Guide: Nature and scope of the protected human rights

Overview

The Human Rights Act 2019 (the Act) protects fundamental human rights that are recognised in international covenants including the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

While there are 23 sections that contain human rights, there are actually more than 23 rights. Some rights have multiple components and discrete rights within them. For example, section 15 of the Act has two rights – the right to recognition as a person before the law, and the right to equality (non-discrimination). There are other sections that operate in a similar way, such as the right to privacy and reputation and the protection of families and children.

This guide provides information about the nature and scope of the protected human rights, as well as policy triggers and case examples, to assist in the analysis of the way in which legislation impacts or limits a human right, and whether any limit might be reasonable and demonstrably justifiable under section 13 of the Act.

While the rights that appear in the Act are modelled on international rights from the above instruments, there are some important textual differences to be mindful of. The rights as they appear in the Act should therefore be read and interpreted in that context.

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1 The case examples provided in this guide are not intended to provide legal advice or be a comprehensive summary of a particular decision. They are intended only to draw out the key issues that may be relevant to the analysis. The best reference is to read individual cases in their entirety.
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Recognition and equality before the law

Section 15 | Articles 16 & 26 ICCPR

Nature of the right

This right is a stand-alone right that also permeates all human rights.

It encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

The right to recognition as a person before the law is both an absolute\(^2\) and non-derogable\(^3\) right at international law.

This right reflects the essence of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

Discrimination includes (but is not limited to) direct and indirect discrimination as defined in the Anti-Discrimination Act 1991 (for example on the basis of age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality). It may also be discrimination in a broader sense.

That part of the right that provides that a person is equal before the law and is entitled to the equal protection of the law without discrimination requires public entities, as well as courts and tribunals in undertaking certain functions, to treat people equally when applying the law and to not apply the law in a discriminatory or arbitrary way.

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

Internal limitation

The scope of this right is limited by subsection 15(5).

The right contains an express exception for measures that are taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination: such measures do not constitute discrimination.

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\(^2\) International human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms. Certain rights, however, are considered ‘absolute’ meaning they cannot be limited for any reason. Absolute rights cannot be suspended or restricted, even during a declared state of emergency.

\(^3\) Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a ‘state of emergency’ and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
Possible policy triggers

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

Case examples

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

- Laws that make provision for people who lack legal competence, for example children, may limit this right in a way that is reasonable and justifiable.
- A person who the law does not recognise has no way of enforcing the recognition of his or her other rights, including “to commence, defend and participate in legal proceedings and to be treated as a legal person in all other aspects of the operation and administration of the law’.
- Bell J at [123]: “The right is to the universal recognition of legal personality of the human being. It follows as a necessary incident of the humanity of every individual which it is the general function of human rights law to respect and protect. As said by Joseph et al, ‘if one’s humanity is not legally recognized, one will lose legal recognition of, and therefore be effectively denied, one’s other human rights” quoting Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004).

*Matsoukatidou v Yarra Ranges Council [2017] VSC 61*

- Two applicants, one with a disability, were self-represented at a hearing in the Magistrates’ Court in respect of offences against the Building Act 1993. Both applicants were fined.
- At the hearing of the appeal in the County Court, the applicants were again unrepresented and the appeal was struck out. The applicants sought judicial review of the judge’s orders (on the grounds of breach of natural justice and procedural fairness as well as unlawfulness under the Charter).
- The judge was found not to have applied the human rights protected by the Charter to the applicants, i.e. the right to equality before the law and the right to a fair hearing.
- The judge did not recognise the applicants as self-represented (one with a disability); appreciate there were two separate applications; explain the court procedure to the applicants; or explain to the applicants the central issue raised in their applications.
The County Court orders were set aside and the applications were remitted to be heard and determined by a different judge.

