



Department of Education and
Early Childhood Development

Human Resources

Charter of Human Rights and Responsibilities

Implementation Guide for DEECD Policy Officers



This Guide has been adapted from the Department of Justice "Charter of Human Rights and Responsibilities Draft Guidelines for Legislation and Policy Officers in Victoria".

Last updated 6 March 2013

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PART 1 OVERVIEW

The Victorian Charter of Human Rights and Responsibilities is a law that protects the human rights of all people in Victoria. It is an ordinary Act of the Victorian Parliament and was given royal assent on 25 July 2006. Section 1 of the Charter makes it clear that it can be referred to as ‘the Charter of Human Rights and Responsibilities’ (without including the word ‘Act’). This is the preferred mode of citation, or it can be shortened to **‘the Charter’**.

As an employee of the public sector, the Charter places legal responsibilities on your decision-making and obligations on your professional behaviour. This is not just a matter of compliance, but a commitment to a human rights culture within government.

The Charter ensures that when current and future Victorian Governments make laws and deliver services, they do so with our civil and political rights in mind.

The Charter follows the adoption of the Australian Capital Territory’s Human Rights Act (2004) and the United Kingdom’s Human Rights Act (1998). Victoria based many of its Charter provisions on these earlier Acts.

Who is the DEECD Charter Implementation Guide for?

The DEECD Charter Implementation Guide (the Implementation Guide) has been written primarily for policy officers in the DEECD. In particular they have been written for those responsible for developing new policies.

Others may find them useful, including project managers, executive directors and staff and ministerial advisers.

As the Charter imposes obligations on ‘public authorities’, this Implementation Guide may also be useful to those individuals, agencies, organisations and some private bodies who fall within the ‘public authority’ definition (see Part 3 of this implementation Guide for further information on public authorities). However, it is important to note that the Implementation Guide has not been written for this audience.

Operation of the Charter in policy development

The Charter is intended to be an integral part of policy development. Under the Charter, policy officers are required to consider the human rights impacts of all policy proposals, operational guidelines and other programs, including but not limited to those that are put before Cabinet. This is reflected in the Cabinet Handbook and templates (to view Cabinet templates log on to:

<https://portal.eduweb.vic.gov.au/collaboration/teams/cabinetandlegislation/default.aspx>

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

Staff at DEECD will need to consider human rights when developing or amending policies and guidelines. Any changes made to legislation and regulations to make them compatible with the Charter may necessitate changes to related DEECD policies and guidelines.

Purpose of the Charter Implementation Guide for DEECD Policy Officers

The purpose of the Implementation Guide is to assist policy officers to identify the impact of the Charter on policy development within DEECD. Specifically, the Implementation Guide is designed to equip you with the necessary information to enable you to integrate human rights considerations into DEECD policy development. They are also intended to assist project managers to assess whether their programs are delivered in a way that is consistent with the Charter.

The Implementation Guide will help you to:

- explore ways of achieving desired policy outcomes which are compatible with the Charter;
- improve your level of awareness and understanding of the Charter and of what it requires in the policy development process;
- identify areas of potential legal risk for DEECD;
- consider each of the rights under the Charter and identify which rights a policy may have an impact upon; and
- assess whether an interference or limit on a right is reasonable and proportionate with regard to the criteria set out in section 7 of the Charter.

The Implementation Guide is not intended to be a definitive legal text on the Charter. It will be necessary in many cases to supplement your knowledge of the areas covered in the Implementation Guide with further research and reading.

How to use the Charter Implementation Guide

The Implementation Guide provides a five step process to ensure proper consideration of human rights has been applied to all DEECD policies and guidelines. The five step process requires policy officers to:

1. Consider whether the proposed policy, procedure or action raises human rights
2. Consider the scope of each human right raised by the proposal
3. Consider whether the proposal limits, restricts or interferes with the scope of the right and if so, whether that limitation or restriction is reasonable and demonstrably justified under section 7 of the Charter
4. Modify the proposal if you find that the limitation or restriction on the right is not reasonable or demonstrably justified
5. Complete a Human Rights Impact Assessment

The Implementation Guide provides detailed information about each of the rights contained in the Charter and gives examples of when a Charter right may be engaged by a policy.

More information or assistance

For more information on the Charter of Human Rights and Responsibilities visit the DEECD Human Rights website at:

http://www.education.vic.gov.au/hrweb/workm/Pages/Human_Rights.aspx

The DEECD online Human Rights Charter training module is available to all DEECD staff. It serves as an introduction to the Charter and our obligations under it. The training module can be accessed through the above website.

If you are unsure whether the Charter applies in a particular context or you require assistance in preparing a human rights impact assessment, please direct queries to the Conduct & Ethics Branch on ph: 9637 2595.

PART 2 RIGHTS PROTECTED BY THE CHARTER

The Charter recognises only the rights of people and not corporations or other entities (Section 6(1)). It applies (sometimes in different ways) to the Victorian Parliament, courts and tribunals, and public authorities (s.6(2)). It also binds the Crown in Victoria.

The human rights and freedoms protected by the Charter are the following:

- Recognition and equality before the law (s.8)
- Right to life (s.9)
- Protection from torture and cruel, inhuman or degrading treatment (s.10)
- Freedom from forced work (s.11)
- Freedom of movement (s.12)
- Privacy and reputation (s.13)
- Freedom of thought, conscience, religion and belief (s.14)
- Freedom of expression (s.15)
- Peaceful assembly and freedom of association (s.16)
- Protection of families and children (s.17)
- Taking part in public life (s.18)
- Cultural rights (s.19)
- Property rights (s.20)
- Right to liberty and security of person (s.21)
- Humane treatment when deprived of liberty (s.22)
- Rights of children in the criminal process (s.23)
- Right to a fair hearing (s.24)
- Rights in criminal proceedings (s.25)
- Right not to be tried or punished more than once (s.26)
- Retrospective criminal laws (s.27)

All of these rights may be subject under law to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ (see s.7). Such limits must take into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether less restrictive means are reasonably available to achieve the purpose of the limitation.

The Charter does not authorise a person, entity or public authority to limit rights to any extent greater than this, or to destroy the human right of any person (see s.7). It also does not preclude or limit rights not in the Charter and arising under other laws (such as the Constitution, common law, federal law, or international law) (see s.5).

PART 3 OBLIGATION ON PUBLIC AUTHORITIES

What is a Public Authority?

Any entity with functions of a public nature which exercises functions on behalf of Victoria can be declared to be a public authority. This includes:

- Public officials, including DEECD employees
- An entity established under an Act of Parliament that has public functions, such as DEECD
- An entity that performs public functions on behalf of the Government, such as government schools and public hospitals
- Victoria Police
- Local councils, Councillors and council staff
- Ministers, and
- Parliamentary Committees when acting administratively

A private organisation can even be considered to be a public authority if it is contracted to carry out services that are of a public nature on behalf of the Government.

The obligation on public authorities to act compatibly with human rights

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

What you need to know about the Charter

You need to be aware that under the Charter:

- Public authorities are obliged to act compatibly with human rights.
- Policy officers are required to consider the human rights impacts of all policy proposals, operational guidelines and other programs, including but not limited to those that are put before Cabinet.
- Policy proposals to Cabinet must include a Human Rights Impact Assessment.
- Statutory provisions are subject to a new interpretation whereby all statutory provisions must be interpreted in a way that is compatible with human rights.
- There may be circumstances where you will need to consult or obtain advice from the Department's Conduct and Ethics Branch about the application of the Charter.

PART 4 LIMITATIONS WITHIN THE CHARTER

Specific limitations or express exceptions

A number of the rights contained in the Charter provide specific limitations or express exceptions that qualify the scope of the right, operating as an internal restriction on the right.

Section 7 Human Rights – What are they and when they may be limited

Section 7(1) of the Charter provides that human rights may be subject to reasonable limits, only where:

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

Section 7(2) states that when determining whether a limit is reasonable, the following relevant factors must be taken into account:

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

The Charter does not authorise any person, entity or public authority to limit rights to any extent greater than this, or to destroy or limit rights in a way that would be inconsistent with the spirit of the Charter (see s.7). It also does not preclude or limit rights not in the Charter and arising under other laws (such as the Constitution, common law, federal law or international law) (see s.5).

PART 5 PROCESS FOR CONSIDERING HUMAN RIGHTS IN DEECD POLICY DEVELOPMENT

Officers should identify the impact of the policy or guideline proposals upon Charter rights early in the process.

Flowchart A (**Appendix A**) outlines the overall process for conducting a human rights impact assessment and is attached to this Implementation Guide.

The recommended process to employ in examining human rights impacts is outlined below.

Step 1: Consider whether the proposed policy, procedure or action raises human rights.

You will need to identify each human right that is relevant to the policy. A human right will be relevant if the proposed policy impacts upon or engages the right.

In some circumstances it may be clear that the policy will only have an impact on one right and no others. However, in assessing the human rights impact it is worth considering each right methodically as it may have an unexpected impact on a right.

Step 2: Consider the scope of each human right raised by the proposal.

At this stage you should take into account any specific limitations or express exceptions that appear in the section providing the right.

You will also need to identify the relevant passage(s) or part(s) of the policy that will impact upon that right. You will need to analyse how the relevant part of the policy interacts with the right, for example, the degree to which it will restrict the operation of the right or whether the scope of the right is unaffected.

If the scope of the right is unaffected or indeed if the policy proposal promotes or further protects the right, there will be no need to consider the following steps (reasonable limitations). It may be clear at this stage that the policy, or a specific part of the policy, is compatible with the relevant right or rights.

This Implementation Guide provides a discussion on each right that will assist you to identify the scope of the right.

Step 3: Consider whether the proposal limits, restricts or interferes with the scope of the right and if so whether that limitation or restriction is reasonable and demonstrably justified under section 7 of the Charter.

You will need to identify all of the reasons why the limitation or restriction on the right is justified. These may be extensive.

Flowchart B (**Appendix B**) will assist you in working through whether a limit is reasonable and demonstrably justified.

The approach to be used in determining whether a human right may be subject to a reasonable limit involves first determining the scope of the human right, taking into account any specific limitations or express exceptions that appear in the section providing for the right. Then you should consider the operation of any limitation or restriction or interference with the right. This requires an analysis based on the terms of s.7 (see Part 4 of this Implementation Guide for more information on s.7). It will then be possible to assess whether a proposal is compatible with the human right in the circumstances.

If a part of the policy limits or restricts or interferes with a right, an analysis must be provided of whether the limitation is reasonable and can be demonstrably justified in a free and democratic society in accordance with s.7 of the Charter. All relevant factors must be taken into account in this analysis, including (but not limited to) the relevant factors listed in s.7(2). This analysis must be completed before any assessment is made about whether the right will be 'breached' by the proposal / whether the proposal is incompatible with the right.

Step 4: Modify the proposal if you find that the limitation or restriction on the right is not reasonable or demonstrably justified.

On some occasions, which are likely to be rare, it may not be possible to modify the proposal. In these situations you will need to set out reasons as to the nature and extent of the incompatibility.

Step 5: Human Rights Impact Assessment

A Human Rights Impact Assessment **must be completed for any policy proposal to be submitted to Cabinet**. For non-legislative policies, strategies, operational guidelines and other programs that are provided to Cabinet for final approval, a thorough assessment of the human rights impacts should be included in the Cabinet submission.

For development of all other departmental policies, a similar assessment approach is recommended to ensure that obligations to act compatibly with the Charter are met.

A Human Rights Impact Assessment Table has been prepared for policy officers to use in examining policy proposals. This table is provided in Appendix C to this Implementation guide.

PART 6 USING THE DEECD CHARTER IMPLEMENTATION GUIDE

The Charter Implementation Guide provides detailed analysis of each right contained in the Charter. Each analysis follows the following format:

Policy triggers

The purpose of the policy triggers is to draw your attention to whether a provision is likely to have some impact on the right, or ‘interfere’ with, or impose some limit on, a particular right. If a provision does so, it will be necessary to consider whether the interference or limitation imposed on the right is reasonable and justified.

The policy triggers are **not comprehensive** and are **not indicative** of whether a particular provision infringes the right.

