply specifically to children who are detained in the criminal justice context.

The standards on children are discussed on page 148. They relate to matters such as education and training of children in detention, children's access to leisure facilities and the size of the facility in which children are detained, etc. The standards on detention generally are discussed under s. 22. The international standards are part of international law and may be used when interpreting human rights under s. 32(2) of the Charter.

2. Review pre-trial criminal procedures that apply to children and ensure that they do not create unnecessary delay in bringing a child to trial as quickly as possible.
3. Review sentencing laws and guidelines covering children to ensure that they provide for age-appropriate treatment.

### RELATED RIGHTS AND FREEDOMS

Section 23 is closely related to the right to humane treatment when deprived of liberty (s. 22). It is also related to the following additional rights:

- Right to liberty and security of person (s. 21);
- Rights in criminal proceedings (s. 25, particularly sub-section (3));
- Protection of families and children (s. 17)

### HISTORY OF THE SECTION

This provision is modeled on article 10(2)(b) and partly on article 10(3) of the ICCPR. The rights protected in ss. 22 and 23 of the Charter are protected in one provision of the ICCPR, namely article 10.

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

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# SECTION 24

## FAIR HEARING

### Section 24

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

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

- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 24?

You will need to consider s. 24 if you are assessing legislation, a policy or a program where it:

- creates a new court or tribunal;
- creates or restricts rights of review for administrative decision-making and appeal;
- includes a privative clause (a clause that purports to make a decision final and ousts the jurisdiction of a court to review it);
- alters the jurisdiction of courts and tribunals;
- amends the way in which evidence is presented in a court or tribunal;
- limits the requirement of a court or tribunal to accord natural justice;
- develops special procedures to provide safeguards for witnesses when giving evidence in a court or tribunal (such as giving evidence when shielded by a screen so that the defendant cannot see him or her);
- regulates the way in which the media is able to report on trials or pending court cases or other hearings (for example, the granting of suppression orders);

- concerns the way in which juries are selected and regulated;
- amends the procedure allowing for a change of trial venue;
- regulates the appointment, including term of appointment, remuneration or removal of judges or tribunal members from office;
- regulates the procedures for giving notice of a hearing, disclosing information to be considered in making a decision or giving the person an opportunity to make submissions;
- regulates the procedures for challenging the impartiality and independence of courts and tribunals.

#### DISCUSSION

##### Right to a fair hearing

Section 24 guarantees the right to a fair and public hearing.

The right to a fair hearing applies in both civil and criminal proceedings and in courts and tribunals.

This provision should be read together with ss. 25, 26 and 27 of the Charter, which establish various rights of a person in *criminal proceedings*. For example, many of the minimum entitlements outlined in s. 25 are elaborations of the right to a fair hearing.

Note though that the observance of the requirements of s. 25 will not always be sufficient to ensure the fairness of a hearing under s. 24.<sup>213</sup>

The requirement for a fair hearing applies to all stages in proceedings and applies in relation to proceedings in any Victorian court or tribunal.

#### What is required for a 'fair hearing'?

The purpose of the right to a fair hearing is to ensure the proper administration of justice. This right is concerned with procedural fairness (that is, the right of a party to be heard and to respond to any allegations made against him or her, and the requirement that the court or tribunal be unbiased, independent and impartial) rather than the substantive fairness of a decision or judgment of a court or tribunal determined on the merits of the case (that is, the rights or wrongs of the decision).

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).

It is likely to differ in criminal and civil proceedings.

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. However, what is 'fair' has been said to involve a triangulation of interests of the victim, the accused and society<sup>214</sup>. Accordingly, 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.

The prohibitions in s. 27 on retrospective criminal laws and retrospective penalties are included in the Charter to help satisfy these requirements.

Thereafter, s. 25 of the Charter elaborates on the minimum conditions required to achieve a fair hearing in criminal proceedings.

Beyond these aspects, the elements of the right to a fair hearing in both criminal and civil proceedings revolve around the procedures that are followed during a hearing and the extent to which they protect the rights of the parties and respect the principle of 'equality of arms'.

The principle of equality of arms means that everyone who is a party to proceedings must have a reasonable opportunity of presenting his or her case to the court under conditions that do not place that party at a substantial disadvantage vis-à-vis his or her opponent.<sup>215</sup>

The content of the right to a fair hearing in both criminal and civil proceedings may include a right to an oral hearing unless there are circumstances justifying otherwise.<sup>216</sup> This may depend on the particular stage of the proceedings as some preliminary applications are sometimes determined by courts or tribunals 'on the papers' and this has been an increasing trend in court management. The right to a fair hearing is unlikely to include a right to access a court given the language expressed in s. 24(1). Access may sometimes depend on jurisdictional requirements or, in the case of leave to appeal from the Victorian Civil and Administrative Tribunal (VCAT), on identifying a question of law.<sup>217</sup>

#### What is a 'competent, independent and impartial' court or tribunal?

A further element of the right to a fair hearing relates to the character of the court or tribunal before which the hearing takes place.

213 *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [5].

214 *R v A* (No. 2) [2002] 1 AC 45 at 65., per Lord Steyn.

215 *Brown v. Stott* [2001] 2 WLR 817; *Fitt v. United Kingdom* (2000) II Eur Court HR 367[44].

216 *Fredin v. Sweden (No 2)* (1994) 283 Eur Court HR (ser A) [19]; *Fischer v. Austria* (1995) 312 Eur Court HR (ser A) [43]–[44]; (1995) 20 EHRR 349.

217 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s. 148.

The Charter expressly requires that the court or tribunal is 'competent, independent and impartial'. These requirements reflect the fundamental notion of the rule of law that a hearing should be conducted by an independent and impartial tribunal that is established by law and jurisdictionally competent to hear the case.

The requirement of a 'competent, independent and impartial' court or tribunal applies both to each of the individual members of the court or tribunal and the whole institution of the court or tribunal.

#### Independence

The institutional design and structure of the court or tribunal must be such as to maintain the independence of the institution and its individual members from government, and to maintain the capacity of the judiciary or tribunal members to act impartially.

The requirement of independence also means that courts and tribunals should have control over internal procedural matters such as allocating cases to be heard by particular judges or tribunal members and control over court or tribunal listings generally. In addition, in any particular case, the judge or tribunal member hearing a matter must be independent and impartial, that is, not influenced by bias in favour of the government.

#### Impartiality

The requirement of impartiality means that proceedings must be free from bias and the objective perception of bias.

An example of this right in practice is where a complaint was made to the European Court of Human Rights by a person who argued that the trial judge had failed to take action to exclude legitimate doubts that the complainant might be condemned because of his ethnicity.<sup>218</sup> Allegations of racism of members of the jury had been publicly reported in the media. The European Court of Human Rights upheld the complaint.<sup>219</sup>

<sup>218</sup> *Sander v. United Kingdom* (2000) v. Eur Court HR 243 [34]; (2001) 31 EHRR 44 [34]–[35].

<sup>219</sup> *Ibid.*

There have also been concerns raised about the independence and impartiality of acting judges, at least where their tenure is very short and they are subject to reappointment. In most international jurisdictions, appointment of judges by the executive has not, in itself, raised doubts as to independence.<sup>220</sup> Note that the High Court of Australia recently upheld the validity of the appointment of acting judges under the New South Wales scheme as not compromising the independence and impartiality of the court or tribunal.<sup>221</sup>

#### Right to a public hearing

The Charter requires that a hearing of a criminal offence or a civil proceeding is not only fair but also public. In international human rights law, the right to a fair hearing incorporates a right to a hearing that is held in public.

The rationale for this requirement is the principle of open justice: not only should justice be done, it should be seen to be done. It is also intended to contribute to a fair trial through public scrutiny.

Appellate and first instance decisions are both captured by this provision. However, in international human rights law, reviews of appeals 'on the papers' have been considered not to breach the right where the documents on which the court bases its decisions are publicly available and the judgment itself is available.<sup>222</sup>

Pre-trial decisions made by prosecutors and public authorities (not being the hearing of a criminal charge or the conduct of a civil proceeding) would not be required under s. 24 to be held in public.<sup>223</sup>

<sup>220</sup> *Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744.

<sup>221</sup> *Forge v. ASIC* (2006) 229 ALR 223.

<sup>222</sup> *Axen v. Germany* (1984) 72 Eur Court HR (ser A) [25]–[26]; (1984) 2 EHRR 195 [31]–[32].

<sup>223</sup> See *RM v. Finland*, Human Rights Committee, Communication No. 301/1988, UN Doc. CCPR/C/35/D/301/1988 (27 March 1989).

Some methods whereby witnesses give evidence, for example, by video link or when shielded by a screen, may raise issues about whether those parts of the hearing are public and thus whether they comply with s. 24 of the Charter. Such methods of presenting evidence and the circumstances in which they are employed should be assessed under s. 7. For example, given the importance of the objective sought to be achieved by the use of these methods, the methods may be an example of measures that, although they impose a limit on s. 24, should nevertheless be permitted by law and justifiable under s. 7.

The right to a public hearing is expressly limited by s. 24(2). This provision is discussed on page 153.

#### **Right to public pronouncement of judgments and decisions**

Section 24(3) of the Charter establishes a right to the public pronouncement of judgments and decisions by a court or tribunal. This means that courts and tribunals must hand down all judgments and decisions in public, subject to reasonable limitations that can be justified under the Charter. The purpose of this provision is also to contribute to a fair trial through public scrutiny.

The scope of this right is limited to judgments and decisions. The right does not require a court or tribunal to publish transcripts of proceedings.

#### **REASONABLE LIMITS ON THE RIGHTS PROTECTED IN SECTION 24**

As with all of the human rights protected in the Charter, the rights in s. 24 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

The right in s. 24(1) to a public hearing and the right in s. 24(3) to the public pronouncement of judgments and decisions are also expressly qualified by the express exceptions contained in s. 24 (2) and s. 24(3) respectively. These exceptions vary somewhat from the exceptions recognised in article 14(1) upon which s. 24 is modelled.

#### **Exceptions to the right to a public hearing**

Section 24(2) provides that 'a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing *if permitted to do so by a law other than this Charter.*'

This exception recognises that there are occasions where restrictions on the media or the public's ability to gain access to a court or tribunal or to information before a court or tribunal are necessary to facilitate a fair trial. Media restrictions may also be necessary to ensure that the court or tribunal remains impartial and that the presumption of innocence, protected by the Charter in s. 25(1), is maintained. It may also be necessary in certain cases to protect particularly vulnerable witnesses (for example, children who have been victims of sexual abuse) or to protect national security.

To satisfy the Charter requirements, the circumstances in which courts or tribunals may hold closed hearings, grant suppression orders or otherwise limit access to material before the court or tribunal should be authorised by law.