*Caserta v Director of Public Transport [2011] VCAT 98*

- The applicant sought a review of the decision of the Director of Transport refusing to grant him an application for driver accreditation for a commercial passenger vehicle.
- As part of the applicant’s job application to drive an airport shuttle bus, he was required to renew his license and obtain driver accreditation with the Department of Transport. To do this, the applicant was required to provide a certificate stating he had passed a prescribed visual acuteness test in accordance with the Transport (Passenger Vehicles) Regulations 2005 (the Regulations). However, the applicant failed the test and accordingly could not provide the certificate.
- The Director of Transport refused the applicant’s application on the grounds he had failed the prescribed test and was not sufficiently fit and healthy to attain accreditation.
- VCAT held that the Director of Transport did not act unlawfully under the Charter by failing to give proper consideration to the applicant’s right to enjoy human rights without discrimination, because the Director of Transport could not reasonably have acted differently or made a different decision because the relevant test was prescribed by the Act and the Regulations.

*Kuyken v Chief Commissioner of Police [2015] VSC 204*

- This proceeding concerned an allegation that the Chief Commissioner of Police had discriminated against Mr Kuyken in settling new grooming standards for Victoria Police.
- Mr Kuyken submitted that the interpretative obligation in s 32 of the Charter should affect the meaning of the relevant provision of the Police Regulation Act 1958 (PR Act) to take account of his right to protection from discrimination under the Charter.
- Garde J concluded that the relevant provision of the PR Act gave the Chief Commissioner power to set grooming standards that might otherwise be discriminatory, and that this was clearly the intention of Parliament. His Honour held that the interpretative obligation could not alter the meaning of the PR provision.

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

- In the first instance, the respondents had failed to make instalment order payments in respect of outstanding fines and so the fine order was quashed and the Magistrate ordered that they be imprisoned under section 160(1) of the Infringements Act 2006. The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.
- Both respondents had a disability. They applied for judicial review of the decision.
- The Court accepted the submissions that the Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law.

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

- The Supreme Court has found that the words ‘without discrimination’ in the right to equality before the law and equal protection of the law without discrimination and equal and effective
protection against discrimination ‘reinforce the objective, criterion-based and non-arbitrary nature’ of the decision-making process required.
Right to life

Section 16 | Article 6 ICCPR

Nature of the right

The right to life is a non-derogable right at international law.

The right imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life, including, for example effective criminal law and law enforcement provisions.

This protective obligation extends to requiring authorities to put in place measures that would protect an individual whose life is being put at risk by another’s criminal activity. However, an authority’s failure to perceive such a risk to an individual does not need to amount to gross negligence or wilful disregard of the right to protect life on the part of the law enforcement authority.

Another aspect of the positive obligation to protect life is a requirement that public authorities protect the lives of people in their care, including from harm they do to themselves. See Keenan v United Kingdom below.

The right may also require that the State supplements the substantive obligation by ensuring safeguards and mechanisms of review are in place for circumstances where it may appear that the substantive obligation has been breached (for example, through coronial review mechanisms).

Internal limitation

The scope of this right is limited by an internal limitation.

The right provides that a person has the right not be arbitrarily deprived of life.

Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

Possible policy triggers

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

Osman v United Kingdom (1998) VIII Eur Court HR 3124

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

Pentiacova v Moldova (Application 14462/03) ECHR 2005

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

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

- The UK Court of Appeal held that the policy of the National Health Service Primary Care Trust to fund a particular unlicensed drug treatment for early stage breast cancer only where ‘exceptional’ personal or clinical circumstances could be shown was irrational and unlawful. The court ordered the trust to reformulate its policy regarding the provision of the drug, but did not order it to be provided.

Keenan v United Kingdom (Application 27229/95) ECHR 2001

- Another aspect of the positive obligation to protect life is a requirement that public authorities protect the lives of people in their care, including from harm they do to themselves. The extent of this obligation will depend on:
  - the facts of the case;
  - the role of the authority in question; and
  - the level of knowledge which the authority could be reasonably expected to have.

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4 Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a 'state of emergency' and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
Protection from torture and cruel, inhuman or degrading treatment

Section 17 | Article 7 ICCPR

Nature of the right

The right to protection from torture and cruel, inhuman or degrading treatment is a non-derogable right at international law.

The right prohibits three distinct types of conduct: torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent.

The right imposes positive obligations on the State to adopt safeguards to ensure that torture, cruel, inhuman or degrading treatment or punishment does not occur (or at the very least that there are few or no opportunities for it to occur without detection).