Discussion

This section provides a discussion of the scope and content of the right. It will guide you on the meaning of the right and also help you work out if a particular policy may not be compliant with the right.

Reasonable limits

This section provides some general guidance on the permissible limits that can be applied to the particular right.

Measures to improve compliance

This section sets out options to guide you on how you might improve the degree of compliance with the right. Where provided, the measures are merely suggestions and are not necessarily sufficient to guarantee compliance with the right.

Related rights and freedoms

This section alerts you to other related rights and to potential areas of overlap or consistency between them.

If you are unsure whether the Charter applies in a particular context or you require assistance in preparing a human rights impact assessment, please direct queries to the Conduct & Ethics Branch on ph: 9637 2595.

PART 7 APPLICATION OF CHARTER RIGHTS

Recognition & Equality before the Law (S.8)

Section 8

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 8?

You will need to consider section 8 if you are preparing or assessing a policy or a program that **draws distinctions between people or groups based on one or more of the attributes in the *Equal Opportunity Act 2010* ('prohibited attribute'), where this may result in less favourable treatment to some people or groups.** You will also need to consider section 8 if the policy or program would have a disproportionate impact on a person or group of people with a prohibited attribute even though no distinction is drawn overtly.

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

You will need to consider section 8 if your policy or program:

- establishes eligibility criteria for programs or entitlements (such as calculating "continuous service" for determining long service leave entitlements);
- contains measures that are attempting to assist persons who have been socially, culturally and/or economically disadvantaged;

- takes steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged;
- provides for the delivery of an entitlement or service to some persons and not others (such as schools established for students of one sex)
- assists or recognises the interests of Aboriginal persons or members of other ethnic groups;
- treats one group differently to another on the basis of an attribute (such as charging fees to students who are over 20 years of age at the 1 January of the year of instruction; charging fees to overseas students; expelling overseas students who fail to pay their fees by the due date; and the powers of school attendance officers to stop children in the street, who appear to be of school age, and ask the child for his/her name & address);
- is stated in neutral terms but has a disproportionate impact on a sector of the community whose members have one or more of the attributes listed above (such as Australian citizenship/flag raising ceremonies; and calculating “continuous service” for determining long service leave entitlements);
- deals with any of the human rights set out in the Charter in a discriminatory way (such as curtailing freedom of expression of students of a particular religious belief);
 - sets age bans that are expressed as protective measures, graduated entitlements or statements of legal capacity.

DISCUSSION

Section 8 establishes a series of recognition and equality rights.

Recognition before the Law

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

Equal Protection against discrimination

The right of every person to be equal before the law and to be entitled to the equal protection of the law without discrimination ‘prohibits discrimination in law or in fact in any field regulated and protected by public authorities.’ This means that the government ought not to discriminate against any person, and the content of all policies and programs ought not to be discriminatory. For example, when the government regulates the provision of education services it should do so in a non-discriminatory way. It also means that a public authority must not discriminate against people when enforcing the law; it must not apply legislation in an arbitrary or discriminatory manner; and if it decides to offer a social service or government program, it must not discriminate in the way the service or program is provided.

What is Discrimination?

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

Discrimination is unlawful differential treatment based on one or more of the attributes listed in the *Equal Opportunity Act*. These attributes are listed above. The *Equal Opportunity Act* prohibits direct discrimination: that is, a law or policy that expressly treats people differently on the basis of a particular characteristic. It also prohibits indirect discrimination, such as an apparently neutral law or policy that impacts differently on different groups. For example, a policy that forbids the wearing of head coverings at school is an example of potential indirect discrimination on the basis of religious belief or activity as it may discriminate against those students whose religion requires them to wear a head covering such as a hijab / turban.

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

Differentiation will also be justified if the criteria for differentiation are reasonable and objective and the aim is to achieve a legitimate purpose. This is discussed further below.

Enjoyment of Rights without Discrimination

This provision ensures that every person should be able to enjoy the human rights that are set out in the Charter, without discrimination. For example, as all people have the right to peaceful assembly, this right should not be restricted to only people who possess particular political beliefs.

REASONABLE LIMITS

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

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

Section 8(4): express exception

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

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

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

Section 7: general limitations clause

If the policy gives rise to a prima facie issue of discrimination under s.8, but does not fall within s.8(4), you will need to consider whether s.7 applies.

Discrimination will only occur if it cannot be demonstrated that the measures are justified under the general limitations clause outlined in s.7 of the Charter. That is, if the measures are a 'reasonable limit as can be demonstrably justified in a free and democratic society' they will not constitute discrimination. You should refer to Part 2 of this Implementation Guide for more information on s.7.

KEY POINTS TO REMEMBER

- Public authorities must not discriminate against people when enforcing or applying the law and all people have the right to be protected against discrimination.
- Legislation must not be applied in an arbitrary or discriminatory manner.
- A policy or program will give rise to a prima facie issue of discrimination if it results in direct or indirect discrimination on the basis of one or more of the attributes in the *Equal Opportunity Act*.
- Not every form of differential treatment is discriminatory.

Circumstances in which discrimination is permitted

The prohibition on discrimination will not apply to:

- measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination: s. 8(4).
- measures that can be justified under the general limitations clause in s.7 of the Charter.

MEASURES TO IMPROVE COMPLIANCE

The *Equal Opportunity Act* has been in operation for many years in Victoria, and the Department has developed policies covering issues around the prohibition of discrimination. An important initial step for policy officers is referring to the Department's Diversity and Equal Opportunity policies

(<http://www.education.vic.gov.au/hrweb/divequity/Pages/default.aspx>), and considering the ways in which the Charter interacts with anti-discrimination laws.

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

- If your policy or program makes a distinction on the basis of one of the attributes listed in the *Equal Opportunity Act*, make sure it is inclusive and not exclusive in its effect. For example, if your policy or program refers to people living in relationships, it should be developed so that, where relevant, it applies equally to married couples, de facto couples, and same-sex couples.
- If your policy or program appears to be discriminatory, consider the underlying purpose or reason for the distinction it relies on. Ask whether:
 - the reason for the distinction is consistent with the objectives;
 - the intention is to achieve an important objective and the policy/program is not designed to discriminate;
 - the distinction is sufficiently clear to meet its purpose;
 - there was no alternative means to achieve the objective without discrimination;
 - the basis for the distinction can be supported by reliable information.

When considering whether a measure falls within the exception in s.8(4), you will need to consider the following questions:

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

If you can demonstrate that your policy or program is a measure falling within the exception in s.8(4), it will not constitute discrimination under the Charter.

RELATED RIGHTS AND FREEDOMS

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

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

Right to Life (S.9)

Section 9

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 9?

You will need to consider **section 9** in assessing a policy or a program where it:

- impacts on the way in which essential medical or welfare services are provided to members of vulnerable groups within the community, including parental control over children's lifesaving medical treatment;
- establishes procedures for the management of students while in a school's care.

DISCUSSION

The right to life is concerned with the protection and preservation of life. This is one of the most fundamental of all human rights. In international human rights law, the right to life not only imposes a negative duty on states to refrain from the arbitrary deprivation of life, but in certain well-defined circumstances **can give rise to a positive obligation** on a state.

The positive duty

The right to life (together with s.38) imposes certain positive obligations on public authorities. One of these obligations is to protect the lives of persons in their care. For example, there may be a breach of the right to life where a student dies while in the care of a public authority unless the state can prove that it had no responsibility for the death. The extent of this obligation will depend on the facts of the case, the role of the particular public authority and the level of knowledge reasonably expected of that public authority. Other aspects of the positive duty are examined below.

Effective official investigation into circumstances of death

The right to life has been interpreted in some international judgments as encompassing a positive, procedural obligation to undertake an 'effective, official investigation' into the circumstances of a death in certain circumstances, including:

- where there is an allegation of lethal force by government authorities or by a private party;
- where a person dies in circumstances in which there was an obligation on a public authority to protect the person's life (for example, where a person was in state custody or because the state knew or should have known that a person's life was at risk); and

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

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

The negative duty

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

Medical treatment

The right to life has particular relevance in the area of medical treatment, especially relating to the medical treatment of terminally ill persons. For example, policy officers should take care when developing policies regarding parental permission and administration of life saving medical treatment and/or therapeutic drugs to children/students who are the subject of not-for-resuscitation orders.

REASONABLE LIMITS

The right to life may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. You should refer to Part 4 of this Implementation Guide for further information on s.7.

However, it may be more difficult than usual to justify reasonable limitations on the right to life because it is regarded as an absolute right in international human rights law.

KEY POINTS TO REMEMBER

- The right to life has been interpreted broadly in international human rights law. It places both a positive and negative duty on public authorities. The scope of these duties may change over time.
- The positive duty requires public authorities to protect the lives of persons in their care and undertake effective official investigations into the circumstances of some deaths.
- The negative duty requires public authorities to refrain from the arbitrary deprivation of life.
- The right to life is also relevant in the context of administration of medical treatment and/or therapeutic drugs.

MEASURES TO IMPROVE COMPLIANCE

- Ensure that policy regarding administration of medical treatment and/or therapeutic drugs to children/students who are the subject of not-for-resuscitation orders is clear; that there are non-arbitrary procedures in place;

- that there are clear procedural safeguards to ensure that any decision not to administer life saving medical treatment and/or therapeutic drugs is made at an appropriate level; and that there is sufficient oversight of those decisions.
- Ensure that an effective official investigation takes place where a child/student dies in circumstances in which the government school/public authority is alleged to have been negligent.

RELATED RIGHTS AND FREEDOMS

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

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

Protection from Torture and Cruel, Inhuman or Degrading Treatment (S.10)

Section 10

A person must not be –

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 10?

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

Torture and cruel, inhuman and degrading treatment:

You will need to consider **section 10** in assessing a policy or a program where it:

- affects the physical or mental well-being of a person in a manner that may:
 - cause serious physical or mental pain or suffering, or
 - humiliate or debase a person (albeit non-intentionally);
- removes the right to complain of mistreatment by a public authority;
- introduces or permits corporal punishment by a public authority;
- authorises a person to be searched or puts in place procedures for conducting searches;
- regulates the treatment of persons located at any site for which a public authority is responsible, including a government school or early childcare service;
- involves crisis or crisis-incident intervention strategies or behavioural management plans that include the use of seclusion and/or physical restraint.

Consent to medical treatment

You will need to consider **section 10** in assessing a policy or a program where it:

- defines and regulates procedures for obtaining consent to medical treatment (especially procedures for obtaining consent from or on behalf of children);
- regulates medical treatment of persons without their consent.

DISCUSSION

The prohibition on torture and inhuman and degrading treatment is primarily a negative obligation, that is, it requires public officials to refrain from torture. It does, however, include some positive elements that require governments to take steps to

prevent the occurrence of torture and inhuman and degrading treatment, and to make appropriate inquiries into claims that it has occurred. Some suggestions as to the types of steps that need to be taken to fulfil the positive obligation are outlined below in the section on Measures to Improve Compliance.

What is torture?

In international law, for an act to amount to torture, not only must there be a certain severity in pain and suffering; the treatment must also be intentionally inflicted for a prohibited purpose such as to obtain a confession, and must be inflicted 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

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

Importantly, the assessment of whether an act amounts to torture is relative, and depends on factors including the duration of the treatment, its physical or mental effects, and the age, sex, vulnerability and state of health of the victim.

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

What is the difference between torture and 'cruel, inhuman or degrading treatment'?

The threshold of severity for torture is extremely high. Conduct not meeting this threshold may, however, amount to 'cruel, inhuman or degrading treatment' and breach human rights.

In international human rights law, there are absolute prohibitions on both types of conduct. This means that they must not occur even in times of public emergency.

What is cruel, inhuman or degrading treatment or punishment?

There are no specific definitions of 'cruel, inhuman or degrading' treatment or punishment in international conventions. However, the following principles have been established through international jurisprudence:

- The prohibition is directed at less severe forms of ill treatment than acts amounting to torture.
- Degrading treatment is treatment that humiliates or debases a person. In other words, it is treatment that shows a lack of respect for a person, or diminishes a person's dignity and causes feelings of fear, anguish or inferiority capable of breaking a person's moral and physical resistance.