#### **Exception to the right to public pronouncement of judgments and decisions**

Section 24(3) qualifies the right to public pronouncement of judgments and decisions by permitting the suppression of all or part of a judgment or decision 'where the best interests of a child otherwise requires or a law other than the Charter otherwise permits.'

This exception was included in recognition that there may be other interests which should be protected that might outweigh the right to public pronouncement of judgments and decisions. In some circumstances it may be appropriate for legislation to authorise that all or part of a judgment should not be made public, (for example, information contained in a judgment that relates to national security). The exception also recognises that the best interests of a child may require that the name of the child in legal proceedings should be suppressed to protect the identity of the child. The exception for the protection of a child does not require separate authorising legislation.

### KEY POINTS TO REMEMBER

- The right to a fair and public hearing applies in both civil and criminal proceedings and in courts and tribunals (including VCAT). It is concerned with procedural fairness rather than with the merits of a decision of a court or tribunal.
- What constitutes a 'fair hearing' will depend on the facts of the case and will require a weighing of a number of public interest factors. It is likely to differ in the criminal and civil context. In the criminal context, s. 24 is closely related to ss. 25, 26 and 27 of the Charter.
- Hearings must in all cases be by a 'competent, independent and impartial' court or tribunal. This means that the institution of the court or tribunal as well as each of the individual members of the court or tribunal must be competent, independent and impartial.
- In general, hearings should be held in public and judgments and decisions should be pronounced in public. However, the Charter recognises that there may be situations in which both rights need to be limited. Express exceptions to the rights to a public hearing and public pronouncement of judgments in s. 24 are contained in this section.
- All of the rights in s. 24 are also subject to s. 7 of the Charter.

### MEASURES TO IMPROVE COMPLIANCE

If you are developing a policy or a program or vetting legislation that raises an issue of consistency with the right to a fair hearing under s. 24 in the criminal context, consider:

- whether and to what extent the interests of the accused, the interests of the complainant and the interests of the community are addressed;

- whether there is an appropriate balance between the legitimate interests of the state in having allegations of criminal offences prosecuted in a particular way and the broader public interest in ensuring that an accused receives a fair hearing;

If the venue where the proceeding will be held carries a risk of a lack of impartiality (for example, where a prosecution takes place in a small closed community close to the home to the accused and the victim), consider whether there are adequate opportunities for shifting the venue of the proceeding.

To achieve compliance with the requirement for a 'competent, independent and impartial court or tribunal' in both criminal and civil contexts, consider:

- whether the policy, program or legislation you are vetting will assist in maintaining the independence of the court or tribunal by preserving rules relating to appointment, tenure, and removal of judges or tribunal members, or whether it will affect the manner in which courts and tribunals are funded, or judges or tribunal members are remunerated, in a way that may place independence or impartiality at risk.

In respect of the right to a public hearing, in both criminal and civil contexts:

- Hearings and pronouncement of judgments should be held in public unless one or more of the qualifications in s. 24(2) or s. 24(3) applies (or a restriction can be justified under s. 7);
- Consider whether there are any persuasive reasons why a hearing should not be held in public.

### RELATED RIGHTS AND FREEDOMS

If your policy, program or legislation raises an issue with respect to the right to a fair hearing under s. 24, you should also check whether it engages the following rights:

- freedom of expression (s. 15);
- rights in criminal proceedings (s. 25);
- the right not to be tried or punished more than once (s. 26);
- the prohibition on retrospective criminal laws (s. 27).

### HISTORY OF THE SECTION

Section 24 is modelled on article 14(1) of the ICCPR. The express exceptions contained within s. 24 vary somewhat from the exceptions in article 14(1).

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

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# SECTION 25(1)

## THE RIGHT TO BE PRESUMED INNOCENT

### Section 25

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(1)?**

You will need to consider s. 25(1) in assessing legislation, a policy or a program where it:

- creates or amends an offence that requires the accused to prove or establish the absence of an element of an offence;
- creates or amends an offence that provides that an exception, qualification, proviso, exemption, excuse or other defence must be proved or established by an accused;
- creates or amends an offence that contains a presumption of fact or law and puts the legal (persuasive) burden on the accused to rebut the presumption;
- creates or amends an offence that contains a presumption of fact or law and puts the evidential burden on the accused to rebut the presumption;
- creates or amends an offence that contains a presumption of fact or law operating against an accused which cannot be displaced;
- creates or amends an offence that imposes criminal liability on an officer of a corporation solely by reference to his or her position in the corporation and requires the officer to make out a defence;

- deals with the admissibility of evidence;
- creates or amends a statutory defence relating to an element of the offence;
- alters the criteria or conditions under which a person may apply for or be released on bail;
- allows public officials to comment on the guilt of persons who have been charged.

These policy triggers are not comprehensive.

#### **DISCUSSION**

Sub-section (1) of s. 25 protects the presumption of innocence in criminal proceedings. The presumption of innocence is a well-recognised civil and political right and a fundamental principle of common law.

More generally, s. 25 is concerned with rights in criminal proceedings. This provision is modelled on articles 14(2), 14(3), 14(4) and 14(5) of the ICCPR.

Note that by virtue of s. 49(2) of the Charter (transitional provisions), the rights in s. 25 will not affect any proceedings concluded or commenced before 1 January 2007. (Thus, if a person has been convicted of a reverse onus offence before 1 January 2007, his or her conviction will not be affected by s. 25.)

### When does section 25(1) apply?

Section 25(1) covers persons charged with an offence, whether it is an indictable or a summary offence.

In Victoria, typically a person is charged with an offence when the charge is filed in the Magistrates' Court on a charge sheet that alleges the person has committed an indictable or summary offence. A person will either be arrested and charged or a summons to answer the charge will be issued. The infringement notice system (discussed on page 164) provides an alternative means of dealing with allegations.

### What does it mean?

The right to be presumed innocent until proven guilty is a fundamental common law principle. It requires that the prosecution has the burden of proving that the accused committed the charged offence. The prosecution must prove the guilt of the accused beyond reasonable doubt.<sup>224</sup> This means that the prosecution must prove all elements of a criminal offence.

A law that shifts the burden of proof to the accused or applies a presumption of fact or law operating against an accused may breach this provision. Both are commonly called reverse onus provisions.

### Reverse onus offences

Reverse onus offences are offences that impose a legal (persuasive) burden on the accused by requiring the accused to prove, on the balance of probabilities, a fact that is essential to the determination of guilt or innocence.

Some offences impose an evidential burden on the accused by requiring the accused to present or point to evidence to raise an issue. In such offences, the prosecution bears the legal burden of disproving the issue beyond reasonable doubt.

These offences may also limit the presumption of innocence.

Reverse onus offences may undermine the presumption of innocence because there is a risk that an accused can be convicted despite reasonable doubt of his or her guilt. However, in international human rights law, reverse onus provisions do not necessarily violate the presumption of innocence as long as they are 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.<sup>225</sup>

Reverse onus offences should be examined carefully to determine if they breach s. 25(1).<sup>226</sup> If so, the provision may still be compatible with the Charter if it can be justified under s. 7. It must be a reasonable limitation that can be demonstrably justified in a free and democratic society. For more information, refer to the discussion in these Charter Guidelines on s. 7.

<sup>224</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [7].

<sup>225</sup> *Salabiaku v. France* (1988) 141 Eur Court HR (ser A); (1991) 13 EHRR 379.

<sup>226</sup> See for example *R v. Lambert* [2002] 2 AC 545 and *R v. Oakes* [1986] 1 SCR 103.

The more serious the reverse onus offence, and the higher the penalty the courts can impose for the offence, the more likely it is that s. 25(1) has been breached. In assessing the seriousness of an offence (including the seriousness of the consequence for a convicted person), consider the purpose for which the offence was created and whether the offence has an element of moral fault. If the nature of the offence makes it very difficult for the prosecution to prove each element of the offence, a reverse onus provision may be acceptable. Similarly, if it is clearly easier and more practical for an accused to prove a fact than for the prosecution to disprove it, a reverse onus provision may be justifiable.

### REASONABLE LIMITS ON THE RIGHT TO BE PRESUMED INNOCENT

As with all of the human rights protected in the Charter, the right to be presumed innocent in s. 25(1) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

However, in this context you should note that in the UK, courts have held that reverse onus provisions are more likely to be consistent with human rights if they require the accused to prove an exception, proviso or excuse rather than disprove an element of the offence.<sup>227</sup> However, for offences heard summarily in Victoria, section 130 of the *Magistrates' Court Act 1989* provides that a defendant who wishes to rely on an exception, exemption, proviso, excuse or qualification has an evidential burden only in relation to that exception, proviso, excuse or qualification. Similarly, provisions that place the evidential burden on the accused will be easier to justify than provisions that place the legal burden on the accused by requiring him or her to prove a fact.<sup>228</sup>

### KEY POINTS TO REMEMBER

- The presumption of innocence is a well-recognised civil and political right and a fundamental common law principle.
- Section 25(1) applies to persons who have been charged with a criminal offence.
- A charged person is entitled to be presumed innocent until proven guilty of committing the offence with which he or she has been charged.
- The prosecution has the burden of proof and must prove the guilt of the accused beyond reasonable doubt. This usually means the prosecution must prove both the physical and fault elements of an offence and disprove any exceptions or defences that are raised by the accused.
- Reverse onus provisions, being laws that shift the burden of proof to the accused or apply a presumption of fact or law operating against an accused, may breach s. 25(1).
- Whether a reverse onus provision breaches s. 25(1) involves consideration of all the facts and circumstances.

<sup>227</sup> *R v. DPP, ex parte Kebilene* [2000] 2 AC 326.

<sup>228</sup> *R v. Lambert* [2002] 2 AC 545.

### MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(1):

- If you are developing a policy or legislation that creates or amends a criminal offence or criminal procedure, ensure so far as possible that it is consistent with the presumption of innocence.

If you are developing a policy or legislation that creates or amends a criminal offence which does not require the prosecution to prove all the elements of the offence, but places a burden on the accused, then consider the following criteria in deciding if the offence breaches s. 25(1):

- the nature and context of the conduct you are attempting to regulate;
  - the nature and purpose of the offence;
  - the reason you want the accused to provide evidence or prove that they were not at fault. Is it very difficult for the prosecution to provide that evidence?
  - the ability of the accused to exonerate himself or herself. Is it difficult and impractical for the accused to establish a defence?
  - the severity of the penalty to be imposed;
  - the nature of the burden placed on the accused. Is it a legal or evidential burden? Does the accused have to prove a qualification, proviso or excuse (in which case the provision may be inconsistent with section 130 of the Magistrates' Court Act) or is he or she required to prove an essential element of the offence?
- If the offence cannot be justified on the above criteria, the provision may still be permissible if it is a reasonable limit on the right to the presumption of innocence, which can be demonstrably justified in a free and democratic society (under s. 7).