Torture involves a very high degree of suffering that is intentionally inflicted. For an act to be torture under this right, the following elements are required. The act must: be intentional; inflict severe physical or mental pain or suffering; be for a prohibited purpose; and be inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity. The vulnerability of the victim, particularly where they are in detention and therefore powerless against the treatment or punishment, is also a factor to be considered.

Cruel and inhuman treatment also involves a high degree of suffering, though not necessarily intentionally inflicted. Degrading treatment is focused less on severity of suffering but on humiliation (which is a subjective test). In order for conduct to amount to cruel, inhuman or degrading treatment or punishment, it need not involve physical pain and can include acts that cause both physical and mental suffering. Treatment or punishment that humiliates or debases a person, causes fear, anguish or a sense of inferiority, or is capable of possibly breaking moral or physical resistance or driving a person to act against their will or conscience, can be cruel, inhuman or degrading.

Treatment has a wide meaning, including “behaving or dealing with someone in a certain way, giving medical care or attention or applying a process or substance to someone”. It “picks up a broad range of governmental and other action and decision-making towards people, consistently with the fundamental purpose of the right” (see the case of Kracke below).

Internal limitation

This right does not have an internal limit or qualification.

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5 Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a 'state of emergency' and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
Possible policy triggers

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

Case examples

**Kracke v Mental Health Review Board [2009] VCAT 646**

- Involuntary treatment orders and community treatment orders made under legislation may be a reasonable and justifiable limit on the right to protection from medical treatment without consent provided that there are sufficient safeguards in the legislation, for example, strict criteria for the imposition of the orders, inherent requirements of proportionality of treatment in relation to the medical need, and appeal and review processes for the decision to make the orders.

**ZEH (Guardianship) [2015] VCAT 2051**

- ZEH was a 25-year-old woman with mild to moderate intellectual disability. Her parents applied to VCAT under section 42E of the Guardianship and Administration Act 1986 to provide consent for ZEH to have a tubal ligation as a form of permanent contraception.
- ZEH was sexually inactive, however, ZEH’s parents were concerned that ZEH was vulnerable to being taken advantage of sexually and were also concerned about the potential side effects of the oral contraceptive pill (pill), which they thought was manifested in ZEH’s headaches, dizziness and fainting spells. There was no medical evidence to back any link between these episodes and ZEH’s use of the pill.
- ZEH consistently expressed the view that she had no objection to continuing to take the pill, that she did not wish to have a baby and was unconcerned about the proposed operation. Her parents and sister strongly felt that the procedure would be in her best interest.
- The alternative treatment option (if permission for tubal ligation was not granted) would be the continued use of the pill.
- VCAT found that, relevant to the Charter:
  - the administration of the procedure without ZEH’s full and informed consent would amount to an invasive and significant compromising of ZEH’s physical integrity, engaging (and limiting) her right to equal treatment before the law and her right to protection from medical treatment without full, free and informed consent under the Charter;
  - the rights engaged were fundamental and in considering the nature of the rights, VCAT took into account Australia’s obligations under the International Convention on
the Rights of Persons with Disabilities, which includes the right for persons with disabilities to retain their fertility on an equal basis with others; and
  o the proposed limitation on ZEH’s rights was significant. The purpose of the limitation was to prevent pregnancy if she were to become sexually active (which she is currently not). ZEH takes the contraceptive pill to manage period pain, which provides reasonably effective contraception. Care is taken to protect ZEH from sexual assault.

- VCAT was therefore not satisfied in these circumstances that the limitation was necessary to prevent pregnancy.

*Davies v State of Victoria [2012] VSC 343*

- Mr Davies, a Disability Development and Support Officer employed by the Department of Human Services, dragged CJ, a disabled person in his care, approximately 1.5 metres across a carpeted hallway and in so doing, caused bruising and grazing on his buttocks.
- Mr Davies’ conduct amounted to cruel, inhuman and degrading treatment.

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

- Certain Children concerned the detention of children in the Grevillia Unit of Barwon Prison following its purported establishment as a youth justice remand centre.
- Garde J found the following conditions, as applying to young people, collectively amounted to cruel, inhuman or degrading treatment: very long periods of solitary confinement in cells formerly used for adult prisoners; uncertainty as to the length of lockdowns; fear and threats by staff; the use of control dogs, including German Shepherds; the use of handcuffs when moving the children to an outdoor area; the noise of loud banging or screaming; the failure to advise the children of their rights or the centre’s rules; the general lack of space and amenities; the limited opportunity for education; and the absence of family visits or religious advisor access.