- Ill treatment may involve both physical and mental pain or suffering, however there is no specific requirement that severe pain be inflicted.
- It is not necessary for the harm to be intentionally inflicted.
- To be within the scope of the prohibition, the harm must be carried out by a public official or other person acting in an official capacity; however, the purpose for which it was carried out is immaterial.

The assessment of whether an act amounts to ‘cruel, inhuman or degrading treatment’ is relative, and will depend on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.

A form of punishment will generally breach this provision if it entails a degree of humiliation and debasement that attains a particular level above any usual level of humiliation involved in punishment. The assessment is relative and depends on all the circumstances of the case. In particular, it depends on the nature and context of the punishment itself and the manner and method of its execution.

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

- inhuman detention conditions (such as prolonged indefinite detention that causes mental illness);
- a penalty (normally criminal, but potentially extending also to regulatory offences) that is arbitrary, excessive or inhuman; and
- corporal punishment.

Medical treatment

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

What is ‘full, free and informed consent’?

Section 10 imposes a requirement that any consent to medical treatment must be full, free and informed. This requirement reflects the requirements for consent outlined in section 5(1) of the *Medical Treatment Act 1988* (Vic.)

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

In certain circumstances, patients will be unable to consent. For example, a person who is rendered unconscious may need urgent medical attention and will not be

able to consent to medical treatment. Undertaking emergency medical treatment in such circumstances is not a breach of the Charter.

If you are developing a policy that provides for medical treatment to be administered without consent, you will need to review it against s.7 of the Charter. You should consult Part 4 of this Implementation Guide for more guidance on s.7.

REASONABLE LIMITS

The rights protected in s.10 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. You should refer to Part 4 of this Implementation Guide for further information on s.7. However, it may be more difficult than usual to justify reasonable limitations on the prohibition on torture and ‘cruel, degrading and inhumane’ treatment, as these rights are regarded as absolute in international human rights law.

The prohibition on medical treatment without consent is not regarded as an absolute right in international human rights law. Victorian law currently provides for medical treatment to occur without consent in a number of situations. For example, consent provided by a substitute decision-maker such as a medical practitioner, where there is an emergency or where a person is incapable of giving consent.

Policy officers should ensure that policies meet the standard for acceptable limitations in s.7.

KEY POINTS TO REMEMBER

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

- The rights protected in s.10 may be subject under law to reasonable limitations in accordance with s.7 of the Charter. However as s.10 is regarded as ‘absolute’ in international human rights law it will be more difficult than usual to justify any limit to this right.

MEASURES TO IMPROVE COMPLIANCE

- Ensure that searches are only carried out in circumstances of necessity and with due respect for the dignity of the person being searched.
- Ensure that the policy or program provides for the needs and individual circumstances so that some individuals are not more seriously affected or disadvantaged by a policy.
- Ensure clear practices and procedures for obtaining and recording consent to medical treatment, and student medical management plans including in relation to not-for-resuscitation orders.
- Ensure that there is an appropriate mechanism in place for receiving and dealing with complaints about ill treatment.

Discipline

- Consider whether the offence and disciplinary measure are proportionate.
- Tailor the disciplinary measure to the type of conduct that you are seeking to prohibit.

RELATED RIGHTS AND FREEDOMS

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

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

Freedom from Forced Work (S.11)

Section 11

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 11?

You will need to consider **section 11** in assessing a policy or a program where it:

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

DISCUSSION

The premise behind protecting these rights is that persons should not be subject to conditions that violate individual dignity and exploit human productivity.

Slavery and servitude

The prohibitions on slavery and servitude are absolute prohibitions in international human rights law from which derogation is not permitted. This means that in international law they must be respected fully at all times.

Slavery is defined in article 1 of the *Slavery Convention 1926* to mean 'the status or condition of a person over whom any or all of the powers attaching to the right of

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

Servitude is not ownership despite the fact that a person under servitude may be directed where to live and may be unable to leave.

Forced or compulsory labour

Forced or compulsory labour refers to work exacted from a person under the threat of a penalty, which he or she has not voluntarily offered to do. The expression ‘forced labour’ suggests physical or mental constraint. An example of a penalty might be a threat of punishment if the person does not perform the work. ‘Work’ is to be given a broad meaning and can cover all kinds of work or service, not just physical work.

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

- the threat of a penalty;
- the nature of the work required; for example, whether the work is required in the general interest of the community; and
- whether the burden is a proportionate one.

If work required by law was ‘for a short period, provided favourable remuneration and did not involve any discriminatory, arbitrary or punitive application’ it may not contravene this provision. Similarly, an arrangement which, in practice, means that a person is prevented from working in his or her chosen environment, or continuing a preferred vocation, is unlikely without more to violate this section.

REASONABLE LIMITS

The rights in s.11 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. You should refer to Part 4 of this Implementation Guide for further information on s.7.

The right to freedom from forced or compulsory labour is also subject to a number of permissible exceptions outlined in s.11(3), including detainee labour, emergencies and civil obligations.

KEY POINTS TO REMEMBER

- The prohibition on slavery and servitude are absolute prohibitions in international human rights law, meaning that, in international law, the prohibition must be respected at all times.
- Forced or compulsory labour is work exacted from a person under the threat of a penalty which he or she has not voluntarily offered to do.

- 'Work' has a broad meaning covering all kinds of work or service, not just physical work.

MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s.11(2):

- Ensure that any policy or program does not compel work or service from a person under the threat of what might be construed as a 'penalty'. If it does, ensure that he or she has voluntarily offered to do the work or perform the service. This measure will be unnecessary if the work or service falls within one of the exceptions in s.11(3).
- Ensure that any student disciplinary measures that involve work or service do not violate individual dignity and exploit human productivity.

RELATED RIGHTS AND FREEDOMS

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

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

Freedom of Movement (S.12)

Section 12

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 12?

You will need to consider **section 12** in assessing a policy or a program where it:

- proposes surveillance of an individual's movements or otherwise enables a public authority to monitor or trace the movements of a person within Victoria;
- enables the detention of a person;
- restricts the free movement of persons lawfully detained;
- establishes eligibility requirements for entering Crown land;
- limits the ability of individuals to move through, remain in, or enter or depart from public space or on private land;
- limits or regulates public demonstrations;
- gives a minister or a public authority the power to direct people's movement or to carry out some activity, for example, during a state of emergency or in the context of essential services.

DISCUSSION

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

The following rights are recognised in s.12:

- right to move freely within Victoria;
- right to choose where to live within Victoria; and
- right to be free to enter and leave Victoria.

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

The rights protected by s.12 impose a positive obligation on public authorities to ensure that a person's freedom of movement is not unduly restricted. Section 12 also confers a negative obligation on public authorities to refrain from interfering with a person's freedom of movement.

KEY POINTS TO REMEMBER

- Section 12 applies only to persons lawfully in Victoria.
- Section 12 encompasses the right not to be forced to move to, or from, a particular location.
- It also includes a freedom from physical barriers and procedural impediments, such as a requirement for prior notification or authorisation from a public authority before entering a public park or school or participating in a public demonstration in a public space.
- The rights in s.12 are subject to reasonable limitation under s.7.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the right to freedom of movement may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. You should refer to Part 4 of this Implementation Guide for further information on s.7.

MEASURES TO IMPROVE COMPLIANCE

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

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

Ask yourself:

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

RELATED RIGHTS AND FREEDOMS

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

Privacy and Reputation (S.13)

Section 13

A person has the right –

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 13?

Privacy – general

In the context of privacy, you will need to consider **section 13** when assessing a policy or a program where it deals with:

- disclosure of or access to personal information (such as parent/student right to access information concerning student's achievements);
- powers of entry, search, seizure, confiscation or forfeiture;
- compulsory physical intervention on a person such as a breath or urine test; medical examination; or corporal punishment;
- the power to direct a person to attend a medical examination;
- termination of employment due to physical or mental incapacity;
- suspension from duty;
- a professional duty of confidence;
- mandatory disclosure or reporting of information (including disclosure of whether criminal record check conducted, convictions, injury or illness);
- notification to a professional body of disciplinary action against an employee;
- restrictions on employees doing other work;
- regulating a person's name, private sexual behaviour, sexual orientation or gender identification;
- surveillance of persons for any purpose (such as closed-circuit television (CCTV)).

Information privacy

In the specific context of information privacy you will need to consider **section 13** when assessing a policy or a program where it:

- involves or authorises surveillance or other monitoring where recorded personal information is collected, accessed, used or disclosed;
- establishes or amends a public register;
- involves the collection of personal information, compulsorily or otherwise;
- envisages a new use for personal information that is already held;

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

Unlawful and arbitrary interference with family

In the context of the right to freedom from unlawful and arbitrary interference with a person's family, you will need to consider **section 13** in assessing a policy or a program where it:

- affects the ability to form and maintain close or enduring personal relationships;
- recognises or fails to give legal recognition to close or enduring personal relationships;
- provides for mandatory reporting of injuries or illnesses.

Unlawful and arbitrary interference with a person's home

It is not anticipated that Department of Education and Childhood Development policies or programs will interfere with a person's home.

If you think that your policy or program may engage or impact upon this aspect of the right to privacy and reputation, please contact the Conduct & Ethics Branch for further advice.

Unlawful and arbitrary interference with a person's correspondence

In the context of the right to freedom from unlawful and arbitrary interference with a person's correspondence, you will need to consider **section 13** in assessing a policy or a program where it:

- may involve the interception of postal articles or other communications;
- provides for the censorship of correspondence;
- monitors a person's personal emails;
- regulates websites that provide for communication between people.

Right to reputation

To comply with a person's right not to have his or her reputation unlawfully attacked, you will need to consider **section 13** when assessing a policy or a program where it deals with:

- termination of employment due to physical or mental incapacity;
- suspension from duty;
- mandatory disclosure or reporting of information (including disclosure of whether criminal record check conducted, convictions, injury or illness);
- notification to a professional body of disciplinary action against an employee.

DISCUSSION

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

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

The scope of each of these rights is discussed below.

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

The meaning of 'privacy'

'Privacy' has not been defined in international human rights law. Privacy is a difficult concept to define. Privacy is bound up with conceptions of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty – a 'private sphere' free from government intervention and from excessive unsolicited intervention by other individuals.

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

In practical terms 'privacy' is often categorised as:

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

The specific area of information privacy is currently regulated in a number of Victorian statutes including the *Information Privacy Act* and the *Health Records Act*.

In practice, information privacy will overlap with other aspects of privacy and the *Information Privacy Act* and the *Health Records Act* may apply whenever identifiable information is recorded or held.

The right to privacy under the Charter is broader than that which is protected under the Victorian information and health privacy laws. For instance, the right to privacy in the Charter will encompass activities that do not involve recorded information, such as ‘strip-searches’. As the categories illustrate, privacy issues can arise in a number of areas. For example, in addition to the disclosure of private information, privacy issues are likely to arise in the context of the interception of correspondence, telephone tapping, search warrants and medical treatment and medical examination without consent.

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

What is an ‘unlawful or arbitrary interference’ with privacy?

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

‘Unlawful’

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

This means:

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

‘Arbitrary’

An ‘arbitrary’ interference is not the same as an unlawful interference. An interference with privacy may be arbitrary even though it is lawful. The requirement that all interferences must not be arbitrary means that even interferences with privacy that are provided for by law or policy should occur in accordance with the provisions, aims and objectives of the Charter and should be reasonable in the particular circumstances.

‘Interference’

The Charter does not define what is meant by the term ‘interference’ and there is no general meaning for this term in international human rights law. An interference in the context of s.13 probably means a disturbance or an unwanted involvement.

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

Section 13 protects not only privacy, but also the family and home by providing a person with rights not to have his or her family or home unlawfully or arbitrarily interfered with. This right closely relates to s.17 of the Charter (protection of families and children).

The meaning of ‘family’ and ‘home’

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

In international human rights law, the term ‘family’ is given a broad interpretation and includes a range of types of family. For example, the UN Committee has said that family is not confined by marriage. A family may take various forms under this section and should be defined broadly. The question under s.13 of the Charter is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

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

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

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

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

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

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

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

‘Correspondence’

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

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

The Charter requires that a public authority must not unlawfully or arbitrarily interfere with a person’s correspondence. The purpose behind this requirement is to protect the confidentiality of correspondence. The meaning of the terms ‘unlawful’, ‘arbitrary’ and ‘interference’ are discussed above. You should consult this discussion to understand more about the scope of this right.