### RELATED RIGHTS AND FREEDOMS

When considering whether a policy or legislation might give rise to an issue under s. 25(1), you should also consider the following additional rights and freedoms:

- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- the right to a fair hearing (s. 24).

### HISTORY OF THE SECTION

Section 25(1) is modelled on article 14(2) of the ICCPR.

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

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# SECTION 25(2)

## MINIMUM GUARANTEES IN CRIMINAL PROCEEDINGS

### Section 25

- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
  - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
  - (c) to be tried without unreasonable delay; and
  - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and
  - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
  - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the **Legal Aid Act 1978**; and
  - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
  - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
  - (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
  - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
  - (k) not to be compelled to testify against himself or herself or to confess guilt.

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(2)?**

You will need to consider s. 25(2) in assessing legislation, a policy or a program where it:

- amends the procedures for filing, issuing or serving charges, presentments or indictments;
- amends the content of charge sheets, presentments or indictments or otherwise varies the requirements regarding information to be given at the time of charge;
- relates to access by a self-represented accused (including an accused in custody) to witnesses and to legal and research materials;
- establishes conditions restricting access to information and material to be used as evidence in criminal proceedings;
- regulates storage and destruction of evidence before and after the conclusion of criminal proceedings;
- establishes timetables for the prosecution and defence to prepare for trial or appeal;
- establishes time limits on the lodging of applications or appeals;
- amends the law relating to adjournments of hearings;
- amends the law relating to pre-hearing disclosure;

- regulates the procedures for investigation and prosecution of offences;
- affects the resources available to investigators, prosecutors, forensic services and others involved in preparing prosecutions for trial and appeal;
- affects the caseload of the courts and the capacity of the courts to hear matters;
- establishes procedures for giving persons charged with criminal offences notice of hearings;
- amends the eligibility criteria for legal aid;
- amends any guidelines or procedures that enable an accused to represent himself or herself personally or restricts the right of an accused to choose the legal representative or advisor of his or her choice;
- amends the law of evidence including the examination and cross-examination of witnesses, the admissibility of hearsay evidence and the evidence of a co-accused;
- establishes or amends procedures protecting prosecution witnesses, for example, the use of protective screens in the court room or video testimony;
- establishes or amends guidelines or procedures for the provision and use of facilities in police interviews and the court room, for example, assistive hearing devices;
- establishes guidelines or procedures for the provision of assistants, translators and interpreters in police interviews and the court room;
- amends the law relating to self-incrimination;
- amends the procedures for and law about obtaining evidence, including confessions.

These policy triggers are not comprehensive.

## DISCUSSION

Section 25(2) is concerned with rights in criminal proceedings.

The minimum guarantees are modelled on article 14(3) of the ICCPR. Section 25(2) modifies article 14(3) in three respects:

- Paragraph (j) is additional to article 14(3) to reflect the fact that some people charged with a criminal offence will need, and should be entitled to, specialised communication tools and technology in order to understand the nature of and the reason for the criminal charge and to participate in the judicial process.
- Paragraphs (d), (e) and (f) of s. 25(2) modify article 14(3) (d) to include references to the *Victorian Legal Aid Act 1978*. This is designed to ensure consistency with current Victorian law and practice within Victoria Legal Aid.
- Paragraph (g) of s. 25(2) reflects paragraph (e) of article 14(3) but includes in addition the words 'unless otherwise provided by law'. This qualification was considered by the Human Rights Consultation Committee to be necessary to ensure that the special rules in relation to the cross-examination of children or victims of sexual assault would continue to apply.<sup>229</sup>

### When do these minimum guarantees apply?

Section 25(2) covers persons charged with both indictable and summary offences. It applies before and at trial, and (where relevant) on appeal.

In Victoria, typically a person is charged with an offence when the charge is filed in the Magistrates' Court on a charge sheet that alleges the person has committed an indictable or summary offence. A person will be arrested and charged, or a summons to answer the charge will be issued. The infringement notice system (discussed on page 164) provides an alternative means of dealing with allegations.

<sup>229</sup> Human Rights Consultation Committee (Victoria) *Rights, Responsibilities and Respect* (2005) 44.

### Infringement notices

The infringement notice system provides for penalisation without prosecution.

When an infringement notice is issued, if the person pays the set penalty within the prescribed period, no further proceedings are taken in respect of the infringement. Alternatively, the person may elect to defend proceedings in court. When a person elects to go to court, he or she then receives a charge and summons and the infringement notice is withdrawn.

An infringement notice is not itself a charge under Victorian law. This means that infringement notices are not captured by s. 25, nor do they attract the protection of the minimum guarantees.

Nevertheless, when reviewing relevant legislation or amendments to current legislation, we recommend that legislative policy officers should bear in mind the desirability of ensuring that infringement notices satisfy, or continue to satisfy, the requirements in s. 25(2)(a). For example, an infringement notice should always be sufficiently clear and detailed to inform the person of the nature and reason for it being issued, and persons issued with such notices should always be informed of their option to elect to defend proceedings in court.

### What do the minimum guarantees mean?

The minimum guarantees are minimal guarantees that apply in relation to the processing of a criminal charge against a person.

The minimum guarantees must be provided to all persons charged with a criminal offence 'without discrimination'. Discrimination is defined in s. 3 of the Charter. This means that people must be treated equally in the provision of the minimum guarantees and additional measures may be needed in certain cases to ensure that a person's rights under s. 25(2) are met.

### The right to be informed of the charge

Paragraph (a) of s. 25(2) establishes an accused's right to be informed promptly of the charge. This right is relevant to the information required to be given, and the mode in which it is given, at the time the charge is laid, rather than the disclosure of evidence necessary to enable an accused to prepare for trial.

The purpose of s. 25(2)(a) is to enable the accused to make a full answer and defence to any charge.

If the charges are subsequently varied, the accused should be promptly notified about the specific variations.<sup>230</sup>

### 'Promptly'

The person must be notified of the charge 'promptly'. In international law, this means the person who is charged must be informed of the nature of the charge once the enforcement authorities have decided to lay the charge.<sup>231</sup>

An unreasonable delay in notifying the person of the charge may result in a breach of s. 25(2)(a). Factors relevant to whether the delay was unreasonable are whether the person contributed to the delay or whether the delay can be attributed to the conduct of the enforcement officers; the resources that were available for finding the person; and the prejudice experienced by the person as a result of the delay.<sup>232</sup>

### 'Informed'

The specific requirements of sub-paragraph 2(a) of s. 25(2) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts (but not the evidence) on which the charge is based. The person should be informed of each specific offence with which he or she is being charged. If the charges are complex, the person may need to be given additional information.

<sup>230</sup> *R v. E* (1999) 17 CRNZ 40.

<sup>231</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [8].

<sup>232</sup> *R v. Delaronde* [1997] 1 SCR 213.

If the person does not speak or understand English, the information must be communicated in a language he or she understands.

If the person has communication or speech difficulties and requires assistance, he or she has the right to be informed of the nature of the charge by a type of communication that the person understands (for example, Auslan).

#### The right to adequate time and facilities

Paragraph (b) of s. 25(2) guarantees the right to adequate time and facilities to prepare a defence and the right to adequate time and facilities to communicate with a lawyer or advisor of the accused's choice. It applies to all stages following the laying of the charge, including the preparation to meet each procedural step.

The purpose of s. 25(2)(b) is to enable the accused to have his or her interests properly and adequately represented so that the accused can make informed decisions relating to the preparation of his or her defence. The aim is to put the accused on an equal footing with the prosecution.

#### 'Time'

What time period will be 'adequate' will depend upon an assessment of the circumstances of each case, and will vary depending upon the stage of the proceedings (for example, whether the proceedings are at an interlocutory or preliminary stage, or at the stage of a contested trial, or whether the matter has gone on appeal); the complexity of the case; the accused's access to evidence and access to his or her lawyer; and the time limits prescribed by law.<sup>233</sup> It is well established in international human rights law that if a defence lawyer is to be appointed,

he or she should be appointed in sufficient time to allow proper preparation of the defence to take place.<sup>234</sup> For example, adequate time to trace key witnesses should be provided for.<sup>235</sup>

#### 'Facilities'

An accused must be given access to documents and other evidence required for the preparation of his or her case. This may include access to earlier case law, to witnesses, and to prosecution files, all subject to reasonable restrictions.<sup>236</sup> The adequacy of facilities depends on the complexity of the case; whether the accused is represented by a lawyer or is self-represented; and the type of evidence required to make a full defence. This does not mean an accused must have the same access to facilities as the prosecution has.

#### 'Lawyer or advisor'

The accused should have the opportunity to engage and communicate with a lawyer. If the accused does not request a lawyer or advisor, the accused should have the opportunity later to request a lawyer or advisor in the event of a change of mind. The communications with the lawyer should occur in conditions that allow for confidentiality and there should be no restrictions, pressures or undue interference with that lawyer or advisor or those counsel chosen to represent the accused.<sup>237</sup>

Incommunicado detention, which makes it impossible to access legal assistance, will be likely to breach s. 25(2)(b).

<sup>233</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [9].

<sup>234</sup> *X and Y v. Austria* 15 DR 160 (1978); *Goddi v. Italy* (1984) 76 Eur Court HR (ser A); (1984) 6 EHRR 457.

<sup>235</sup> *Smith v. Jamaica*, Human Rights Committee, Communication No. 282/1988, UN Doc. CCPR/C/47/D/282/1988 (12 May 1993).

<sup>236</sup> *Haase v. Federal Republic of Germany*, (1977) 11 Eur Comm HR 78.

<sup>237</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [9].

The right to be tried without unreasonable delay

Paragraph (c) of s. 25(2) is the right to be tried without unreasonable delay. This right reflects the common law principle that justice delayed is justice denied. Section 25(2)(c) is intended to protect the right of an accused to examine the evidence led against them while the evidence can still be tested, and it reflects the public interest in having someone charged with a criminal offence brought before the court expeditiously. This right also seeks to preserve public confidence in the administration of justice.

The UN Human Rights Committee has observed that this right relates not only to the time by which a trial should commence, but also the time by which it should end and judgment is given – all stages must take place without unreasonable delay.<sup>238</sup>

As with all rights under the Charter, the right to trial without unreasonable delay is not an absolute right. Whether delay is 'unreasonable' will depend on the nature of the case and a range of other factors such as whether the accused is held in custody; the length of the delay; the complexity of the case (including the number of witnesses, the number of other parties (if any), and the need to obtain expert evidence); the conduct of the parties; the seriousness of the offence; and the prejudice to the accused. Where the delay is attributable to the accused, there is likely to be no breach of s. 25(2)(c).

The right to be tried in person

Paragraph (d) of s. 25(2) is the right to be tried in person. The accused has the right to be tried and to defend himself or herself in person, or through legal assistance of his or her choice, or, if eligible, through legal aid.