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

- In Certain Children (No 2), authorising the use of OC spray and extendable batons in a youth justice and remand centre was held to engage the right as the use of these weapons may constitute cruel or inhuman treatment if grossly disproportionate to the purpose achieved and if the use results in pain or suffering that meets a certain threshold. However, in this case the court considered that these elements had not been made out; therefore, the right was not limited.

*Ciorap v Moldova (Application 12066/02) ECHR 2007*

- Force feeding a mentally ill prisoner who strongly resisted, but who was in danger of dying of starvation, did not amount to cruel, inhuman or degrading treatment under article 3 of the European Convention on Human Rights.

*Ireland v United Kingdom (1978) 25 Eur Court HR*

- The European Court of Human Rights has held that whether an act amounts to torture or to cruel, inhuman or degrading treatment or punishment is relative. It ‘depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim’.
Freedom from forced work

Section 18 | Article 8 ICCPR

Nature of the right

The right to freedom from forced work (slavery and servitude) is both an absolute and non-derogable right at international law.

Persons should not be subject to conditions that violate individual dignity and exploit human productivity.

A person must not be held in slavery or servitude, which are practices of extreme expressions of power that human beings can possess over other human beings, representing a direct attack on bodily integrity and security, human personality and dignity.

Under international law, slavery is defined in the Slavery Convention 1926 as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

The powers attached to a right of ownership include: the power to make a person an object of purchase; the power to use a person and/or their labour in a substantially unrestricted manner; an entitlement to the results of a person’s labour without compensation corresponding to the value of the labour; the power to transfer the use of the person to another person; a sense of permanency to the person’s service, such as where the person has no freedom to leave; children of the person in service are automatically also in service; a person must not be made to perform forced or compulsory labour. It is not necessary that all of the powers of ownership be exercised over a person. The exercise of any power attached to ownership will be sufficient to establish slavery. See R v Tang below for an Australian context.

Internal limitation

The scope of this right is limited by an internal qualification.

Forced work does not include work or service normally required of a person under a court order, work development order under State Penalties Enforcement Act 1999, service required in emergency, work or service that is part of normal civil obligations.

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6 International human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms. Certain rights, however, are considered ‘absolute’ meaning they cannot be limited for any reason. Absolute rights cannot be suspended or restricted, even during a declared state of emergency.

7 Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a ‘state of emergency’ and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
This qualification is intended to cover work that is considered necessary in democratic communities to fulfil State functions, such as requiring physicians to provide medical care, or requiring lawyers to act as defence representatives, and performing jury service.

Possible policy triggers

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

Case examples

**W, X, Y and Z v United Kingdom (1968) 11 YB 562 E Com HR**

- Obliging a soldier to serve out a minimum enlistment period in the armed forces, contrary to his wishes, did not constitute slavery or servitude.

**R v Tang [2008] HCA 39**

- The question of what powers attach to the ‘right of ownership’ has been considered in Australia in the context of the *Criminal Code Act 1995* (Cth). The Criminal Code’s definition of slavery derives from the Slavery Convention, with two differences.
  - First, because it is not lawfully possible to hold the status of slave in Australia, the Code refers only to ‘the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.
  - Second, it provides that it is still slavery when that condition has come about by reason of a debt or contract made by the person.
Freedom of movement

Section 19 | Article 12 ICCPR

Nature of the right

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

Notably, the right applies only to persons lawfully within Queensland. A person is not lawfully in Queensland if they are not an Australian citizen and are in breach of the Migration Act 1958 (Cth). Further, a person who is prohibited from leaving another state or territory, under the laws of that state or territory, or pursuant to a court order made in that state or territory, is not lawfully in Queensland.

The right places an obligation on the State not to act in a way that unduly restricts the freedom of movement, but does not go so far as to require that the State take positive steps to promote the freedom of movement (such as, for example, providing free public transport).

Statutory provisions that provide for the imprisonment of people convicted of serious crimes are likely to be considered as imposing reasonable and justifiable limits on the right to freedom of movement.