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

- checking, intercepting, censoring or stopping a person’s mail;
- preventing or monitoring correspondence between categories of people;
- tapping, bugging or metering a person’s telephone;
- placing a person under surveillance;

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

The right not to have your reputation unlawfully attacked

Section 13(b) provides a person with a right not to have his or her reputation unlawfully attacked. This provision was modelled on article 17(1) of the ICCPR. However, that instrument protects a person from unlawful attacks on a person’s ‘honour’ or ‘reputation’, whereas the Charter is confined to such attacks on a person’s reputation.

‘Reputation’

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

‘Unlawfully attacked’

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

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

Taking this approach, an unlawful attack for the purpose of s.13(b) would include a public attack involving untrue statements that are intended to harm the reputation of a person. The word ‘attack’ suggests something more than just comment on a person. Expressing an opinion about a person that does not involve untrue statements intended to harm the person’s reputation is unlikely to be sufficient to trigger consideration of this right.

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

REASONABLE LIMITS

The rights protected in s.13 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. However, you will need to examine any proposed policy or program carefully to ensure that it meets the requirements for a reasonable limitation under the Charter.

KEY POINTS TO REMEMBER

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

Privacy

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

Family and home

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

Correspondence

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

Reputation

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

MEASURES TO IMPROVE COMPLIANCE

Privacy

- Consider privacy issues early in the policy process to avoid and mitigate unintended potentially adverse impacts on privacy and to ensure appropriate safeguards are in place.
- When vetting a policy or program involving powers of investigating officers, you will need to consider whether a particular power breaches s.13. You need to ensure both that the authorising power is reasonable and that the power is exercised in a manner that is reasonable.
- For policy proposals that would require or authorise acts and practices that may be an interference with privacy or may adversely affect the privacy of an individual, consider legislative and non-legislative ways to avoid or mitigate adverse impacts upon privacy and encourage the early consideration and adoption of privacy-enhancing amendments or policy alterations.

- In relation to information privacy:
 - understand how the *Information Privacy Act* (Vic.) and the *Health Records Act* (Vic.) interact with the existing privacy laws and the Charter;
 - utilise checklists and other guidance prepared by the Office of the Victorian Privacy Commissioner and the Office of the Health Services Commissioner to help identify privacy concerns. Information is available by contacting those offices;
 - you may wish to consult directly with one of the specialist government bodies on privacy:
 - Office of the Victorian Privacy Commissioner;
 - Office of the Health Services Commissioner (if the policy or the legislation involves issues relating to health privacy);
 - consult the Department's information privacy policy or contact the Department's Privacy Officer.

Family and home

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

Correspondence

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

RELATED RIGHTS AND FREEDOMS

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

- freedom from discrimination (s.8);
- freedom of movement (s.12);
- freedom of thought, conscience, religion and belief (s.14);
- freedom of expression (s.15);
- freedom of assembly (s.16);
- protection of families and children (s.17);
- property rights (s.20);
- right to liberty and security (s.21);

Freedom of Thought, Conscience, Religion and Belief (S.14)

Section 14

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 14?

You will need to consider **section 14** if you are assessing a policy or a program where it:

- promotes a particular religion or set of beliefs;
- restricts or interferes with a particular religion or set of beliefs;
- regulates cultural or religious practices around the provision of secular public education;
- requires someone to disclose his or her religion or belief;
- affects an individual's ability to adhere to his or her religion or belief;
- impinges upon or disadvantages a person because of the person's opinions, thoughts or beliefs on a matter;
- attempts to regulate conduct that will affect some aspect of a person's worship, observance, practice or teaching of his or her religion or belief;
- places an individual in a position where he or she must choose between demonstrating a belief or participating in society;
- prohibits or limits a person's capacity to teach his or her religion or to attempt to convince others by appropriate means to change their religion;
- requires certain types of conduct that may conflict with a person's religion or beliefs;
- compels certain acts that may be inconsistent with a religion or set of beliefs;
- sets dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress;
- requires school children to learn about particular religions or beliefs or to be taught materials that might have the effect of undermining their religious beliefs.

DISCUSSION

Section 14 protects a number of rights with respect to freedom of thought, conscience, religion and belief. It protects not only a right to entertain ideas or hold positions of conscience and religious and other beliefs (including the right not to have religious beliefs), but also a right to demonstrate one's religion or belief, whether individually or collectively, whether in private or public, and whether through worship, observance, practice and teaching. Note that the right to demonstrate only extends to a person's religion or belief and does not extend to all matters of thought and conscience.

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

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

In international human rights law the right to freedom of thought, conscience, religion and belief has been interpreted broadly to include 'freedom of thought on all matters, personal conviction and the commitment to religion or belief'. The Charter does not define what is meant by 'thought', 'conscience' and 'religion and belief'.

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

'Conscience': The notion of 'conscience' is often bound up with religious belief, but international human rights law suggests that the term requires that there be some philosophical basis for a belief to amount to 'conscience'. An example of the application of this freedom in Canada involved the Correction Service of Canada being ordered to provide a vegetarian diet to accommodate an inmate's non-religious conscientious beliefs. Note though that the right to freedom of thought and conscience does not imply the right to refuse all legal obligations imposed by law, such as paying taxes, nor does it provide immunity from criminal liability for every such refusal.

'Religion': The UN Human Rights Committee has not defined religion. It has only said that 'religion' should be interpreted broadly to include 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.' This suggests that 'religion' does not just refer to traditional institutional religions but also to new religions. In other contexts, the High Court of Australia has also adopted a broad interpretation of the notion of religion. Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a religion, you should contact the Conduct and Ethics branch.

‘Belief’: The ICCPR provides that the right to ‘freedom of thought, conscience and religion’ includes a freedom to adopt a religion or belief of one’s choice and a freedom to demonstrate religion or belief in worship, observance, practice and teaching. The implication is that ‘belief’ is an aspect of ‘thought, conscience and religion.’ The UN Human Rights Committee has not defined what is meant by ‘belief’. It has, however, made clear that the right to freedom of thought, conscience and religion encompasses a broad range of beliefs including religious and non-religious beliefs, such as atheism, agnosticism, and scepticism about religious matters.

Scope of these rights

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

- It protects the right to *have* a religion or belief of one’s choice. This is closely linked to the right to freedom of thought and conscience.
- It protects the right to *adopt* a religion or belief of one’s choice. This means that people have the right to change their religion or belief, including a right to leave their religion or convert to another religion.
- It protects freedom *from* religion or certain beliefs. This means that the government cannot be seen to impose religion or take sides in matters of religion or belief.
- It protects the right to demonstrate one’s religion or belief, whether individually or in community with others, whether in public or private. This right is discussed further below.

Positive or negative obligation?

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

These circumstances may include, for example:

- the publication of offensive portrayals of religious worship;
- where private individuals instigate a campaign of harassment against a church or religious group;
- showing a film ending with a violent denunciation of a particular religious group; and
- any of the above in relation to a person’s belief (which may be non-religious).

Right to demonstrate religion or belief

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

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

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

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

'Observance'

The UN Human Rights Committee has provided guidance on the meaning of 'observance'. Observance includes:

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

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

'Practice or teaching'

The expression 'practice or teaching' is likely to include acts covered by the concept of observance but may also include acts by religious groups integral to the conduct of their basic affairs, such as choosing religious leaders and teachers, establishing religious schools, and preparing religious texts and publications.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights in s.14 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. However, it may be more difficult than usual to justify reasonable limitations on some of the rights in s.14 as they are regarded as absolute rights in international human rights law. An absolute right is one that in international human rights law must be respected at all times and cannot be limited.

Among the rights protected in s.14, limitations have only been accepted in international human rights law on the right to demonstrate religion and belief. They have not been accepted in relation to the right to have, and to adopt, a religion of one's choice or to hold opinions without interference. Limitations on the right to demonstrate religion and belief have been justified by reference to public health, public safety and the protection of the rights of others. Some examples that have arisen in international cases of reasonable limitations on the right to demonstrate one's religion or belief are:

- A Sikh man was dismissed from his job with a Canadian state railway company after refusing to wear safety headgear. He argued that the dismissal violated his right to demonstrate his religion by wearing a turban. The Canadian Government successfully maintained that the restriction on his freedom to demonstrate his religion was a justified measure for public health safety.
- In certain contexts, limits on the rights of teachers or students to wear religious apparel or symbols in state schools has been upheld (*Dahlab v. Switzerland* (2001) v. Eur Court HR 447 (ser A). See also *Leyla Sahin v. Turkey*, Application No. 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005) which also involved the issue of whether a prohibition on wearing the hijab violated the right to manifest one's religion.) but in other contexts such restrictions have been said to be a violation of religious freedom. Any restrictions in Victoria on religious apparel in government schools would need to be justified under s.7.

If you think your policy or program may limit the rights protected in s.14, it is important that you examine the specific circumstances when applying s.7 to determine if the limitation is reasonable.

KEY POINTS TO REMEMBER

- Section 14 protects:
 - the right to hold certain thoughts, positions of conscience and religious and other beliefs;
 - the right not to have religious or other beliefs;
 - the right to change religious and other beliefs; and
 - the right to demonstrate one's religion or belief, whether individually or collectively, whether in private or public or whether through worship, observance, practice and teaching.
- This section has a broad scope. 'Thought' includes political, philosophical and social thought. 'Conscience' refers to beliefs with some philosophical basis.
- The expressions 'religion' and 'belief' should be interpreted broadly to include theistic, non-theistic and atheistic beliefs.
- A public authority may be obliged in some circumstances to intervene to protect these rights. Examples of when this may be required are discussed above.

- The right to demonstrate one's religion or belief relates only to religion and belief and does not extend to thoughts or conscience. It means that a public authority must not prevent a person from demonstrating his or her religion or belief either alone or with others, either in private or in public.
- The scope of the right to demonstrate one's religion or belief is broad. It applies to a range of acts including observance, worship, practice and teaching. These terms are not defined in the Charter although guidance is provided above on what they mean in the international sphere.
- The rights protected by s.14 may be limited in accordance with s.7. However, note that in international human rights law, limitations have only been permitted in respect of the right to demonstrate one's religion and belief. It may be more difficult than usual to justify a limitation on the other rights protected in s.14.
- You may be required to balance the right in s.14 with the right in s.15 (freedom of expression) since the effect of a particular method of opposing or denying religious beliefs through speech may violate the right protected in s.14.

MEASURES TO IMPROVE COMPLIANCE

- Develop links with religious leaders of communities and consider whether certain staff might benefit from information sessions about the teachings and practices of religious groups.
- Examine dress codes (for example, in manuals, guidelines or school rules) to ensure that they accommodate religious beliefs;
- Scrutinise policy and programs to ensure that they do not interfere with the rights of people to:
 - attend worship;
 - have access to religious leaders in a confidential setting;
 - be given food that complies with their religious requirements or other beliefs (and also the need for variation, nutrition and quantity);
 - be allowed to wear clothing that complies with their religion and to maintain a personal appearance (for example, beard or dreadlocks) that complies with their religion.

This right is particularly relevant in contexts where a public authority exercises a high degree of control over individuals, for example, with respect to prisoners, public authority employees and people in state care.

- Where curriculum in government schools requires that students are taught about religions, care should be taken to ensure that a diverse range of religions are taught and that the style of teaching is neutral rather than proselytising. Consideration should be given to whether students should be allowed to not attend these classes if attending would conflict with their religious beliefs.

RELATED RIGHTS AND FREEDOMS

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

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

Freedom of Expression (S.15)

Section 15

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 15?