Where an accused has been provided with a Legal Aid lawyer, and cannot otherwise afford a lawyer, s. 25(2)(d) does not entitle the accused to a choice of lawyer.<sup>239</sup> It does entitle an accused to defend himself or herself in person.<sup>240</sup>

If there are exceptional circumstances and it is in the interests of justice, trials may be held in the absence of the accused (*in absentia*), but there should nevertheless be strict observance of the rights of the defence.<sup>241</sup> *In absentia* hearings are permissible in international human rights law only when the accused has been given ample notice and opportunity to attend the hearing but has failed to do so.

Legal Aid

Paragraph (e) of s. 25(2) establishes a right to be told about the right to legal aid under the Legal Aid Act. This right applies only if an accused does not already have legal assistance and he or she must be told that the right to legal aid is only available if the person is eligible for legal aid.

Paragraph (f) of s. 25(2) establishes a right to be provided with legal aid in certain circumstances. The obligation to provide legal aid is confined to cases where the 'interests of justice' require it and the person is eligible for legal aid. The eligibility criteria are set out in the Legal Aid Act. The application of the 'interests of justice' criterion in international decisions has shown that this criterion will take account of the complexity of the proceedings; the capacity of an accused to represent himself or herself; and the severity of the potential sentence.<sup>242</sup> Whether the 'interests of justice' require legal aid to be provided is ultimately a legal question, not solely an operational or administrative one.

239 *Pratt and Morgan v. Jamaica*, Human Rights Committee, Communications Nos 210/1986 & 225/1987, UN Doc. CCPR/C/35/D/210/1987 (7 April 1989) [13.2].

240 *Hill and Hill v. Spain*, Human Rights Committee, Communication No. 526/93, UN Doc. CCPR/C/59/D/526/1993 (23 June 1997).

241 *Mbenge v. Zaire*, Human Rights Committee, Communication No. 16/1977, UN Doc. CCPR/C/18/D/16/1977 (25 March 1983).

242 *Quaranta v. Switzerland* (1991) 205 Eur Court HR (ser A).

238 *Ibid.*

### Witness attendance

Paragraph (g) of s. 25(2) protects the right of an accused to examine, or to have examined, prosecution witnesses unless the law provides otherwise. Paragraph (h) of s. 25(2) establishes the right of the accused to obtain the attendance and examination of witnesses on his or her own behalf under the same conditions as the prosecution.

The UN Human Rights Committee has said that these rights 'guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.'<sup>243</sup>

The term 'witness' has been interpreted in international decisions as including a person whose statements are produced as evidence before a court, even if he or she is not called to give oral evidence.<sup>244</sup> It also includes a co-accused.

### Prosecution witnesses

An accused should be given an adequate opportunity to challenge and question a witness who will give or has given evidence against him or her, either at the time the witness was making a statement or at some later stage of the proceedings.<sup>245</sup> This means that the prosecution must give the accused adequate notice of the witnesses that the prosecution intends to call so that the accused is able to prepare his or her defence including accessing evidence that will challenge the prosecution's evidence.

For the right to cross-examine the prosecution witnesses to be effective, the evidence must usually be given orally in the presence of the accused in court so that its reliability as well as the credibility of the witness can be tested. For this reason, reliance on hearsay evidence may amount to a breach of this right. In international law, a conviction that was based on the evidence of witnesses whom the accused had no opportunity to cross-examine was found to have breached the right to a fair trial.<sup>246</sup> Similarly, reliance on statements of anonymous witnesses may offend this right.<sup>247</sup>

However, if there are good reasons for a witness not to appear and the accused can still test the reliability and credibility of the evidence given by means of written statements, then evidence from unexamined witnesses will probably not interfere with these rights (or will be justifiable under s. 7). Nor is it likely that reliance on written evidence that can be independently corroborated will amount to a breach of this right (that is, such reliance is unlikely to amount to an interference with the right that cannot be justified as a reasonable limit).

### Vulnerable witnesses

The right of an accused to examine prosecution witnesses is qualified by the words 'unless otherwise provided by law'. This qualification ensures that rules which restrict the cross-examination of children or victims of sexual assault would continue to apply. This qualification may well go further than the recognition given in international law to the need for protective measures to be instituted to protect the interests of witnesses.<sup>248</sup>

<sup>243</sup> *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [12].

<sup>244</sup> *Kostovski v. Netherlands* (1989) 166 Eur Court HR (ser A); (1990) 12 EHRR 434.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Lucà v. Italy* (2001) II Eur Court HR 167; (2003) 36 EHRR 46. See also *Unterpertinger v. Austria* (1987) 110 Eur Court HR (ser A); (1991) 13 EHRR 175.

<sup>247</sup> *Kostovski v. Netherlands* (1989) 166 Eur Court HR (ser A); (1990) 12 EHRR 434.

<sup>248</sup> *Doorson v. The Netherlands* (1996) II Eur Court HR 470 [70]; (1990) 22 EHRR 330 [70].

In international law, these protective measures must be limited to what is strictly necessary to protect the witness. It is for the prosecution to establish the need for any special measures and there must be a proper assessment of any alleged threat to a witness. Special measures may include:<sup>249</sup>

- giving evidence by closed circuit television link or video recordings for child witnesses in proceedings concerning sexual abuse;
- the use of special protective screens to protect a witness's identity; or
- the use of written statements.

Although the terms of s. 25(2)(g) mean that the right is unlikely to be breached when legislation authorises these kinds of special measures, attention should be given in developing such legislation to whether the special measures chosen are strictly necessary or are disproportionate to the aim.

### Defence witnesses

It is a matter for an accused to decide who should be called as a defence witness.<sup>250</sup> If an accused calls a witness who then fails to turn up to the hearing, the hearing may need to be adjourned. Alternatively, the presiding judge may need to issue a subpoena, or a warrant, to secure the attendance of the witness in court and/or the police may be required to assist to transport the witness to court. Securing the attendance of defence witnesses is particularly important in circumstances where the penalty for the offence faced by an accused is harsh.<sup>251</sup>

### The right to an interpreter

Paragraph (i) of s. 25(2) confers a right to the free assistance of an interpreter for persons charged with a criminal offence who do not understand or speak English. It does not give a person who prefers to speak a language other than English the right to an interpreter without payment.

This right applies at all stages of the prosecution once the charge has been laid, including during police interviews and during any court hearing, (including the trial and any appeal). It is critically important that an accused who does not speak English understands that he or she has this right and the effect of it should be that he or she can participate fully and effectively in the preparation of a defence and during the trial. For the right to be meaningful and effective, the interpretation and translation provided by the interpreter must be competent and accurate.

In international human rights law, the comparable right (article 14(3)(f)) has been construed as prohibiting an accused from being ordered to pay the costs of an interpreter.<sup>252</sup> This right applies to both citizens and non-citizens.<sup>253</sup> In international law, it includes the right to have all relevant documents translated free of charge although oral translations may sometimes be sufficient to guarantee the right (for example, where the documents are made available to the person's lawyer).<sup>254</sup> However, under the Charter, free access to an interpreter does not require that the relevant documents need to be translated into writing. This is because 'interpreter' in s. 3 of the Charter is defined as relating only to the oral rendering of the meaning of the spoken word or other form of communication from one language or form of communication into another language or form of communication.

249 See *Regina (D) v. Camberwell Youth Court* [2005] UKHL 4.

250 *Peart and Peart v. Jamaica*, Human Rights Committee, Communications Nos 464/91 & 482/91, UN Doc. CCPR/C/54/D/464/1991 (24 July 1995) [11.3].

251 *Grant v. Jamaica*, Human Rights Committee, Communication No. 353/1989, UN Doc. CCPR/C/50/D/353/1989 (4 April 1994).

252 *Luedicke, Belkacem and Koc v. United Kingdom* (1978) 29 Eur Court HR (ser A); (1979–80) 2 EHRR 149.

253 *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [13].

254 *Harward v. Norway*, Human Rights Committee, Communication No. 451/1991, UN Doc. CCPR/C/51/D/451/1991 (18 August 1994).

The definition of an ‘interpreter’ in s. 3 of the Charter means an accredited interpreter (the Regulations will set out the bodies that may accredit interpreters) or, if an accredited interpreter is not readily available, a competent interpreter. This may mean that if it is not reasonably possible to access an accredited interpreter (for example, at a rural police station), a competent interpreter (for example, an adult family member who speaks both the accused’s native language and English) who is not accredited may be used.

#### Free assistance for persons with communication or speech difficulties

Paragraph (j) of s. 25(2) confers the right, without discrimination, to have the free assistance of assistants and specialised communication tools and technology for persons with communication or speech difficulties. This right is an aspect of the right to a fair trial as it seeks to ensure such persons can understand and participate fully and effectively in the preparation of their defence and during the trial.

Where a person has speech or hearing difficulties, proper support must be provided to ensure that the person fully understands the nature of the charges against him or her and the nature of the proceedings. Examples of such support are Auslan interpreters; braille translations of relevant documents; and communication technology such as assistive hearing devices, hearing aid loops and real-time captioning.

#### Self-incrimination

Paragraph (k) of s. 25(2) protects the right to be free from compulsory self-incrimination. This right means that a person charged with a criminal offence must not be compelled to testify against himself or herself or to confess guilt. The right against self-incrimination is an important element of the right to a fair trial.

At the pre-trial stage, this right includes the right not to answer self incriminating questions. However, the person can still be compelled to answer other questions. When a use immunity is provided, a person cannot be regarded to have incriminated themselves, regardless of the nature of the question. If legislation was to allow for adverse inferences to be made as a result of a person’s refusal to answer questions or his or her continuing to remain silent, it might interfere with the right against self-incrimination.<sup>255</sup>

At the trial stage, this right means that self-incriminating evidence which has been unfairly or improperly obtained by compulsion from a person, including confessions made under duress, should be excluded.

In international law, obtaining evidence compulsorily from a person where the evidence has an existence independent of the will of the person, (for example documents, breath samples, blood and urine samples and bodily tissue used for the purpose of DNA testing), does not engage this right.

<sup>255</sup> *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [14]; *Heaney & McGuinness v. Ireland* (2000) XII Eur Court HR 419 [57]–[59]; (2001) 33 EHRR 12 [57]–[59]. See also *Saunders v. United Kingdom* (1996) VI Eur Court HR 37; (1997) 23 EHRR 313, *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AG A17 (HL).