Internal limitation

This right is limited to persons lawfully within Queensland.

Possible policy triggers

- A policy or statutory provision that imposes restrictions of movement or place of residence on persons.
- A policy or statutory provision that empowers a public entity to restrict people’s movement based on national security considerations.
- A policy or statutory provision that allows for surveillance or monitoring of a person’s movements.
- A policy or statutory provision that limits the ability to move through, remain in, or enter or depart from areas of public space.
- A policy or statutory provision that imposes planning controls by zoning residential locations away from commercial, industrial or agricultural areas.

Case examples

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

- A supervision order made in terms of the Serious Sex Offenders (Detention and Supervision) Act 2009 where the offender poses an unacceptable risk was considered a reasonable and justifiable limit on the right.
Nigro v Secretary, Department of Justice [2013] VSCA 213

- Unreasonably wide conditions on a post-sentence supervision order were not reasonable and justifiable in the circumstances.

- Supervision orders made in terms of the Serious Sex Offenders (Detention and Supervision) Act 2009 may involve a limitation of the right to freedom of movement. However, since the threshold requirement for the making of a supervision order, that of ‘unacceptable risk’, ‘depends upon both the severity of the apprehended conduct and the likelihood that that conduct will occur’, the limit on the right is capable of justification under s 7(2) of the Charter.

- The unacceptable risk requirement was aimed at achieving ‘a balance between the offender’s rights and the right of members of the public to be protected against the risk of the offender committing further sexual offences’.

- However, justification of a limit on freedom of movement will depend on the particular circumstances.

- For example, a supervision order with a condition that the appellant ‘must not obtain paid or unpaid employment, or undertake voluntary work, which involves him attending, contacting or entering into people’s homes and/or attending or entering licensed venues’ was found to be an unreasonably wide and therefore unjustified limit on his freedom of movement. This was because the offences giving rise to the order were not committed in the context of any employment in another’s home, nor was there any apparent connection between the appellant’s entry into licensed premises and the commission of those offences.

Woods v DPP [2014] VSC 1

- Unreasonable and unnecessary bail conditions that prevented an accused from using any public transport at all would limit the accused’s freedom of movement to an extent that was not necessary for any legitimate purpose of bail.

- The court instead imposed a less restrictive condition.

Antunovic v Dawson [2010] VSC 377

- Ms Antunovic was being instructed to live at Norfolk Terrace Community Care Unit by the authorised psychiatrist there. Although she was allowed to go out during the day, she was forced to return at night and was not allowed to live with her mother as she wished. She was therefore being compelled to live in a certain place, and prevented from living in another. Her right to choose where to live was clearly limited by the order.

- Bell J held that the requirement to reside at the CCU was a partial though ‘substantial restraint’ on Ms Antunovic’s freedom of movement and that being prevented from living with her mother added another dimension to the restraint. The freedom of movement and residence enjoyed by the general public at common law ‘is an important aspect of the private and social life and the development of the individual, including that which occurs within their own family’.

- Bell J ordered her immediate release in circumstances where nothing could be submitted or presented to justify the lawfulness of the restraint.
*DPP v Kaba [2014] VSC 52*

- When police stop a vehicle to check on the licence of the driver and the registration of the vehicle, they limit the right to freedom of movement of the driver, and any passenger.
Freedom of thought, conscience, religion and belief

Section 20 | Article 18 ICCPR

Nature of the right

The right to freedom of thought, conscience, religion and belief a non-derogable right at international law.

This right encompasses the right of everyone to develop autonomous thoughts and conscience, to think and believe what they want and to have or adopt a religion, free from external influence, and to demonstrate the religion or belief through worship, ritual, practice and teaching.

The concepts of ‘religion’ and ‘belief’ have been interpreted relatively broadly so as to include mainstream and alternative religions and beliefs. There is no requirement in the right that the religion or belief have any ‘institutional characteristics’ or practices associated with traditional or mainstream religions.

The right to demonstrate a religion (whether individually or collectively) encompasses a broad range of rights including engaging in worship, observance, practice and teaching. ‘Worship’ can include for example using ritual formulae and objects, displaying symbols, and observing holidays and days of rest. ‘Observance’ can include ceremonial acts, dietary regulations, wearing distinctive clothing and participating in rituals associated with certain life stages.