You will need to consider **section 15** in assessing a policy or a program where it:

- regulates what anyone can say, write or communicate through their art or actions (for example, regulates the contents of any speech, publication, broadcast, display or promotion; regulates offensive speech);
- regulates the format of any expression (for example, restricts political leaflets to black-and-white printing);
- regulates the time, place or manner of any form of expression (for example, regulates the number of people who can participate in a street march; prohibits 'busking' in particular areas; restricts protesters' access to particular places);
- restricts or censors media coverage;
- requires particular material to be reviewed or approved before it is published;
- compels someone to express information;

- compels someone to participate in an Australian citizenship or flag raising ceremony;
- regulates or restricts an individual's access to information (including access to material on the internet);
- penalises or disadvantages any person on the basis of their opinions;
- imposes a dress code (for example, a dress code that prohibits staff from wearing t-shirts with 'political messages' will engage this right);
- regulates cultural or religious practices around the provision of secular public education.

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

- picketing and protesting;
- censorship and classification;
- public servants expressing political opinions;
- busking;
- public disorderly conduct.

DISCUSSION

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

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

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

The right to hold an opinion without interference

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

An example of an activity that interferes with the right to hold an opinion without interference would be 'brainwashing' by a public authority; that is, compelling or coercing a person to change his or her opinion or adopt a particular belief. For this right to be interfered with, a person's opinion must be somehow involuntarily influenced. It would not appear to be sufficient merely to seek to influence opinion. A provision that penalises or disadvantages a person on the basis of his or her opinion may interfere with this right.

The right to freedom of expression

What expression?

Section 15 protects a right to freedom of political, artistic and commercial expression in any medium. Examples of expression covered by this section are:

- written and oral communications;
- broadcasting, film and video;
- pictures;
- sign language;
- dress; and
- images.

You should note that the right to freedom of expression:

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

What is protected?

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

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

‘Seek and receive’: An important manner in which the right to seek and receive information is realised is through legislation providing for freedom of information. However, s.15 does not create a right to freedom of information. An example of how s.15 may be interfered with is restrictions on student/employee access to school libraries or internet terminals in school libraries. There is no obligation to provide either under the Charter, but if they are provided there must be no restriction in relation to access that cannot be justified either under the special limitations to be found in s.15(3) or under the general limitation of s.7.

REASONABLE LIMITS

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

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

Note, though, that it may be difficult (though not impossible) to justify a limitation on the right to hold an opinion without interference (in s.15(1)) since this is an absolute right in international human rights law. An absolute right is one that in international human rights law must be respected at all times and cannot be limited.

Section 15(3): specific limitation

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

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

All of the following conditions must be met for s.15(3) to be satisfied:

1. Is the restriction ‘lawful’?

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

2. What is the purpose of the restriction?

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

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

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

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

Public order: The term ‘public order’ may be defined as the sum of rules which ensure the peaceful and effective functioning of society. Common ‘public order’ limitations on the right to freedom of expression include prohibitions on speech that may incite crime, violence or mass panic.

Public morality: The UN Human Rights Committee has stated that there is no universally applicable common standard for what constitutes ‘public morality’. A restriction on obscene or pornographic material is an example of a restriction of free expression on the ground of public morality.

3. Is the restriction ‘reasonably necessary’?

As stated above, the restriction must be necessary for one of the prescribed purposes. This requirement is often referred to as one of ‘proportionality’. In other words, the law must be appropriate and adapted to achieving one of the ends or purposes enumerated in s.15(3).

This means that you must consider:

- whether the policy or program is effective to achieve one of the enumerated ends;
- whether it impinges on free expression more than is necessary to achieve that end given the seriousness of that end; and
- whether there are less restrictive means of achieving that end.

Examples of restrictions that may come within the scope of Section 15(3):

- restrictions on speech that incites racial violence and other violent conduct are likely to be lawful restrictions for the purpose of both respecting the rights and reputation of others and protecting public order.

Section 7: General limitation

It is possible that the right protected by s.15 may be limited even though none of the requirements of the specific limitation (s.15(3)) are present. The right to freedom of expression may be restricted by a policy or program that meets the requirements of the general limitation under s. 7 of the Charter, even though it does not meet the particular requirements of the specific limitation under s.15(3).

KEY POINTS TO REMEMBER

- The Charter establishes a right for all persons in Victoria to hold an opinion without inference and to express themselves by seeking, receiving and imparting both information and 'ideas of all kinds'.
- Expression may occur orally, in writing, in print, by way of art or in another medium (for example sign language).
- The right to freedom of expression applies to information and ideas sought, received and imparted in and outside Victoria.
- As with all of the rights in the Charter, freedom of expression may be reasonably limited. In relation to s.15, limitations or restrictions on the right may be permissible either because they satisfy the specific requirements of s.15(3) or the general requirements of s.7. Both sections are central provisions that will need to be considered whenever the right to freedom of expression is raised.

MEASURES TO IMPROVE COMPLIANCE

- Examine whether your policy or program falls within any of the policy triggers listed above, that is, raises an issue under s.15 of the Charter.
- If yes, you should consider whether it is a justified limit or restriction on the rights protected by s.15.
- First, consider the nature of the harm that is being addressed. Does it fall within one of the following (s.15(3)) limitations:
 - the protection of the rights and reputation of other persons?
 - national security?
 - public order?
 - public health?
 - public morality?
- If so, consider:
 - Is the policy or program likely to be effective in addressing the harm?
 - Is the restriction limited to what is necessary to prevent the harm?
 - How serious is the harm or potential harm?
 - What is the extent of the restriction on freedom of expression?
 - Whose expression is restricted? Do they have realistic alternative avenues for communicating their message? Does the policy or program restrict more people than necessary?
 - What forms of expression are restricted? Does the policy or program restrict more forms than necessary? Are alternative avenues of communication open?
 - What subject matters of expression are restricted?

- Is some alternative form of regulation possible that would result in a lesser restriction of freedom of expression?
 - Consider whether in your case an option would be to impose conditions on that form of speech to make it acceptable, rather than banning that form of speech altogether.
- If not, consider whether it is a reasonable and demonstrably justified limitation pursuant to s.7.

RELATED RIGHTS AND FREEDOMS

The right to freedom of expression is very broad and intersects with a wide variety of rights. It is expected that policy officers will frequently be required to balance s.15 with other Charter rights, for example:

- right to freedom of thought, conscience, religion and belief, especially the right to manifest a person's religion or belief (s.14);
- right to peaceful assembly and freedom of association (s.16);
- right to take part in public life (s.18);
- cultural rights, especially the right of persons with a particular religious background to declare or practice their religion and the right to persons with a particular linguistic background to use their language (s.19);

Peaceful Assembly and Freedom of Association (S.16)

Section 16

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 16?

You will need to consider **section 16** if you are assessing a policy or a program that:

- limits the ability of a person or group of persons to exercise the right to peacefully protest (for example, regulating picketing in an employment setting, or regulating public demonstrations);
- limits the ability of a person or group of people to hold or participate in a public or private gathering or to come together for a common purpose (for example, restricting the areas where, or times at which, a demonstration, picket or public event can take place);
- treats people differently on the basis of their membership of a group or association;
- prohibits or creates disincentives for membership in a group or association;
- requires a person to disclose membership in a group or association;
- compels a person to belong to a professional body or workplace association;
- confers preferences on a person belonging to a group or association.

DISCUSSION

Section 16 provides for the two separate but related rights of freedom of peaceful assembly and freedom of association.

Right to peaceful assembly

The right to peaceful assembly protects the right of individuals and groups to meet in order to exchange ideas and information, to express their views publicly and to hold a peaceful protest.

The right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful. However, the right is not engaged when those who organise or participate in a demonstration have violent intentions that result in public disorder.

The right to peaceful assembly creates a positive duty. There is some international jurisprudence to support the view that this right requires public authorities to take reasonable and appropriate positive measures to ensure that the right can be exercised, for example, by setting up areas for people to assemble peacefully.

Right to freedom of association

When does it apply?

The right to freedom of association protects the right of all persons voluntarily to group together for a common goal and to form and join an association. It applies to all forms of associations including trade unions.

To what extent does the right to freedom of association encompass a right not to associate?

In international human rights law, association rights generally tend to have both a positive and a negative aspect; that is, you can't be stopped from joining and you can't be forced to join.

Another issue that may arise is the extent to which the right to associate applies to professional bodies. In international case law, a requirement for compulsory membership of a professional body has not generally violated this right, particularly if the association is responsible for professional regulation.

What is the scope of the right?

The scope of the right to freedom of association is unsettled in international human rights law, particularly the extent to which it protects the activities of the association. The United Nations Human Rights Committee has been divided on the issue. A majority of the Committee has taken the view that the equivalent ICCPR right (article 22) does not protect the right to strike. However, a strong dissent of the same committee said that 'the exercise of the right requires that some measure of concerted activities be allowed; otherwise it could not serve its purpose.'

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights to peaceful assembly and freedom of association may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter. For example, in respect of the right to peaceful assembly, public nuisance laws may impose reasonably justified limits on this right. Laws restricting a person's right to engage in a non-violent assembly that is likely to create public disorder may also be justified.

KEY POINTS TO REMEMBER

Right to peaceful assembly

- This right protects individuals and groups to meet for non-violent purposes.
- The right imposes both a positive and negative obligation on public authorities.
- The right applies to all gatherings for a peaceful purpose, even if unpopular or distasteful, but not to violent gatherings.

Right to freedom of association

- The right to freedom of association means that all persons have a right to voluntarily group together for a common goal.
- Forming and joining a trade union is one example of the application of this right.
- The right most likely also protects against the right *not* to associate with others.
- A requirement for compulsory membership of a professional body has not generally violated the right to freedom of association, particularly where the body is responsible for professional regulation.
- The scope of the right is unsettled in international human rights law, particularly the extent to which it protects the activities of the association.

MEASURES TO IMPROVE COMPLIANCE

Right to peaceful assembly

- If your policy or program restricts the right to peaceful assembly, ensure that any restrictions:
 - serve a legitimate interest;
 - are no more than what is necessary to protect that interest; and
 - clearly contemplate the person's right to continue to assemble peacefully where possible.
- It is advisable that you state the reasons for any restrictions in your policy or program.

Right to freedom of association

- Although professional associations may be exempt from the right to freedom of association (and the negative aspect of the right – the right not to join an association), if you are establishing a framework supporting a new professional body or association, consider whether it is appropriate to creating exemptions for people who do not wish to be members of that particular organisation or association.
- Ask yourself:
 - is membership required in order to achieve the objectives of the policy?
 - is the criteria for allowing an exemption practicable?
 - will those persons obtaining exemption be significantly disadvantaged by not being a member of the organisation?

- If you are developing a policy that offers inducements to persons who associate with certain bodies, ensure that the inducements are not so great as to effectively compel persons to join that body. If the same benefits are obtainable elsewhere, the inducements would probably fall out of this category and an issue under section 16 would be unlikely to be raised.

RELATED RIGHTS AND FREEDOMS

These rights are closely related to the following additional rights protected in the Charter:

- right to freedom of expression (s.15);
- right to freedom of thought, conscience, religion and belief (s.14);
- right to freedom of movement (s.12).

Protection of Families and Children (S.17)

Section 17

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 17?

You will need to consider **section 17** in assessing a policy or a program where it:

- affects the ability to form and maintain close or enduring relationships;
- affects or draws distinctions between children with or groups of children based on one or more of the attributes in the *Equal Opportunity Act 1995*;
- recognises or fails to give legal recognition to close or enduring personal relationships;
- affects the welfare of children within the family or in the care of public authorities;
- regulates the obligations of parents or guardians towards children.

DISCUSSION

Section 17 provides for protection of families and children.

Section 17(1): Protection of families

Meaning of 'family'

In international human rights law, 'family' is interpreted broadly, and includes a range of types of family. The question is likely to be whether there are sufficiently close and permanent personal relationships to constitute a family.

Scope

The Charter provides that families are to be protected by society and the state. This provision is related to the right to privacy in s.13 which prohibits (among other things) a public authority from unlawfully or arbitrarily interfering with a person's family.

The UN Human Rights Committee has interpreted the equivalent ICCPR provision to require countries to adopt legislative, administrative and other measures to protect families. In other words, protection refers at least to legal protection but may also extend beyond this to other forms of protection.

This right has arisen in a number of contexts including:

- not-for-resuscitation orders;
- removal of children from a family unit;
- incarceration of parents;
- residency and family unity.

Section 17(2): Protection of children

Meaning of ‘children’

Section 17(2) recognises that children are entitled to special protection. It is premised on the recognition of children’s vulnerability because of their age. A child is defined in s.3 as being a person under 18 years of age.