### REASONABLE LIMITS ON THE RIGHTS IN SECTION 25(2)

As with all of the human rights protected in the Charter, the rights in section 25(2) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

#### KEY POINTS TO REMEMBER

- Section 25(2) applies to persons who have been charged with a criminal offence and provides minimum guarantees, which are specific aspects of the right to a fair trial.
- The minimum guarantees must be provided to all persons charged with a criminal offence 'without discrimination'.
- A person charged with a criminal offence has the right to be informed promptly of the charge so that he or she may make a full answer and defence to that charge.
- A person charged with a criminal offence also has the right to adequate time and facilities to prepare a defence and the right to adequate time and facilities to communicate with a lawyer or advisor of the person's choice during all stages following the laying of the charge, including, for example, pre-trial procedural steps.
- Whether time and facilities are adequate depends on factors such as the nature of the proceedings and the complexity of the case.
- An accused should have the opportunity to engage and communicate with a lawyer. If the accused does not request a lawyer or advisor, the accused should have the opportunity later to request a lawyer or advisor in the event that the accused changes his or her mind.
- The right to trial without unreasonable delay relates to the time by which a trial should commence, but also the time by which it should end and judgment is given.

- Whether delay is unreasonable will depend on the nature of the case and a range of factors, such as whether the accused is in custody and the length of the delay.
- An accused has the right to be tried and to defend himself or herself in person or through legal assistance of his or her choice or if eligible, through legal aid.
- If an accused does not already have legal assistance, he or she must be told, if eligible, about the availability of legal aid.
- The obligation to provide legal aid is confined to cases where the interests of justice require it and the person is eligible for legal aid under the Legal Aid Act.
- An accused has the right to examine prosecution witnesses and also has the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as the prosecution.
- The accused should have the same powers as the prosecution to compel the attendance of witnesses and of examining or cross-examining any witness. However, the right of the accused to examine prosecution witnesses is qualified by the words 'unless otherwise provided by law'.
- An accused who does not speak or understand English has the right to the assistance of an interpreter to provide an oral translation free of charge.
- Persons with communication or speech difficulties have the right to have the free assistance of assistants and specialised communication tools and technology.
- A person charged with a criminal offence has a right not to be compelled to testify against himself or herself or to confess guilt.

## MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(2)(a), ensure that the policy, program or legislation you are working on establishes procedures or processes:

- for informing people charged with a criminal offence of the necessary information relevant to the offence with which they have been charged without delay;
- for identifying when people charged with a criminal offence may require the provision of translation facilities;
- for identifying when people charged with a criminal offence may require specialised communications tools or technology due to communication difficulties or other disabilities.

To improve compliance with s. 25(2)(b):

- ensure that there are procedures to ensure that persons charged with a criminal offence are aware of their right to legal representation;
- ensure that there are procedures that enable an accused to access information and material to be used as evidence in criminal proceedings;
- ensure that there are procedures that enable a self-represented accused to access legal and research materials;
- ensure that an accused has the opportunity to engage and communicate with a lawyer under conditions that enable confidential communications;
- ensure that time limits for lodging appeals or applications and seeking adjournments allow a reasonable time for the defence to be prepared;
- ensure that documentary and other forms of evidence necessary for the preparation of the defence are disclosed within an adequate time before the relevant hearing.

To improve compliance with s. 25(2)(c):

- ensure that the policy, program or legislation you are working on will not unduly delay the investigation and prosecution of offences.

To improve compliance with s. 25(2)(d):

- ensure that there are procedures for informing persons charged with a criminal offence of their right to legal representation or to defend themselves in person;
- ensure that there are procedures in place so that hearings are not held in the absence of the accused unless he or she has been given adequate notice and the opportunity to attend and has failed to do so, and it is in the interests of the administration of justice that the hearing proceeds.

To improve compliance with s. 25(2)(e) and s.25(2)(f), ensure that the legislation, policy or program you are working on does not introduce arbitrary or discriminatory criteria for applying and qualifying for legal aid.

To improve compliance with s. 25(2)(g) and s.25(2)(h), ensure that the policy, program or legislation you are working on:

- preferably provides for witnesses to give evidence orally and for the accused to have the opportunity to examine the witnesses;
- gives the accused sufficient opportunity to challenge the prosecution evidence;
- where it allows for evidence to be given by vulnerable witnesses in the absence of the accused, provides proper authorisation in clearly defined circumstances for this to occur.

To improve compliance with s. 25(2)(i):

- ensure that there are procedures for informing an accused who does not speak or understand English of the right to the free assistance of an interpreter who would provide an oral translation;
- ensure that the relevant agencies are aware that competent and accurate translations of all relevant documents and interpretation of proceedings are provided to an accused who does not speak or understand English.

To improve compliance with s. 25(2)(j):

- ensure that there are procedures for informing an accused who has speech or other communication difficulties of the right to free assistance;
- ensure that there are proper processes to facilitate competent and accurate translations of all relevant documents and interpretation of proceedings including police interviews and trials;
- consult or facilitate consultation with interpretation and translation service providers to determine the best way the relevant services can be delivered;
- seek the views of the groups within the community who are representative of those who may be affected by speech and hearing communication difficulties.

To improve compliance with s. 25(2)(k), ensure the relevant legislation, policy or program you are working on:

- provides for, or recognises, that an accused should be informed of the right to remain silent and the right against self-incrimination;
- recognises that, at any stage of the prosecution, judges have the authority to consider any allegations made that the accused's right to remain silent was violated or to exclude evidence of the accused on the ground that it was obtained by compulsion;
- provides for, or recognises, that evidence that has been unfairly or improperly compelled from a person may be excluded at trial.

### RELATED RIGHTS AND FREEDOMS

When considering whether a policy, a program or legislation might give rise to an issue under s. 25(2), you should also consider the following additional rights and freedoms:

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

- the right to be protected from torture and cruel, inhuman or degrading treatment (s. 10);
- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- the rights of children in criminal process (s. 23);
- the right to a fair hearing (s. 24).

### HISTORY OF THE SECTION

Section 25(2) is modelled on article 14(3) of the ICCPR. The Charter modifies article 14(3) by ensuring, where necessary, that people will be entitled to specialised communication tools and technology in order to understand the nature and reason for the criminal charge and to participate in the judicial process. Article 14(3) is also modified as it relates to the provision of legal assistance by making reference to the Legal Aid Act to ensure consistency with Victorian law. Also, a qualification is made in relation to the examination of witnesses to accommodate Victorian laws regarding cross-examination of certain witnesses, such as children and victims of sexual assault.

The purpose of these modifications was identified by the Human Rights Consultation Committee in this way:

‘The Charter provision modifies ICCPR article 14(3) in a number of important respects. First, the Committee has modified the provision to reflect the fact that some people charged with a criminal offence will need, and are entitled to, specialised communication tools and technology to understand the nature of and reason for the criminal charge and to participate in the judicial process. Secondly, the Committee has adapted the sub-sections dealing with the provision of legal assistance to include references to the Victorian *Legal Aid Act 1978* to ensure consistency with current Victorian law. In addition, the Charter provision qualifies the rights of a criminal accused in relation to the attendance and examination of witnesses

by including the words ‘unless otherwise provided by law’. The Committee considers that this qualification is necessary to ensure that the special rules in relation to the cross-examination of children or of victims of sexual assault would continue to apply.<sup>256</sup>

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

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<sup>256</sup> Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 44.

# SECTION 25(3)

## RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS

### Section 25

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(3)?**

You will need to consider s. 25(3) in assessing legislation, a policy or a program where it:

- creates or amends procedures applicable to children charged with criminal offences in the investigation and prosecution of those offences;
- creates or amends court procedures applicable to children charged with criminal offences;
- creates or amends the law of evidence applicable to children charged with criminal offences;
- creates or amends laws relating to the detention and custody of children charged with criminal offences;
- creates an additional jurisdiction or judicial forum in relation to matters involving children or amends the law relating to the existing Children's Court of Victoria;
- creates or amends offences for actions likely to be performed by children;
- alters the definitions of 'child' and 'young offender' (for example, by reducing the age of criminal responsibility);

- amends the law relating to adjournments of hearings involving children;
- establishes or amends guidelines for sentencing children.

These policy triggers are not comprehensive.

#### **DISCUSSION**

Sub-section (3) of s. 25 recognises the need for special procedures for children charged with criminal offences. It provides that a child has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. This protection is a widely recognised civil and political right. Sub-section (3) of s. 25 reflects article 14(4) of the ICCPR.

#### **When does s. 25(3) apply?**

Sub-section (3) of s. 25 applies where a child has been charged with a criminal offence. It applies to children charged with either an indictable offence or a summary offence. This right applies at all stages of the proceedings, from the time of the charge, to the trial, to the determination of a final appeal.

A 'child' is defined in s. 3 as being a person under the age of 18. Under Victorian law, children under the age of 10 are presumed to be incapable of any criminal offence.<sup>257</sup> Children between 10 and 14 years old are presumed to lack the necessary level of mental culpability and the prosecution must prove that the accused child knew that his or her conduct was wrong before the child can be found to be capable of committing the offence.<sup>258</sup>

International human rights law does not recognise any particular age as the optimal minimum age for the imposition of criminal responsibility but the chosen age should take account of the emotional, mental and intellectual immaturity of children.<sup>259</sup>

#### What does it mean?

Children charged with a criminal offence are entitled to the same guarantees and protections as are accorded to adults under s. 25. However, under this sub-section, children are entitled to additional special protection. The additional protection is directed at ensuring that age-appropriate procedures are in place and that an emphasis is placed on the rehabilitation of the child. Children charged with a criminal offence must be dealt with in special and appropriate ways that take account of age, maturity, and intellectual and emotional capacities.<sup>260</sup>

Where possible, courts should be established specifically to try offences committed by children, and the relevant laws and court processes should take account of the special needs and capacities of children. Where children are involved in the criminal justice system, steps should be taken and adult trial procedures modified to promote a child's ability to understand the nature of the charge and the proceeding and to participate in the proceedings. In Victoria, this role is performed by the Children's

Court of Victoria.

The right to additional protection means that special procedures should be applicable to child defendants at the investigation stage. For example, special measures may need to be adopted to ensure that an age-appropriate explanation about the nature of the charge is given to a child accused so that he or she understands what is being alleged. Interviews should be conducted in the presence of a parent or guardian or other support person in a manner that is sensitive to the child's age, level of maturity and emotional state. In Victoria, special procedures are incorporated into the Victoria Police Manual and s. 464E of the *Crimes Act 1958*.

Similarly, special procedures should be put in place to provide age-appropriate support during hearings. For example, a policy or program should seek to ensure that processes are put in place so that:

- children are supported by a parent or guardian or other support person at all stages of the criminal process;
- children have the court procedures explained to them, in a manner that they understand;
- adjournments can be obtained if it is in the child's best interests.

Procedures should be developed to ensure that a child's privacy is fully respected at all stages of the proceedings to avoid psychological harm due to publicity or the process of labelling or stigmatising.<sup>261</sup> This may mean that the trial is conducted in a closed court. In Victoria, such procedures are outlined in s.19 of the *Children and Young Persons Act 1989*.<sup>262</sup>

257 See section 344 of the *Children, Youth and Families Act 2005 (Vic)*.

258 See *R (A Child) v. Whitty* (1993) 66 A Crim R 462; section 7.2 of the *Criminal Code (Cth)*.

259 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985) rule 4.