The right also includes the right of, and extends protections to, people who choose not to have, adopt or practise any religion or belief (such as atheists).

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that promotes, restricts or interferes with a particular religion or set of belief.
- A policy or statutory provision that requires disclosure of religion or belief.
- A policy or statutory provision that regulates conduct that will affect a person’s worship, observance, practice or teaching of his or her religion or belief (for example, a dress code that does not accommodate religious dress).
- A policy or statutory provision that imposes requirements as a condition of receiving a benefit, or accessing a service, that prevents a person from adhering to their religion or belief.
- A policy or statutory provision that restricts the capacity for those under state control to observe their religion (for example, prisoners).
Case examples

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

- An exemption from the *Equal Opportunity Act 1995* (Vic) allowing the Victorian Electoral Commission (VEC) to request and consider information about the political activities (as opposed to the political beliefs) of potential employees was considered a reasonable and justified limit on this right.

- However, an exemption allowing the VEC to take into account the political views or beliefs (rather than the political activities) was not justified.

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

- Where a person has voluntarily agreed to take on responsibilities in secular employment that they know may affect their ability to demonstrate their religion or belief, that person is less likely to be able to successfully raise their right to freedom of religion and belief in order to justify infringing the rights of others, particularly the right to be free from discrimination.

- In considering the right to freedom of religion or belief in international human rights instruments, in the context of commercial activities, Redlich JA noted that the further the relevant activity is from core elements of a person’s religion or belief, the less likely it will be protected under the right. For example, a person’s core religious beliefs might include the condemnation of homosexuality. In that case, the right may not protect a person employed in a printing business from having to provide ordinary materials like letterheads and business cards to homosexual people, but it may protect that person from having to provide materials proselytising and promoting a homosexual lifestyle or ridiculing his beliefs.

- Neave JA quoting *Hasan v Bulgaria* (2002) 34 EHRR 55: “Religious communities traditionally and universally exist in the form of organised structures. … [T]he believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members”.

**Hoskin v Greater Bendigo City Council [2015] VCAT 1124**

- Refusing a permit or planning permission for a place of worship, such as a mosque, may interfere with the right by restricting the right of an identifiable group to practice their faith.
Freedom of expression
Section 21 | Article 19 ICCPR

Nature of the right

Protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication). Attempts to coerce someone into holding, changing or expressing any opinion would interfere with this right.

The forms of protected expression are also broad: expression can be oral, written, in print, art or any other medium. Means of expression may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions.

Any act that would be perceived by reasonable members of the public as trying to convey some meaning would ‘impart information and ideas’, whether or not it actually conveys a particular meaning to a specific person, and whether the meaning conveyed is objectively clear and precise or subject to individual interpretation.

The UN Human Rights Committee has stated that article 19(2) of the ICCPR ‘embraces a right of access to information held by public bodies … regardless of the form in which the information is stored, its source and the date of production’.

The right to hold an opinion is considered a fundamental component of an individual’s privacy, requiring absolute protection without external influence.

The right to freedom of expression and the free flow of information and ideas between people and through the media, particularly about public and political issues, is considered to be a touchstone of healthy democratic society. This right is central to the fulfilment of other rights such as cultural rights and freedom of thought, conscience and religion.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

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

Case examples

**XYZ v Victoria Police [2010] VCAT 255**
- VCAT has held that the right to freedom of expression, in particular the right to seek and receive information and ideas, includes a positive right to access information held by the government.
- VCAT found that ‘freedom of information is a necessary constituent of freedom of expression, for the purposes of the right to seek, receive and impart information will be frustrated if the government, without justification, can simply refuse the information sought’.

**Magee v Delaney [2012] VSC 407**
- Painting over an advertisement is an act capable of imparting information and ideas for the purposes of exercising the right to freedom of expression, but doing so by damaging a third party’s property did not engage the right (to freedom of expression).

**Magee v Wallace [2014] VSC 643**
- The Supreme Court found section 10(1) of the Summary Offences Act 1966, pursuant to which Mr Magee was fined for posting bills obscuring commercial advertisement, is compatible with s 15. The Court found that the section, which creates the offence of posting bills and defacing property, was a lawful restriction reasonably necessary for the protection of public order under the right because it was ‘possible that actions of the type that Mr Magee engaged in might lead to some form of public disturbance involving persons seeking to stop those actions’.