Under the Charter, children are entitled to the enjoyment of all of the rights, as human beings (except where there is an eligibility criterion that they do not satisfy, for example the right to vote, under s.18(2)).

Section 17(2) is one of a few provisions in the Charter that grant special rights to children as opposed to children and adults generally. The Charter also confers special rights on children in ss.23 and 25(3).

Scope

The UN Human Rights Committee has interpreted the equivalent ICCPR provision (article 24) to require countries to adopt special measures to protect children, including ‘every possible measure ... to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognised in the Covenant.’

In other words, public authorities should first seek to ensure that children’s human rights outlined in the Charter are protected. This may require consideration of social or economic circumstances.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s.17 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter.

There are a number of legitimate interventions in families presently provided for in legislation; for example, laws protecting women from domestic violence or protecting against child abuse. These forms of family intervention may impose reasonable limits on the rights in s.17 in accordance with the requirements of s.7. The specific policy or program will nonetheless need to be vetted for compliance with the Charter under this Implementation Guide.

KEY POINTS TO REMEMBER

- Section 17 provides for protection of families and children.
- In international human rights law, 'family' is given a broad interpretation and includes a range of types of family.
- The scope of what is meant by 'protection' is unclear.
- The Charter recognises that children are entitled to special protection because of their vulnerability as minors. As human beings, they are also entitled to the enjoyment of all of the other human rights in the Charter unless they do not meet an eligibility criterion.
- Under s.17(2), public authorities should seek to ensure that all of the human rights in the Charter are protected for children. This should be done without discrimination.
- Section 17 is subject to general limitations imposed under s.7.

MEASURES TO IMPROVE COMPLIANCE

- Where the policy or program involves children, consider whether it adequately takes into account the best interests of the child as a paramount consideration.
- Where the policy or program provides for children to be subject to differential treatment compared to adults, examine the purpose of the provision. Ensure that the provisions are to protect the child and do not interfere with children's rights under the Charter.
- Ensure that processes that will have a significant impact on children and families are fair and transparent and that there is scope within the processes for a child's interests to be represented.

RELATED RIGHTS AND FREEDOMS

Section 17 is related to the right to recognition and equality before the law in s.8. You should consult s.8, which prohibits discrimination and protects the right to equal treatment, if an issue is raised under s.17.

Section 17 is also closely related to the right to privacy and reputation in s.13. You should consult s.13, which prohibits arbitrary and unlawful interferences with the family, if an issue is raised under s.17.

More generally, the rights under s.17 are closely related to the following additional rights protected in the Charter:

- right to protection from torture, and cruel, inhuman or degrading treatment (s.10);
- right to liberty and security (s.21);
- right to humane treatment when deprived of liberty (s.22).

Taking Part in Public Life (S.18)

Section 18

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 18?

You will need to consider **section 18** in assessing a policy or a program where it:

- regulates access to employment in the public service or appointment to public office;
- establishes requirements for membership of public bodies;
- regulates the suspension and removal of statutory office holders.

DISCUSSION

Section 18 protects the following rights:

- the right to participate in public affairs directly or through a representative;
- the right to vote in genuine, periodic and free elections; and
- the right to have access to the public service and public office.

Who does section 18 apply to?

The right to participate in public affairs applies to all people in Victoria. By contrast, the right to vote and to access the public service and public office are restricted to only 'eligible' persons, that is, those who Victorian legislation determines are eligible to vote, to stand for public office and/or for employment in the public service (determined by the *Public Administration Act 2004* (Vic)).

Section 18(1): Right to participate in public affairs

This section provides that every person in Victoria has the right to participate in public affairs. This right is subject to reasonable limitations under s.7.

Concept of 'public affairs'

The expression 'public affairs' is a broad concept, which embraces the exercise of governmental power by all arms of government at all levels. It is not limited to legislative processes but includes participation in non-government organisations and public debate. For example, it will include the formulation of policies regarding disability discrimination through to a local council's decision regarding the frequency of rubbish collection.

Examples of direct participation considered by the UN Human Rights Committee are:

- exerting influence through public debate and dialogue with elected representatives;
- exercising power as members of Parliament or by holding executive office;
- voting in an election or a referendum to change a Constitution;
- taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community;
- taking part in bodies established to represent citizens in consultation with government.

Indirect participation occurs where people elect a body to represent them. In this case, the UN Human Rights Committee has considered that bodies elected by the people must in fact exercise governmental power; the elected body cannot be a mere advisory body with no legally enforceable powers. The Westminster-style system of government found in Victoria falls within this understanding.

It is important to note that the right to participate in the conduct of public affairs does not provide a right to a specific outcome from such participation. It requires each person to be given the opportunity, without discrimination, to exercise the right. This may require a public authority to take positive measures to enable a person to exercise this right.

For this reason it is recommended that policy officers consider:

- whether there are any impediments to the exercise of the right to participate in public affairs by persons in Victoria;
- if there are impediments, how might these be overcome?

For example, a non-English speaker may face an impediment to his or her right to participate in public affairs if there is no relevant information translated in his or her native language or a language he or she could understand.

Section 18(2)(a): Right to vote and be elected

It is not anticipated that you will need to consider s.12 when assessing a Department of Education and Childhood Development policy or program. If you think that your policy or program may engage or impact upon the right to vote and be elected at periodic State and municipal elections, please contact the Conduct & Ethics Branch for further advice.

Section 18(2)(b): Right to have access to the Victorian public service and public office

The Charter provides that eligible persons have a right to have access to the Victorian public service and public office. Note also that the Charter amends s.8 of the *Public Administration Act 2004* (Vic.) (in the consequential amendments) by inserting human rights into the public service values.

Meaning of ‘public service’ and ‘public office’

The concepts of ‘public service’ and ‘public office’ are not defined in the Charter. The Public Administration Act defines ‘public service’ in the narrower sense of employees of the Crown. This definition of ‘public service’ applies to all references to that term in any Act, unless the contrary intention appears. This means that ‘public service’ in the Charter only covers the public service in the general sense of employees of the Crown, whereas ‘public office’ is intended to cover other office holders, such as the judiciary, members of Parliament and holders of office in other areas of state administration.

What does the right encompass?

In international human rights law, this right has been interpreted by the UN Human Rights Committee as providing a right of access, on general terms of equality, to positions in the public service and in public office.

The UN Human Rights Committee has said:

‘... affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures.’

To ensure compliance with this right, the criteria and processes for appointment, promotion, suspension and dismissal within the public service must be objective and reasonable, and non-discriminatory.

REASONABLE LIMITS

The rights protected in s.18 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter.

KEY POINTS TO REMEMBER

- Section 18 protects various rights of political participation.
- Conditions relating to the exercise of these rights should be based on reasonable, objective and non-discriminatory criteria.
- The right to participate in public affairs applies to all people in Victoria.
- The right to participate in public affairs may extend to participation in non-government organisations and public debate, but does not provide a right to a specific outcome from such participation.

- Eligible persons also have a right to access the public service and public office.
- The concepts of 'public service' and 'public office' together encompass the public service in the narrow sense of employees of the Crown as well as the executive, judiciary and legislature and other areas of state administration.
- The criteria and processes for appointment, promotion, suspension and dismissal in the public service and in public office ought to be objective and reasonable.

MEASURES TO IMPROVE COMPLIANCE

- When reviewing the eligibility requirements for the right to access the Victorian public service and public office, ensure that the criteria and processes for appointment, promotion, suspension and dismissal in the public service are objective, reasonable and non-discriminatory.
- Consider whether there are any impediments to the exercise of the right to participate in public affairs by persons in Victoria. If there are impediments, how might these be overcome? For example, are there physical or communication barriers preventing persons with financial hardship, disabilities, language barriers or different cultural backgrounds, from exercising these rights?
- If you are establishing criteria for the establishment of electoral boundaries, ensure that the criteria reflect the need for broad parliamentary representation.

RELATED RIGHTS AND FREEDOMS

If your policy or program raises an issue under section 18, you should check whether it also raises an issue under the right to recognition and equality before the law (s.8).

Cultural Rights (S19(1))

Section 19(1)

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 19(1)?

You will need to consider **section 19(1)** in assessing a policy or a program where it:

- limits the observance of any religious practices, regardless of the religion;
- restricts the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group;
- limits the ability of individuals to communicate in languages other than English;
- limits the ability of Aboriginal persons or members of an ethnic group to continue to take part in a cultural practice;
- results in an agreement with one indigenous group that interferes with the distinct cultural practices of another;
- prohibits the use of any particular language;
- imposes or coerces individuals to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire;
- compels someone to participate in Australian citizenship or flag raising ceremonies;
- prevents people using their language in community with others;
- restricts the provision of services or trade on religious holidays;
- regulates censorship;
- regulates cultural or religious practices around the provision of secular public education;
- makes provision for government information only in English;
- licenses or provides a restriction on the preparation and serving of food.

DISCUSSION

Section 19(1) confers certain cultural rights on individuals. It was modelled on article 27 of the ICCPR, which is directed towards 'ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.' However, unlike the ICCPR, section 19(1) does not apply only to 'minorities'. It applies to persons with a particular cultural, religious, racial or linguistic 'background', reflecting the wording of the *Multicultural Victoria Act 2011* (Vic). In other words, the cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected. Such persons may or may not be a member of a minority group, in the

sense of being in a group with numerically fewer members or members who are in a subordinate position compared with those in the rest of the community.

The rights protected by s.19(1) are distinct from, and in addition to, all other rights held by people as individuals in common with everyone else. They apply to all people physically present in Victoria – even if they are only in the State on a temporary basis.

Scope of the right

Section 19(1) is concerned with protecting a person from being denied the right to enjoy his or her culture, religion or language. A person may have been denied the right in this section if his or her enjoyment of a right is substantially restricted. This will require you to consider the extent of any interference with the right protected by s.19(1). You will first need to consider the meaning of ‘culture’, ‘religion’, ‘race’ and ‘language’.

‘Culture’

Culture manifests itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous people (discussed in relation to s.19(2)). In international human rights law, the UN Human Rights Committee has adopted a broad and flexible interpretation of the meaning of ‘culture’ so that in that context it has embraced the maintenance of traditional beliefs and practices (for example, the wearing of traditional dress), but it may also include those social and economic activities that are part of a group’s tradition; for example, it may include traditional activities such as fishing or hunting.

The UN Human Rights Committee considers that certain activities may be cultural even though they are undertaken for economic gain. However, in order for such activities to be cultural, they must be ‘an essential element in the culture of an ethnic community’.

‘Religion’

Section 19(1) protects the right of persons with a particular religious background to declare or practise their religion. Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a ‘religion’, you should consult Australian law on the subject (for example, Butterworths, *Halsbury’s Laws of Australia*, 21 Human Rights, 4 ‘Civil and Political Rights’ [81]; and *Church of New Faith v. Commissioner of Payroll Tax (Vic.)* (1983) 154 CLR 120) or contact the Conduct & Ethics Branch.

As mentioned above in the context of s.14 (freedom of thought, conscience, religion and belief), in Australia a broad interpretation of what constitutes a ‘religion’ has been adopted by the High Court.

The right of persons with a particular religious background to declare and practise their religion will be subject to many of the same considerations as those set out in relation to s.14; however, the focus of s.14 is on the right of individuals *as individuals*

to practise their religion. By contrast, the focus of s.19(1) is on the right of the individual to practise their religion *in community with others*.

‘Race’

The term ‘race’ has a broad meaning which may include colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.

‘Language’

The right of an individual to use his or her language applies to all persons who wish to use their language in community with others. It is distinct from the right to freedom of expression.

Individual or collective rights?

An individual can exercise the rights in s.19(1) on his or her own. It would also be possible for an individual to exercise these rights together with other persons with the same background.

REASONABLE LIMITS

The rights protected in s.19(1) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter.