260 See *T v. United Kingdom* (1999) 7 BHRC 659.

261 See *T v. United Kingdom* (16/12/99) ECHRR; 7 BHRC 659.

262 Note that the *Children and Young Persons Act* will be repealed upon the commencement of the *Children, Youth and Families Act 2005 (Vic)*.

Procedures that promote a child's rehabilitation may include those that:

- minimise harmful publicity;
- ensure that a restriction on the personal liberty of a child is imposed only after careful consideration;
- ensure that detention or imprisonment is used as a measure of last resort and for the shortest appropriate period of time;
- provide treatment, education or other assistance either in conjunction with detention or imprisonment or as part of a non-custodial order.

There are a number of international human rights instruments that relate to the rights of children, some of which give general guidance on the sort of protection children may require in the criminal process. See in particular the UN Convention on the Rights of the Child 1989<sup>263</sup> and UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).<sup>264</sup>

### REASONABLE LIMITS ON RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS

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

### KEY POINTS TO REMEMBER

- Section 25(3) applies to children who have been charged with a criminal offence.
- Where possible, courts should be established specifically to try offences committed by children and the relevant laws and court processes should take account of the special needs and capacities of children.
- Special procedures should be followed at all stages of a proceeding to take account of a child's age and maturity.
- Children should be supported by a parent or guardian or other support person at all stages of the proceeding.
- Where there is a risk of psychological harm to the child due to publicity, hearings (including the trial) may need to be conducted in closed court.
- Alternatives to imprisonment should be available and imprisonment should be a last resort.

### MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(3):

- ensure that the relevant laws and court processes take account of the special needs and capacities of children;
- ensure that age-appropriate procedures are in place that will assist a child accused to understand the charges against him or her;
- ensure that procedures are in place so that a child defendant has the opportunity to be accompanied by a parent or guardian or other support person at the various steps in the proceeding;

263 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990. See particularly articles 3, 37 and 40.

264 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985). See articles 8 and 17.

- ensure that the applicable court and court-related procedures and processes accommodate a child defendant's age, maturity, and intellectual and emotional capacities;
- ensure that law enforcement officers, court personnel and judges have adequate training in dealing sensitively with children;
- ensure that policy or legislation that will impact on children makes special provision for the fact that children will be affected by these arrangements;
- ensure that any guidelines for the sentencing of children promote the rehabilitation of the child as a core goal;
- where necessary, consult with persons who have knowledge or expertise on child and youth issues about the impact on children of legislation, a policy proposal or a program.

## RELATED RIGHTS AND FREEDOMS

When considering whether legislation, a policy or a program might give rise to an issue under s. 25(3), you should also consider the following additional rights and freedoms:

- the right to be protected from torture and cruel, inhuman or degrading treatment (s. 10);
- protection of families and children (s. 17);
- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- the rights of children in the criminal process (s. 23);
- the right to a fair hearing (s. 24).

## HISTORY OF THE SECTION

Section 25(3) is modelled on article 14(4) of the ICCPR.

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

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# SECTION 25(4)

## RIGHT TO REVIEW OF CONVICTION AND SENTENCE

### Section 25

- (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

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#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(4)?

You will need to consider s. 25(4) in assessing legislation, a policy or a program where it:

- amends or alters the statutory rights or procedures under which a person convicted of an offence is able to appeal against or seek review of the conviction or sentence;
- amends or alters the criteria under which legal aid is granted for criminal appeals.

These policy triggers are not comprehensive.

#### DISCUSSION

Sub-section (4) of s. 25 of the Charter protects the right to have a conviction and sentence for a criminal offence reviewed by a higher court. This is a widely accepted civil and political right and reflects article 14(5) of the ICCPR.

#### When does section 25(4) apply?

Sub-section (4) of s. 25 applies where a person has been convicted of committing a criminal offence. This includes where the accused has been found to have committed an offence but a conviction has not been recorded.

#### What does it mean?

Sub-section (4) of s. 25 recognises that a person convicted of a criminal offence has the right to appeal against the conviction and the sentence imposed. The right applies to all offences, not simply the most serious.<sup>265</sup>

An appeal carries with it the same protections that are afforded the accused at trial, including, for example, the right to adequate time and facilities, and access to an interpreter, and the right to have the appeal or review heard without delay.<sup>266</sup> The reason for this is that a criminal charge is not finally determined until all avenues of appeal have been exhausted.<sup>267</sup>

<sup>265</sup> *UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [17].*

<sup>266</sup> *Evans v. Trinidad and Tobago*, Human Rights Committee, Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000 (5 May 2003) [6.3].

<sup>267</sup> *Delcourt v. Belgium* (1970) 11 Eur Court HR (ser A) [25]; (1979-80) 1 EHRR 355 [25].

This right means that a person convicted of a criminal offence must be provided with an opportunity to seek review by a higher court of the conviction made against him or her and any sentence imposed.<sup>268</sup>

#### Higher court

A person convicted of a criminal offence must be given an opportunity for an appeal or review of the conviction and the sentence, and the appeal or review must be heard by a court or tribunal that is higher than the court or tribunal that made the original decision. It is not sufficient that the conviction or sentence is confirmed by the same judge.<sup>269</sup> However, the court hearing the appeal or conducting the review may be a different division of the same court providing it is differently constituted, such as the Court of Appeal of the Supreme Court of Victoria.

The court hearing the appeal or conducting the review must have the power to overturn, replace or affirm the conviction or sentence.

#### Nature of the appeal

The right to an appeal must be given substance so that it is an effective right of appeal or review.<sup>270</sup> The mere presence of an appeal process may not be sufficient if the person is unable adequately to present his or her case to a higher court. A dismissal of an application for leave to appeal without any written reasons being given would violate this right.<sup>271</sup> An effective appeal requires a 'collective judicial decision' that is arrived at after a hearing that should be held in public.<sup>272</sup>

<sup>268</sup> *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989 (20 July 1994).

<sup>269</sup> *Salgar de Montejo v. Colombia*, Human Rights Committee, Communication No. 64/1979, UN Doc. CCPR/C/15/D/64/197 (24 March 1982).

<sup>270</sup> *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989 (20 July 1994 [14.3]; *Taito v. R* (2002) 19 CRNZ 224 [12].

<sup>271</sup> *Taito v. R* (2002) 19 CRNZ 224.

<sup>272</sup> *Taito v. R* (2002) 19 CRNZ 224, 236.

The right will usually require that there is an oral hearing, although this may depend on the nature of the proceedings and the scope of the appeal.<sup>273</sup> For example, if the issues are not complex and it would not unreasonably prejudice the accused, in the interests of expediency it is possible that the appeal could be heard by the court 'on the papers', without any oral hearing.

This right does not require the appeal court to conduct a retrial of the factual issues, and does not require that any further evidence be led.<sup>274</sup> However, a right to judicial review instead of appeal might fall short of the requirements of sub-section (4) of s. 25.<sup>275</sup>

In international human rights law, the opportunity to 'seek leave to appeal' is ordinarily not considered sufficient. However, if the hearing of an application for leave to appeal entails a full review of the evidence and the law, the requirements in s. 25(4) would probably be met.<sup>276</sup>

#### Multiple appeals

The right under s. 25(4) is only to one appeal or review. However, if there is provision for more than one appeal within the court hierarchy, the convicted person must be given a fair opportunity to pursue each of those appeals.<sup>277</sup>

<sup>273</sup> See *Taito v. R* (2002) 19 CRNZ 224 and *Monnell and Morris v. United Kingdom* (1987) 115 Eur Court HR (ser A); (1988) 10 EHRR 205.

<sup>274</sup> *Perera v. Australia*, Human Rights Committee, Communication No. 536/1993, UN Doc. CCPR/C/53/D/536/1993 (28 March 1995); *H T B v. Canada*, Human Rights Committee, Communication No. 534/1993, UN Doc. CCPR/C/49/D/534/1993 (3 November 1993).

<sup>275</sup> *Domukovsky v. Georgia*, Human Rights Committee, Communications Nos 623/1995, 624/1995, 626/1995, 627/1995, UN Doc. CCPR/C/62/D/626/1995 (29 May 1998).

<sup>276</sup> *Lumley v. Jamaica*, Human Rights Committee, Communication No. 662/1995, UN Doc. CCPR/C/65/D/662/1999 (30 April 1999).

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## REASONABLE LIMITS ON THE RIGHT TO REVIEW OF CONVICTION AND SENTENCE

As with all of the human rights protected by the Charter, the right of a person convicted of a criminal offence to have the conviction and sentence reviewed by a higher court may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

### KEY POINTS TO REMEMBER

- Section 25(4) applies to persons who have been convicted of a criminal offence.
- A person convicted of a criminal offence has a right to appeal to a higher court and legislation, policies and programs must take account of this right.

## MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(4), ensure that:

- policy, programs and legislation establish a statutory framework for appeals against conviction and sentence in all criminal matters;
- legislation clearly sets out what avenues of appeal exist following a conviction;
- procedures for lodging an appeal are established including a reasonable timeframe for lodging an appeal;
- legislation provides that the appellant can make oral submissions unless there are good reasons for restricting the form of appeal to one that is done simply 'on the papers' (without an oral hearing).

## RELATED RIGHTS AND FREEDOMS

When considering whether legislation, a policy, or a program might give rise to an issue under s. 25(4), you should also consider the following additional rights and freedoms:

- the right to a fair hearing (s. 24);
- the right to the relevant minimum guarantees in criminal proceedings (s. 25(2));
- the rights of children in criminal proceedings (ss. 23 and 25(3));
- the right to recognition and equality before the law (s. 8).

## HISTORY OF THE SECTION

Section 25(4) is modelled on article 14(5) of the ICCPR.

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

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## SECTION 26

# RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE

### Section 26

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

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 26?**

You will need to consider s. 26 in assessing legislation, a policy or a program where it:

- makes changes to existing offences that might allow a person to be tried a second time for the same underlying criminal activity;
- amends any criminal procedure rules relating to previous convictions and acquittals;
- creates a regulatory regime that provides for the imposition of a punishment for doing something that would also amount to a crime;
- creates an overlap between an offence in regulations and an offence in the parent Act.

These policy triggers are not exhaustive.

#### **DISCUSSION**

Section 26 protects an accused against what is commonly referred to as 'double jeopardy'. The prohibition on double jeopardy is a well-supported and fundamental safeguard in the common law considered to be part of the right to a fair trial.

This right means that a person who has been tried in proceedings where the person was at risk of the imposition of a penalty cannot be tried again on a charge that is substantially the same as the original charge.

The purpose of the principle against double jeopardy is to ensure fairness to an accused and to bring finality in the system of justice by preventing repeated attempts to convict.