**Kuyken v Lay (Human Rights) [2013] VCAT 1972**
- VCAT held that the wearing of a goatee does not in itself impart any information, ideas or meaning at all.

**VPOL v Anderson and Ors (Criminal) [2012] VMC 22**
- The ‘wilful trespass’ offence in section 9(1)(d) of the Summary Offences Act (1966) was found not to apply to protestors at a public shopping centre who were ‘demonstrating disapproval of the political or social interests of a retail tenant of [the] shopping centre’ by chanting, singing and waving banners:

  “The gathering of the protestors in QV square and the expression of their political beliefs, notwithstanding the limited physical activity between the protest line and police line immediately in front of Max Brenner’s did not, in my opinion, constitute a threat to public order or a significant breach of the peace so as to warrant a restriction on their rights to express their political opinions. In fact, the evidence revealed that a large number of members of the public appeared to be watching with interest and one even engaged in robust discussions with a number of the protestors. ...

  [A] number of customers at Max Brenner’s remained at the tables outside observing the activities. The demonstration only lasted 15 minutes before the protestors were
requested to leave and the arrests occurred shortly thereafter. There was no threat to public order or breach of the peace to the extent necessary so as to justify a lawful restriction on the right of the protestors to express their political beliefs as is contemplated by the Charter.”

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

- VCAT allowed an application for exemption under s 83 of the *Equal Opportunity Act 1995* relating to the ability of the Victorian Electoral Commission (VEC) to request and consider information about the political activities of its potential employees, including their previous activities in publishing political opinions.

- The exemption was found to be a reasonable and justified limit on the right, given the need for the VEC to be, and to appear to the community to be, impartial in conducting elections. One of the factors in the decision was that the ‘free expression of political view via the ballot box [by] all Australians’ was made possible, in part, through the limits imposed on the rights of VEC employees, including their freedom of expression.

**Kerrison v Melbourne City Council [2014] FCAFC 130**

- The Full Court of the Federal Court found that police and Council officers’ conduct in removing a tent being worn by an Occupy Melbourne protester, Ms Kerrison, limited her freedom of expression.

- Two female police officers removed the tent against the protester’s wishes, including by using a knife to cut some of the knots holding the tent around the protester. Ms Kerrison was wearing only underwear under the tent, although she had been offered clothes to wear, which she refused, and had been warned of the likelihood of her tent being removed. Once they had removed the tent, they confiscated it.

- The Court found that Ms Kerrison had been wearing the tent as an ‘effective visual form of protest’ and the removal of the tent, though lawful, ‘limited her right under section 15(2) [of the Charter] because it precluded her from imparting her ideas about the constraints on the Occupy protestors in the way she had decided was most effective’.

- Without analysing the internal limitations in section 15(3) of the Charter, the Court held that the police conduct was justified. The police conduct was intended to preclude Ms Kerrison from staying in the tent against applicable regulations aimed at preserving and maintaining public gardens for their equitable use, rather than preventing her from protesting. Additionally, the Court found that no less restrictive means were available in the circumstances as Ms Kerrison had been given ample warning regarding enforcement of the regulations. However, the Court expressed some concern about the manner in which the tent was removed.
Peaceful assembly and freedom of association

Section 22 | Articles 21 & 22 ICCPR

Nature of the right

The right to peaceful assembly upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration.

The right is limited to peaceful assemblies that do not involve violence. Violent assemblies, such as riots and affrays, are not protected.

It covers both the preparing for and conducting of the assembly by the organisers and the participation in the assembly.

Not every assembly of individuals is protected by this right – ‘assembly’ in this context means the intentional, temporary gathering of several persons for a specific purpose.

The freedom of association protects the rights of individuals to join together with others to formally pursue a common interest – for example, political groups, sporting groups and trade unions. It includes the freedom to choose between existing organisations or to form new ones.

Under international law, the justifications for limiting the freedom of association must be based on real and not hypothetical concerns.

Internal limitation

The right is limited to peaceful assemblies.