KEY POINTS TO REMEMBER

- Section 19(1) applies to persons with a particular cultural, religious, racial or linguistic ‘background’ who are physically present in Victoria. These persons may or may not be a member of a minority group.
- An individual can exercise the rights in s.19(1) on his or her own.
- A ‘denial’ of the rights in s.19(1) may occur by substantially restricting the enjoyment of the rights. Whether a ‘denial’ occurs is a matter of degree, requiring an assessment of the magnitude of the interference.
- **Culture:** The term ‘culture’ has a broad and flexible interpretation in international human rights law. It may manifest itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous people.
- **Religion:** Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a religion, you should consult Australian law on the subject or contact Conduct and Ethics.
- **Race:** The term ‘race’ has a broad meaning which may include colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.
- **Language:** The right of an individual to use his or her language applies to all persons who wish to use their language in community with others. It is distinct from the right to freedom of expression.

MEASURES TO IMPROVE COMPLIANCE

- Consult with these groups about what aspects of policies or programs they might regard to be an interference with those cultural practices and traditions.
- Take steps towards fostering positive relations with communities to develop a good understanding and knowledge of the practices, cultural traditions and observances of cultural, religious, racial and language groups.

RELATED RIGHTS AND FREEDOMS

When considering s.19(1) you should also consider the following rights under the Charter:

- right to recognition and equality before the law (s.8);
- right to freedom of thought, conscience, religion and belief (s.14);
- right to freedom of expression (s.15);
- cultural rights of Aboriginal persons (s.19(2)).

Distinct Cultural Rights of Aboriginal Persons (S.19(2))

Section 19(2)

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

- (a) to enjoy their identity and culture; and**
- (b) to maintain and use their language; and**
- (c) to maintain their kinship ties; and**
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.**

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 19(2)?

You will need to consider **section 19(2)** if you are assessing a policy or a program which:

- limits the ability of Aboriginal persons to continue to take part in cultural practices;
- imposes or coerces Aboriginal persons to do something that interferes with their culture;
- limits the ability of Aboriginal persons to communicate in languages other than English;
- may interfere with the relationship between Aboriginal persons and land, water and resources;
- concerns the protection of Aboriginal cultural heritage in Victoria, including Aboriginal human remains and secret or sacred objects.

DISCUSSION

The distinct rights of Aboriginal persons in Victoria have been set out in s.19(2) of the Charter. These rights are primarily based on article 27 of the ICCPR and decisions of the UN Human Rights Committee to extend article 27 to protect the cultural rights of indigenous peoples.

The preamble to the Charter provides a context in which to consider the specific rights of Aboriginal persons in relation to identity, culture, language, kinship and relationship to traditional lands and waters. The Preamble provides that the Charter is founded on a principle that 'human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.

Under s.19(2), four rights are recognised:

- right to enjoy identity and culture;
- right to maintain and use language;
- right to maintain kinship ties; and
- right to maintain a distinctive spiritual, material and economic relationship with the land and waters and other resources with which there is a connection under traditional laws and customs.

Spiritual, material and economic relationship with land, waters and other resources

Section 19(2)(d) was based on article 25 of the *United Nations Draft Declaration on Indigenous Rights*, which reads:

‘Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.’

This right under s.19(2)(d) should be taken into account in the context of the protection of Aboriginal cultural heritage in Victoria. It should be taken into account if a law or a policy restricts access to a place of spiritual significance for Aboriginal people or prevents or limits traditional practices on that land. It also requires consideration of restrictions on traditional Aboriginal practices that bring material benefit for that community, for example hunting or fishing. This aspect of s.19(2) may interact with the law on native title in Australia.

Individual or collective rights?

Section 19(2) states that ‘Aboriginal persons... must not be denied the right, *with other members of their community*...’. [emphasis added]. The inclusion of the phrase ‘with other members of their community’ raises the issue of the nature of the rights protected by s.19(2): are they individual rights or collective rights?

As in the case of s.19(1), the rights conferred by s.19(2) are conferred on individuals, not on a community. Nonetheless, sometimes there can be tensions or clashes between the cultural rights of an individual and the interests of the group or community to which they belong.

Dardee Boorai

When considering Section 19(2) of the Charter of Human Rights, *Dardee Boorai*, the *Victorian Charter of Safety and Wellbeing for Aboriginal Children and Young People*, should also be taken into account.

Dardee Boorai sits under the Charter of Human Rights and is a statement of a shared commitment between the Aboriginal community and government. It affirms the strength and resilience of Victoria’s Aboriginal culture, communities and families. *Dardee Boorai* sets out shared values and principles and commits to improving outcomes for Victoria’s Aboriginal children and young people.

Similar to the Charter of Human Rights, the emphasis of *Dardee Boorai* is on getting things right at a policy and planning stage to ensure all relevant programs and policies are consistent with the *Dardee Boorai* Charter and its principles and outcomes.

REASONABLE LIMITS

The rights in s.19(2) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s.7 of the Charter.

KEY POINTS TO REMEMBER

- Section 19(2) recognises four distinct rights of Aboriginal persons in Victoria.
- The preamble to the Charter provides a context in which to consider those rights.
- Some positive measures of protection may be required to correct conditions that prevent or impair the enjoyment of the rights under s.19(2).
- Indigenous rights to culture often arise in the context of economic development.
- Consultation with Aboriginal communities is critical if you are considering a policy or program involving some aspect of the relationship of Aboriginal persons and their identity, culture, language, kinship ties, or their relationship with land, waters and other resources.

MEASURES TO IMPROVE COMPLIANCE

- Consult with appropriate representatives for Aboriginal communities about whether a program or policy may interfere with the rights under ss.19(1) and 19(2).
- Take steps to encourage effective participation of appropriate representatives of Aboriginal communities in policy formation of relevance to those communities.
- Consider formulating best practice guidelines and procedures to ensure protocols are followed in interactions between public officials and Aboriginal communities.
- Ensure public officials working with Aboriginal persons have training on culturally appropriate behaviour and adherence to protocols.
- In developing a policy or program, ensure it will not discriminate between different Aboriginal groups.

RELATED RIGHTS AND FREEDOMS

If you are examining s.19(2) you should also consider the right to culture in s.19(1).

Property Rights (S.20)

Section 20

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 20?

You will need to consider **section 20** in assessing 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;
- implements government control over its own property (for example, resumption of land);
- deprives a co-owner of property;
- creates a charge or mortgage on land;
- creates a charge or mortgage on personal property.

DISCUSSION

Section 20 establishes a right not to be deprived of property other than in accordance with law. It ensures that the institution of property is recognised and acknowledges that Victoria is a market economy that depends on the institution of private property. 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.

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.

What this right means

'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. 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.

This means:

- Where the common law or a 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 a 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. This Implementation Guide 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 or contact Conduct and Ethics if you need further advice.

‘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 the Measures to Improve Compliance below for ways to help ensure that these requirements are met.

REASONABLE LIMITS

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.

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

Right to Liberty And Security of Person (S.21)

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 **section 21** in assessing 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;
- 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'
- allows a public authority to cordon an area and control movement within that area;
- deals with mandatory reporting.

DISCUSSION

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:

- right to liberty and the right not to be subjected to arbitrary arrest or detention;
- right to security;
- right to be informed of the reasons for arrest and any charges;
- right to be brought promptly before a court;
- right to be tried within a reasonable time or to be released from detention;
- right to be released pending trial, subject to certain guarantees;
- right to challenge the lawfulness of the detention;
- 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 some of these rights is outlined below.

Right to liberty

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. Any detention that is more than transitory will be covered under this section.

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 and 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.

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).

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.

The right to security applies to persons inside and outside detention. For example, it is likely to be invoked where the police fail to act on complaints of domestic violence or fail to act on death threats.

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. 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.'

Some guidance may be found in the commentary in this Implementation Guide on the positive obligation of a public authority to safeguard the right to life (s.9). 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.'

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.'

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.

REASONABLE LIMITS

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.

KEY POINTS TO REMEMBER

- The right to liberty applies to all forms of detention
- The right to security applies to persons 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.
- A person who has been arrested or detained has the right to challenge the lawfulness of his or her detention in court, without delay.

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.

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).

Humane Treatment when Deprived of Liberty (S.22)

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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 22?

You will need to consider **section 22** in assessing a policy or a program particularly where it:

- enables a public or private authority to detain individuals;
- relates to the conditions under which an individual may be detained;
- provides for students to be restricted/restrained or provides circumstances in which it is considered necessary to keep students in a confined area for a particular purpose.

DISCUSSION

Section 22 requires a public authority to treat all persons in detention with humanity and dignity. 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.

Section 22 (1): Right to humane treatment

The right to humane treatment when deprived of liberty is a universally accepted 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.

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 (adult or child) detained elsewhere under the laws and authority of the government.

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. The UN Human Rights Committee has emphasised persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment (for example, a person's freedom of movement, elements of freedom of expression and elements of privacy).

Individuals who are detained must be provided with services that will satisfy their essential needs. In considering whether 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.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected 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 have not been considered a justification for inhumane treatment.

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.
- 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.

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.

These instruments are all available on the Internet.

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.

RELATED RIGHTS AND FREEDOMS

Situations that engage s.22 may also raise issues in relation to the following rights in 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);
- right to life (s.9); and
- protection of families and children (s.17).

Children in the Criminal Process (S.23)

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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 23?

It is not anticipated that you will need to consider **section 23** when assessing a Department of Education and Early Childhood Development policy or program.

If you think that your policy or program may engage or impact upon this right, please contact the Conduct & Ethics Branch for further advice.

Fair Hearing (S.24)

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 **section 24** if you are assessing a policy or a program where it:

- 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);
- reverses the onus of proof of a matter;
- amends the way in which evidence is presented in a court or tribunal;
- 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 appointment, including term of appointment, remuneration or removal of judges or tribunal members from office;
- 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 to all stages of both civil and criminal proceedings, and in courts and tribunals.

It is anticipated that this section will apply to professional regulatory bodies established by statute, such as the Victorian Institute of Teaching.

It is anticipated that this section may also be found to apply to employer disciplinary procedures in relation to allegations of employee misconduct or unsatisfactory performance (such as the Merit Protections Boards and Disciplinary Appeals Board). Based on early judicial approaches, it is likely that such a board, when conducting hearings, would be considered to be functioning as a tribunal for the purposes of s.24, and the right to a fair hearing would apply.

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 balancing of a number of public interest factors including the rights of all parties (in civil proceedings) or of the accused and the victim (in criminal proceedings).

The elements of the right to a fair hearing 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.

The content of the right to a fair hearing may include a right to an oral hearing unless there are circumstances justifying otherwise. 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.

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. 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. Thus, 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.

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. 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.

Pre-trial decisions made by public authorities and prosecutors (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.

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).

REASONABLE LIMITS

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 free and democratic society in accordance with s.7 of the Charter. You should refer to Part 4 of this Implementation Guide for further information on s.7.

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 and professional regulatory bodies such as VIT). It is concerned with procedural fairness rather than with the merits of a decision of a court or tribunal.
- The right to a fair and public hearing may apply to employer disciplinary proceedings in relation to employee misconduct and unsatisfactory performance (such as the Merit Protections Boards and Disciplinary Appeals Board when conducting hearings).
- 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.
- 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 assessing a policy or a program that raises an issue of consistency with the rights under s.24:

- Consider whether the policy or program 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 at risk independence or impartiality.
- 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 or program raises an issue with respect to the right to a fair hearing under s.24 you should also check whether it engages the right to freedom of expression (s.15).

Rights in Criminal Proceedings (S.25)

Section 25

- (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.**
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—**
 - (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and**
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and**
 - (c) to be tried without unreasonable delay; and**
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and**
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and**
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978; and**
 - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and 18 Part 2—Human Rights Charter of Human Rights and Responsibilities Act 2006 No. 43 of 2006**
 - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and**
 - (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and**
 - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and**
 - (k) not to be compelled to testify against himself or herself or to confess guilt.**

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

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25?

It is not anticipated that you will need to consider **section 25** when assessing a Department of Education and Early Childhood Development policy or program.

Right Not to be Tried or Punished More Than Once (S.26)

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.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 26?

Section 26 applies in respect of criminal offences and not civil trials that may result in a form of civil liability. It is not contemplated that disciplinary penalties and sanctions (including eligibility to be employed as a teacher; and dismissal, suspension and termination of employment) will form a punishment for the purposes of this right.

It is not anticipated that you will need to consider **Section 26** when assessing a Department of Education and Early Childhood Development policy or program.