The following points should be noted regarding the scope of this right:

- It applies in respect of all criminal offences, regardless of their seriousness.
- It does not apply to civil trials that may result in a form of civil liability.
- Penalties and sanctions imposed by professional disciplinary bodies do not usually form a punishment for the purposes of this right.
- It applies after a final judgment of either conviction or acquittal. This means that all applicable proceedings for judicial review and all appeals must be finally exhausted or the time limits for invoking such reviews or appeals must have passed.

- It only applies to the benefit of the same legal person.<sup>278</sup>
- It is aimed at preventing new trials or punishments for offences with substantially the same elements.
- It does not prevent the reopening of a case (including the conduct of a new trial) when a conviction has been found by an appeal court to have been a miscarriage of justice. New trials may be held, for example, when evidence emerges, after conviction, of serious procedural flaws or in the event of new or newly discovered facts.
- In particular, it has the consequence that a person who has been acquitted of a criminal charge is not to be subjected to a criminal trial for the same offence or substantially the same offence.

The prohibition against double jeopardy appears in a number of other human rights instruments from comparable jurisdictions. Refer to Appendix H for more information.

In many jurisdictions, there have been legislative refinements to this prohibition since the enactment of the relevant human rights instrument: for example, in light of advances in DNA technology.

### **REASONABLE LIMITS ON THE RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE**

As with all of the human rights protected in the Charter, the right not to be tried or punished more than once may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

### **KEY POINTS TO REMEMBER**

- A person who has been tried in proceedings where he or she was at risk of the imposition of a penalty cannot be tried again on a charge that is substantially the same as the original charge.
- This right only applies in respect of criminal offences and not civil trials that may result in a form of civil liability. Disciplinary penalties and sanctions will most likely not form a punishment for the purposes of this right.
- This right only applies where a person has been finally acquitted or convicted (that is, after all appeals have been exhausted).
- This right only applies to benefit the same legal person.
- This right does not prevent the reopening of cases (including the conduct of a new trial) when a conviction has been found by an appeal court to have been the result of a miscarriage of justice.

### **MEASURES TO IMPROVE COMPLIANCE**

If you are creating a statutory offence that is part of a new regime and there are existing offences that apply to the activity, ensure that the legislation doesn't allow for the punishment for the new offence to be imposed in addition to any punishment for the existing offence, or for a person convicted or acquitted of the existing offence to be tried for the new offence.

### **RELATED RIGHTS AND FREEDOMS**

If your policy or legislation raises an issue under s. 26, check whether it also raises an issue under s. 27 (retrospective criminal laws).

### **HISTORY OF THE SECTION**

This right is modeled on article 14(7) of the ICCPR.

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

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<sup>278</sup> *Spencer v. Wellington District Court* [2000] 3 NZLR 102.

# SECTION 27(1)

## NO RETROSPECTIVE CRIMINAL LAWS

### Section 27

- (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.

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#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(1)?

You will need to consider s. 27(1) in assessing legislation, a policy or a program where it:

- creates an offence for acts done before the legislation comes into force;
- seeks to expand or broaden an existing criminal offence by altering the range of activities to which it applies;
- amends criminal law procedure in a way that affects fairness of trial procedures.

These policy triggers are not comprehensive.

#### DISCUSSION

A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed. This flows from the general principle that a person must be able to predict any criminal culpability that attaches to his or her actions. Thus, the conduct of an accused is to be judged by the law at the time that he or she acted or failed to act. The criminal law should not apply retrospectively.

Section 27(1) requires the criminal law to be sufficiently accessible and precise to enable a person to know in advance whether his or her conduct is criminal.<sup>279</sup>

#### Scope of section 27(1)

The protection from the operation of retrospective criminal laws applies only to protection from the instigation of criminal proceedings which might result in a conviction or the imposition of a criminal penalty.

The right does not extend to prevent retrospective changes to procedures that do not form part of the penalty or punishment of an offender, or to changes in procedural law (for example, shifts in trial practice or changes to the rules of evidence). However, changes to criminal law procedure may infringe this right where they affect the basic elements of a fair trial.

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<sup>279</sup> *Handyside v. UK* (1976) 24 Eur Court HR (ser A); (1979–80) 1 EHRR 737; *Kokkinakis v. Greece* (1993) 260-A Eur Court HR (ser A); (1994) 17 EHRR 397.

When considering s. 27(1), you should also refer to the discussion on s. 27(4) of these Charter Guidelines. Section 27(4) expressly limits the rights in s. 27(1), s. 27(2) and s. 27(3) by providing that they do not affect ‘the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.’

### REASONABLE LIMITS ON THE PROHIBITION ON RETROSPECTIVE CRIMINAL LAW

The right not to be found guilty of a retrospective criminal offence in s. 27(1) is qualified by s. 27(4).

As with all of the human rights protected in the Charter, the right under s. 27(1) may also be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

#### KEY POINTS TO REMEMBER

- A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed.
- This section applies only to protection against the instigation of criminal proceedings which might result in a conviction or the imposition of a criminal penalty.
- The criminal law must be sufficiently accessible and precise to enable a person to know in advance whether his or her conduct is criminal.

### MEASURES TO IMPROVE COMPLIANCE

- If you are amending offence provisions ensure that all elements of the offence are clearly defined.
- Avoid giving offence provisions retrospective effect.
- Include transitional provisions that will enable conduct to be dealt with under previous legislation if it occurred before the statute which creates the new offence came into force.

### RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under s. 27(1), check whether it also raises an issue under the following rights and freedoms:

- the right to a fair trial (s. 24);
- rights in criminal proceedings (s. 25); and
- the rights relating to criminal penalties (s. 27(2) and s. 27(3)).

### HISTORY OF THE SECTION

This provision is modelled on article 15(1) of the ICCPR.

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

### BIBLIOGRAPHY

#### Case Law

1. *Handyside v. UK* (1976) 24 Eur Court HR (ser A).
2. *Kokkinakis v. Greece* (1993) 260-A Eur Court HR (ser A).

# SECTIONS 27(2) AND 27(3)

## NO HIGHER PENALTY AND RIGHT TO BENEFIT FROM LESSER PENALTY WHEN PENALTIES CHANGE

### Section 27

- (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(2) AND SECTION 27(3)?**

Compared to many other rights in the Charter, s. 27(2) and s. 27(3) have a clearly defined sphere of operation. You need to consider s. 27(2) and s. 27(3) in assessing legislation, a policy or a program that is relevant to sentencing in criminal law, where it:

- seeks to introduce a new range of sentencing initiatives that expand or reduce the scope of possible sanctions or that impose further restrictions or remove restrictions on convicted offenders;
- seeks to extend the period of detention of persons who have been convicted of an offence;
- alters penalties or penalty levels for offences;
- introduces or makes changes to the orders that can be made on conviction that are in the nature of a penalty.

These policy triggers are not exhaustive.

#### **DISCUSSION**

Section 27(2) bars the imposition of greater criminal penalties than would have been imposed at the time the offence was committed.

Section 27(3) gives a person the right to benefit from a lighter punishment if one is provided by law after the commission of the offence.

Experience in other jurisdictions with comparable human rights legislation suggests that these rights are often relevant in the development and vetting of legislation. It is therefore important to clarify how these sections operate and indicate their scope.

These sections should be distinguished from statutory provisions which allow for a greater penalty to be imposed because the offender has a previous conviction for the same type of offence. For example, such provisions operate in the context of serious sexual offences.

Under s. 27(2), a penalty must not be imposed for a criminal offence that is greater than the penalty which applied at the time when the offence was committed.

For example, in the context of international human rights law, the UN Human Rights Committee examined the operation of this right in a case against the Government of Canada. A convicted prisoner claimed that the retroactive introduction of 'mandatory supervision' during parole under the Canadian Parole Act constituted a heavier penalty in breach of the ICCPR. He claimed that the mandatory supervision requirement did not exist at the time he was convicted and sentenced and that the requirement constituted a 'penalty'.

The Committee found the petition to be inadmissible since the prisoner was not a relevant 'victim' of any abuse of his ICCPR rights. The Committee added that mandatory supervision was not a 'penalty' within the meaning of article 15 of the ICCPR. The Committee said:

'... mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest. The fact that, even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom [the requirement of mandatory supervision] cannot therefore be characterised as the imposition or re-imposition of a penalty incompatible with the guarantees laid down in article 15(1) of the Covenant.'<sup>280</sup>

However, where the supervision in effect amounts to punishment (for example, by way of detention or effective detention) the right might be engaged.

Section 27(3) is concerned with a decrease in the penalty applicable to an offence. Under this section, any reduction in a penalty that may occur after a person commits an offence, but before he or she is sentenced for that offence, must be applied to the benefit of the accused.

This right has arisen before the UN Human Rights Committee in the context of the liberalisation of parole laws under Canadian criminal law. The committee was asked to consider whether the liberalisation of parole laws should be applied retrospectively. The Committee side-stepped the issue, however, finding that the authors had failed to prove that the retrospective application of the more liberal parole laws would have resulted in their early release in any event.<sup>281</sup>

<sup>280</sup> *ARS v. Canada*, Human Rights Committee, Communication No. 91/1981, UN Doc. CCPR/C/14/D/91/1981 (28 October 1981) [5.3].

<sup>281</sup> *Van Duzen v. Canada*, Human Rights Committee, Communication No. 50/1979, UN Doc. CCPR/C/15/D/50/1979 (7 April 1982); *MacIsaac v. Canada*, Human Rights Committee, Communication No. 55/1979, UN Doc. CCPR/C/17/D/55/1979 (14 October 1982).

These rights only apply in the context of penalties that are imposed following conviction of a criminal offence and have a punitive objective.

### What is a penalty?

The principal issue for consideration under these sections is whether a particular measure is a penalty.

You will need to consider if a measure is a penalty. Factors that may be taken into account in assessing whether a measure is a penalty include:<sup>282</sup>

- the nature and purpose of the measure;
- its characterisation under law;
- the procedures involved in the making and implementation of the measure; and
- its severity.

Some examples of penalties are:

- fines;
- terms of imprisonment;
- an imposition by a judge of a non-parole period at the time of sentencing;<sup>283</sup>
- compensation orders;
- community service orders;
- confiscation of property.

### REASONABLE LIMITS ON THE PROHIBITION ON RETROSPECTIVE PENALTIES

The rights in these sections are qualified by section 27(4).

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

<sup>282</sup> *Welch v. United Kingdom* (1995) 307 Eur Court Hr (ser A); (1995) 20 EHRR 247.

<sup>283</sup> *R v. Pora* [2001] 2 NZLR 37.