Retrospective Criminal Laws (S.27)

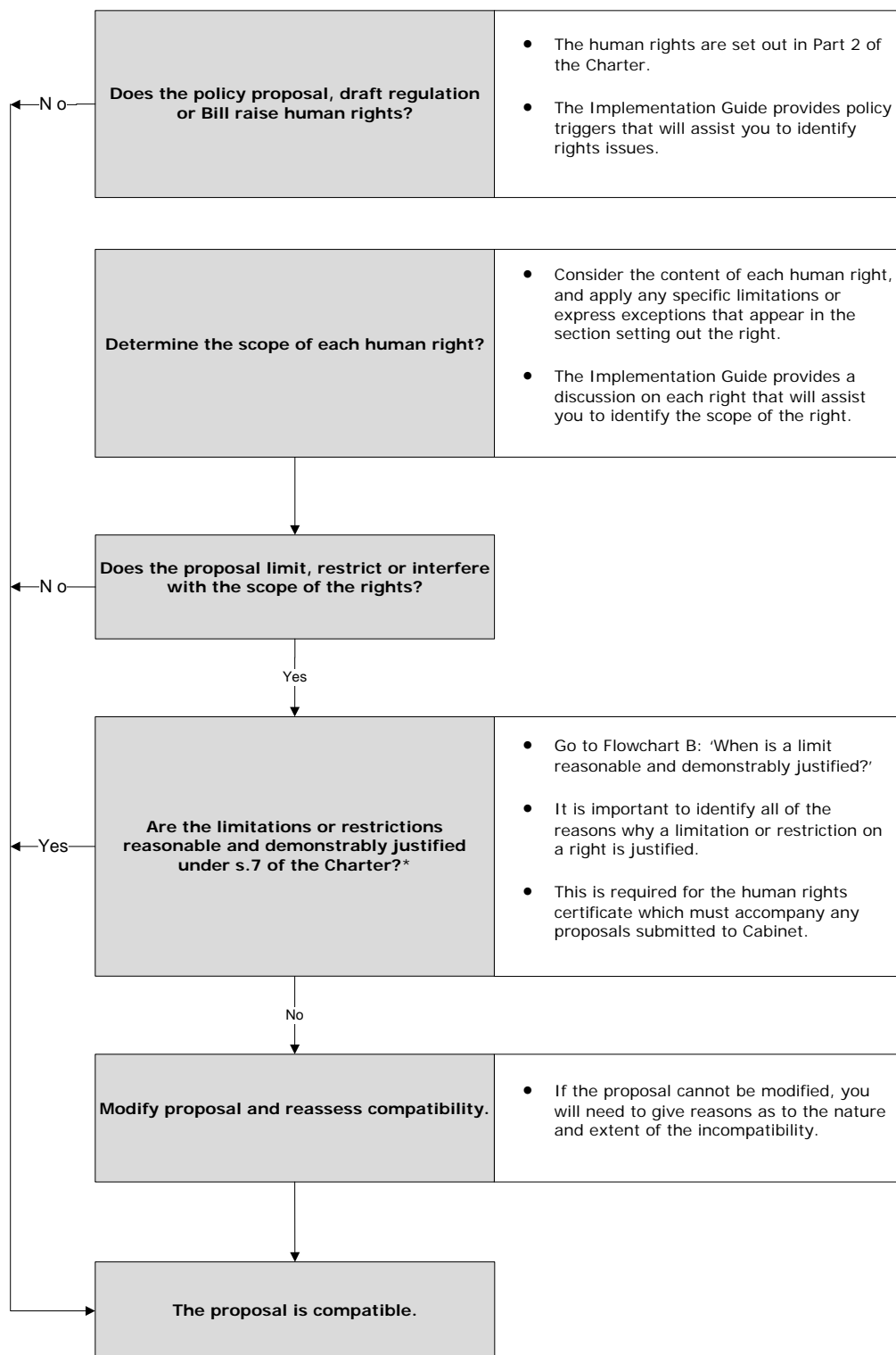
Section 27

- (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.
- (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.
19 Part 2—Human Rights Charter of Human Rights and Responsibilities Act 2006 No. 43 of 2006
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

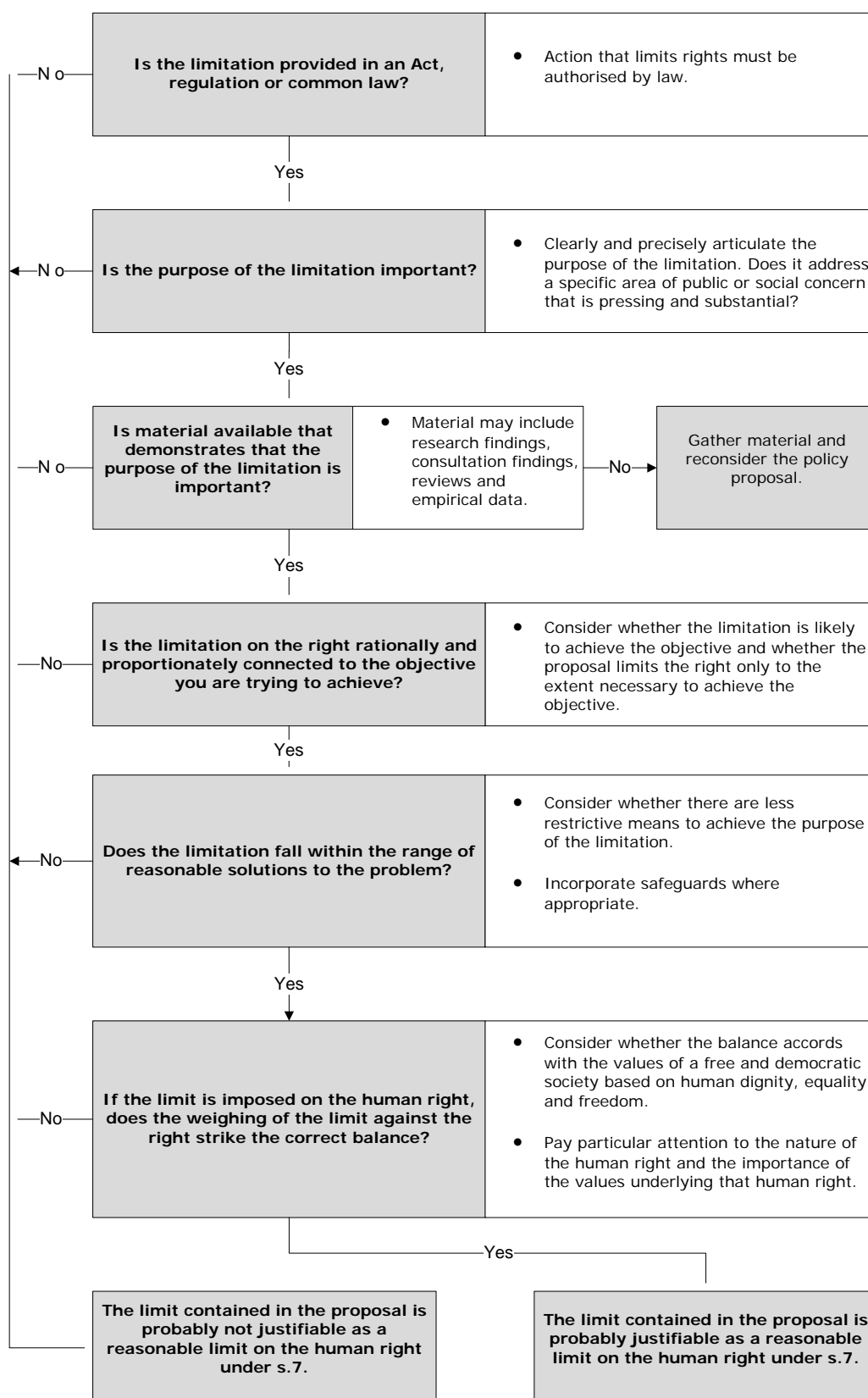
POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 27?

It is not anticipated that you will need to consider **section 27** when assessing a Department of Education and Early Childhood Development policy or program.

APPENDIX A - FLOWCHART A - HUMAN RIGHTS IMPACT ASSESSMENT



APPENDIX B – FLOWCHART B - WHEN IS A LIMITATION REASONABLE AND DEMONSTRABLY JUSTIFIED?



APPENDIX C - HUMAN RIGHTS IMPACT ASSESSMENT TABLE

The below Human Rights Impact Assessment Table has been prepared for policy officers to use in examining policy proposals:

1. The first column is fixed and contains a list of the rights set out in the Charter.
2. The second column requires you to **identify** the passage(s) or part(s) of the policy that raise, limit, or have an impact on the right in the first column.
3. The third column requires you to analyse whether the relevant part of the policy is compatible with the right, given the scope of the right. It is in this column that you should identify if the policy **limits** the right, or restricts or interferes with its operation, and articulate the reasons why that limitation or restriction or degree of interference is reasonable (for example, because of the importance of the objective to be achieved through the policy). The criteria set out in s.7 of the Charter (discussed above in Step 3) will assist you in this task.
4. The fourth column requires you to identify whether or not you will discuss each issue in a Human Rights Certificate for Cabinet submissions for proposed statutory rules.

HUMAN RIGHT <i>Charter of Human Rights and Responsibilities Act 2006</i>	CLAUSE/PART WHICH IMPACTS UPON THE RIGHT	CONSIDERATION OF COMPATIBILITY - INCLUDING WHETHER CLAUSE/PART LIMITS, RESTRICTS OR INTERFERES WITH THE RIGHT AND REASONS WHY THAT LIMITATION, RESTRICTION OR DEGREE OF INTERFERENCE IS REASONABLE	DISCUSS IN HUMAN RIGHTS CERTIFICATE? (CABINET SUBMISSIONS)
8 Recognition and equality before the law			
9 Right to life			

HUMAN RIGHT <i>Charter of Human Rights and Responsibilities Act 2006</i>	CLAUSE/PART WHICH IMPACTS UPON THE RIGHT	CONSIDERATION OF COMPATIBILITY - INCLUDING WHETHER CLAUSE/PART LIMITS, RESTRICTS OR INTERFERES WITH THE RIGHT AND REASONS WHY THAT LIMITATION, RESTRICTION OR DEGREE OF INTERFERENCE IS REASONABLE	DISCUSS IN HUMAN RIGHTS CERTIFICATE? (CABINET SUBMISSIONS)
10 Protection from torture and cruel, inhuman or degrading treatment			
11 Freedom from forced work			
12 Freedom of movement			
13 Privacy and reputation			
14 Freedom of thought, conscience, religion and belief			
15 Freedom of expression			
16 Peaceful assembly and freedom of association			

HUMAN RIGHT <i>Charter of Human Rights and Responsibilities Act 2006</i>	CLAUSE/PART WHICH IMPACTS UPON THE RIGHT	CONSIDERATION OF COMPATIBILITY - INCLUDING WHETHER CLAUSE/PART LIMITS, RESTRICTS OR INTERFERES WITH THE RIGHT AND REASONS WHY THAT LIMITATION, RESTRICTION OR DEGREE OF INTERFERENCE IS REASONABLE	DISCUSS IN HUMAN RIGHTS CERTIFICATE? (CABINET SUBMISSIONS)
17 Protection of families and children			
18 Taking part in public life			
19 Cultural rights			
20 Property rights			
21 Right to liberty and security of person			
22 Humane treatment when deprived of liberty			
23 Children in the criminal			

HUMAN RIGHT <i>Charter of Human Rights and Responsibilities Act 2006</i>	CLAUSE/PART WHICH IMPACTS UPON THE RIGHT	CONSIDERATION OF COMPATIBILITY - INCLUDING WHETHER CLAUSE/PART LIMITS, RESTRICTS OR INTERFERES WITH THE RIGHT AND REASONS WHY THAT LIMITATION, RESTRICTION OR DEGREE OF INTERFERENCE IS REASONABLE	DISCUSS IN HUMAN RIGHTS CERTIFICATE? (CABINET SUBMISSIONS)
process			
24 Fair hearing			
25 Rights in criminal proceedings			
26 Right not to be tried or punished more than once			
27 Retrospective criminal laws			