### KEY POINTS TO REMEMBER

- These rights arise frequently in the development and vetting of legislation.
- Criminal law penalties must not be applied retrospectively.
- A penalty must not be imposed for a criminal offence that is greater than the penalty applying at the time the offence was committed.
- Any reduction in a penalty that may occur after a person commits an offence, but before he or she is sentenced for that offence, must be applied to the benefit of the accused.
- Both sections only apply to criminal penalties.
- The term 'penalty' is not restricted to fines or terms of imprisonment.
- The imposition by a judge of a non-parole period at the time of sentencing is likely to be regarded as a penalty.
- If you are considering whether a measure amounts to a penalty, consider the following factors:
  - the nature and purpose of the measure;
  - its characterisation under law;
  - the procedures involved in the making and implementation of the measure; and
  - its severity.

### MEASURES TO IMPROVE COMPLIANCE

- In relevant circumstances, ensure that all Bills have transitional provisions which clarify the application of any altered offence or altered sentencing regime.

### RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under s. 27(1), check whether it also raises an issue under the following rights and freedoms:

- The right to a fair trial (s. 24);
- Rights in criminal proceedings (s. 25); and
- No retrospective criminal laws (s. 27(1)).

### HISTORY OF THE SECTION

This provision is modelled on article 15(1) of the ICCPR.

### BIBLIOGRAPHY

#### Case Law

1. *R v. Pora* [2001] 2 NZLR 37.
2. *Welch v. UK* (1995) 307 Eur Court Hr (ser A).

#### United Nations Human Rights Committee Jurisprudence

3. *ARS v. Canada*, Human Rights Committee, Communication No. 91/1981, UN Doc. CCPR/C/14/D/91/1981 (28 October 1981).
4. *MacIsaac v. Canada*, Human Rights Committee, Communication No. 55/1979, UN Doc. CCPR/C/17/D/55/1979 (14 October 1982).
5. *Van Duzen v. Canada*, Human Rights Committee, Communication No. 50/1979, UN Doc. CCPR/C/15/D/50/1979 (7 April 1982).

# SECTION 27(4)

## CRIMES UNDER INTERNATIONAL LAW

### Section 27

- (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

#### POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27(4)

Compared to many other rights in the Charter, s. 27(4) has a more clearly defined sphere of operation.

You will need to consider s. 27(4) if you are assessing legislation or developing a new policy that intends to create retrospective criminal offences.

If you are doing so, s. 27(4) will be relevant if the retrospective criminal offence is also a criminal offence in international law. It is these type of offences that can have a permissible retrospective operation. Criminal offences in international law include:

- crimes against humanity;
- war crimes;
- the crime of piracy;
- the crime of genocide.

Note that the following offences are regarded as war crimes in the Commonwealth *Criminal Code Act 1995*.

- wilful killing;
- torture;
- inhuman treatment;
- biological experiments;

- wilfully causing great suffering;
- taking hostages; and
- denying a fair trial.

This list is not exhaustive.

You should also consider s. 27(4) in a situation where legislation or policy expressly refers to international criminal law or international obligations in the creation of an offence.

#### DISCUSSION

Generally, retrospective criminal laws are not permitted in Victoria (see the discussion of s. 27(1) in these Charter Guidelines). However, s. 27(4) provides an exception to the prohibition on retrospective criminal offences in respect of acts or omissions that constitute an offence under international law.

Section 27(4) specifically allows for the trial of persons in respect of acts and omissions that were not criminal in Victoria at the time they were committed but at that time amounted to grave breaches of international humanitarian law (for example, war crimes and crimes against humanity, and also the crimes of piracy, and genocide). It allows for new Victorian offences to be created that authorise prosecution of these persons.

In the future, section 27(4) may also include international crimes that are yet to be created in international law.

For more information on what constitutes 'war crimes', 'crimes against humanity' and 'genocide', legal and policy officers should consult:

- Part 2 of the Rome Statute of the International Criminal Court (to which Australia is a party). A copy of this Statute is available at [www.un.org/law/icc/statute/romefra.htm](http://www.un.org/law/icc/statute/romefra.htm); and
- Schedule, Chapter 8, Division 268 of the Commonwealth Criminal Code Act.

Section 27(4) also has the effect of denying the benefits of s. 27(2) and s. 27(3) to any person charged with the commission of any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

#### REASONABLE LIMITS ON SECTION 27(4)

Section 27(4) creates an express exception to s. 27(1), s. 27(2) and s. 27(3) of the Charter. As s. 27(4) does not protect a right, there is no need to examine the issue of reasonable limits on it.

#### KEY POINTS TO REMEMBER

- Generally, retrospective criminal laws are not permitted in Victoria under s. 27(1). However, the Charter establishes an exception to this prohibition in section 27(4) with respect to conduct which would have constituted offences under international law at the time they were committed.
- The prohibition on retrospectivity does not apply in respect of legislation or policy providing for the trial of persons for an offence under international law.

- Current international law offences covered by this section include:
  - crimes against humanity;
  - war crimes;
  - the crime of piracy; and
  - the crime of genocide.
- Further international crimes may be created in the future. If you have a policy in which you plan to create a retrospective criminal law offence, you should check whether the offence is also an offence in international law. If it is, it may fall within the scope of s. 27(4) and be permitted despite the general prohibition in the Charter on retrospective criminal offences.

#### MEASURES TO IMPROVE COMPLIANCE

If you are developing a policy or legislation that will establish a retrospective criminal offence you should check whether the act is an offence under international law. You may wish to rely on this exception on retrospective criminal laws. You should pay particular attention to the elements of the offences. Ensure that the elements of the offences are consistent with those that apply in respect of the international law counterpart offence. (Consult Part 2 of the Rome Statute of the International Criminal Court for the elements of offences.)

#### RELATED RIGHTS AND FREEDOMS

Section 27(4) is related to the other parts of s. 27.

#### HISTORY OF THE SECTION

This provision is modelled on article 15(2) of the ICCPR.

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

# SUMMARY OF THE CHARTER RIGHTS PARTICULARLY RELEVANT TO CHILDREN

The Charter rights apply to all persons, including children. Additionally, there are a number of Charter rights which are specifically applicable to children. There are also some general rights which may have a particular significance for children.

For the purposes of the Charter, a child is a person under 18 years of age. This is so because of the definition of 'child' under s. 3.

## RIGHTS SPECIFIC TO CHILDREN

### Right to protection of families and children (s. 17)

Section 17 confers a right of protection to families and guarantees the right of every child to such protection as is in his or her best interests and is needed by him or her by reason of being a child. This right to protection should be considered for proposed laws or policies that touch on aspects of family life and that affect family relations. The notion of 'family' is to be interpreted broadly to include extended families, gay and lesbian families and single parent families. The best interests of the child should be taken into account as the paramount consideration in all actions affecting a child.

### Rights of children in the criminal process (ss. 23 and 25(3))

Sections 23 and 25(3) guarantee certain rights for children in the criminal process. Both of these sections recognise the particular vulnerability of children in criminal proceedings. Section 23 is concerned with the detention of children in the criminal process, whereas section 25(3) is concerned with their procedural rights, especially during the investigatory or trial stages of criminal proceedings.

Section 23 guarantees that accused children who have been detained must be segregated from detained adults at all times, whether before or after

conviction, and that accused children must be brought to trial as quickly as possible. Section 23 further assists in ensuring that children who have been convicted of an offence will be treated in an age-appropriate manner. These rights (and particularly s. 23(2)) mean that children should be detained for the shortest possible time. The right of children to be segregated from adults does not mean that child offenders should automatically be removed to adult prisons when they turn 18.

Section 25(3) provides that children charged with criminal offences have the right to a procedure that takes account of their age and the desirability of promoting their rehabilitation.

This right requires that special and appropriate procedures are in place that take account of the age, maturity, and intellectual and emotional capacities of the child, and that procedures are in place that emphasise the rehabilitation of the child. For example, trial procedures may need to be modified to ensure the child understands and can participate in the proceedings, and alternatives to detention or imprisonment should be available. Services that provide treatment, education or other assistance may be available either in conjunction with detention or imprisonment, or as part of a non-custodial order. Section 25(3) is in addition to the rights accorded to adults under the other provisions of s. 25 (that is, the right to be presumed innocent

(s. 25(1)), the minimum guarantees (s. 25(2)) and the rights in relation to appeals against conviction and sentence (s. 25(4)).

### **GENERAL RIGHTS WHICH MAY BE SIGNIFICANT FOR CHILDREN**

The following general rights may be significant for children and will often need to be read in the light of other provisions of the Charter that specifically seek to protect the interests of children.

#### **The right to protection from torture and cruel, inhuman or degrading treatment (s. 10(a) and s. 10(b))**

Section 10(a) and s.10(b) guarantee the rights of a person not to be subjected to torture or treated or punished in a cruel, inhuman or degrading way. The assessment of whether an act amounts to cruel, inhuman or degrading treatment is relative and depends on factors including the duration of the treatment, its physical or mental affects, and the age, vulnerability and state of health of the victim. Hence, the particular vulnerability of children is relevant in the application of these rights.

#### **The right to not have privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s. 13(a))**

Section 13(a) ensures that a person does not have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Particular attention should be given to this section in the context of laws or procedures that concern the removal of children from the family unit. This right does not mean that a child should not be removed from his or her home in, for example, an abusive situation. However, care should be taken to ensure that whatever arrangements are made for the child take into account the interests of privacy, family and the home of the child.

#### **The rights of Aboriginal persons to enjoy their identity and culture and to maintain their language and kinship ties (s. 19(2)(a)(b)(c))**

Section 19(2)(a) to (c) recognises that Aboriginal persons hold distinct cultural rights and that they must not be denied the right, with other members of their community, to enjoy their identity and

culture, and to maintain their language and kinship ties. This section gives children the right to be exposed to, and to learn about, their cultural heritage, their community and their languages for the purpose of having the opportunity to enjoy their identity and use their language. It also recognises that kinship plays an important role in Aboriginal communities and that the notion of kinship ties is closely linked to other cultural and religious practices. The right to maintain kinship ties is particularly important in the context of removing children from their homes, fostering, adoption and other processes where Aboriginal children could potentially be taken away from their families. Again, this right does not mean that a child should not be removed from his or her home, for example, in an abusive situation, but that care should be taken to ensure that whatever arrangements are made for the child, the child's right to maintain contact with his or her kin is respected.

#### **The rights of persons awaiting trial (section 21(6))**

Section 21(6) ensures that a person awaiting trial must not be automatically detained in custody, but that his or her release may be subject to guarantees to appear for trial, and at any other stage of the proceeding including execution of judgment if appropriate. In its application to children, regard should be had to the rights guaranteed under ss. 23 and 25(3) and to the understanding that, due to their particular vulnerability, children should not, where possible, be detained, including prior to trial.

#### **The right to humane treatment when deprived of liberty (section 22)**

Section 22 ensures that persons deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person, and that persons detained without charge are segregated from persons convicted of offences (except where reasonably necessary) and are treated in a way that is appropriate for a person who has not been convicted. Again, given the particular vulnerability of children in the criminal process, these rights must be read together with and in the light of s. 23.