Possible policy triggers

- A policy or statutory provision that limits the ability of a person or group of people to hold or participate in a public or private gathering or to come together for a common purpose (for example, restricting the areas where, or times at which, a demonstration, picket or public event can take place).
- A policy or statutory provision that compels a person to belong to a professional body or workplace association (note, however, that a requirement for compulsory membership of a professional body has not generally violated this right, particularly if the association is responsible for professional regulation).
- A policy or statutory provision that treats people differently on the basis of their membership of a group or association.
- A policy or statutory provision that prohibits membership in a group or association with certain persons (for example, in a criminal justice context).
Case examples

*Appleby v United Kingdom (Application 44306/98) ECHR 2003*

- Prohibiting a group from campaigning in a private shopping centre, was found not to violate the freedom of assembly where the group had other means available to them to ensure the effective exercise of their rights.


- The UNHRC found that restrictions on a father’s ability to associate with his son did not fall within the scope of the right.
Taking part in public life

Section 23 | Article 25 ICCPR

Nature of the right

This right affirms the right of all persons to contribute to and exercise their voice in relation to the public life of the State. It ensures that all persons have the opportunity to contribute to the political process and public governance. Participation in the conduct of public affairs may be direct or through freely chosen representatives.

A key aspect of the right to take part in public life is the right to vote and to be elected to public office. Participation in public life through representatives must be exercised through lawfully established voting processes. Moreover, the representatives elected by that process must actually exercise governmental power and be electorally accountable.

The UN Human Rights Committee has said that the opportunity to vote may require:

- positive measures to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement, which prevent persons entitled to vote from exercising their rights effectively; and
- information and materials about voting to be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.

The UN Human Rights Committee also considers the right to vote imposes obligations regarding the conduct of elections, including to establish an independent electoral authority to supervise and ensure the fairness, impartiality and lawfulness of the electoral process, and to allow independent scrutiny of the voting and counting processes.

The right to vote does not include as a corollary the right not to vote.

Section 23 also includes a right to have access, on general terms of equality, to the public service and to public office.

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.’

The right interacts with the general right to equality (section 15) and includes that the criteria and processes for appointment, promotion, suspension and dismissal within the public service must be objective and reasonable, and non-discriminatory.
**Internal limitation**
The scope of this right is limited by an internal qualification.

The right is restricted to ‘eligible persons’. ‘Eligible’ is not defined by the Act, and instead will be determined by other Queensland legislation.

This qualification recognises that there are commonly accepted exceptions to universal suffrage such as children, certain prisoners and non-Queensland residents.

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

**Case examples**

*Slattery v Manningham CC (Human Rights) [2013] VCAT 1869*
- A local Council ban on a resident attending at any Council building, and a subsequent refusal to lift the ban engaged the right.
- The right was found to be unjustifiably limited because:
  - the ban was initially imposed because of conduct resulting from the resident’s disability;
  - the ban engaged the resident’s right to participate in the conduct of public affairs as well as his freedom of expression;
  - the resident’s enjoyment of those rights had accordingly been limited on a discriminatory basis; and
  - under a proportionality analysis, ‘there were less restrictive means reasonably available to the Council to achieve the purpose for which it sought to limit Mr Slattery’s rights, and the Council could have acted differently’

*Richardson v City of Casey Council (Human Rights) [2014] VCAT 1294*
- A local Council ban on a resident asking questions at Council meetings engaged the right.
- The Court considered that the right had been justifiably limited given:
  - the only practical effect of the ban was that the resident was no longer expressly identified at meetings and in the minutes as connected to the questions;
  - the resident remained able to send emails to the Council, attend and participate in public meetings and gatherings, including Council meetings, make submissions to Council, seek to have letters published in the newspaper and otherwise make public statements about matters of interest to him;
  - the resident was still able to ask two questions per Council meeting through other people; and
  - the resident was taking up a very significant amount of Council resources, his questions were often repetitive and had already been answered, he was personally
abusive and at times threatening to councillors and staff, and his communications contained arguably defamatory statements.

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

- The right was engaged by an application for an exemption under anti-discrimination law to enable the relevant Departments to employ up to 118 positions to be advertised as and designated to be occupied by Indigenous Victorians.

- McKenzie DP considered that if the right did apply, under a proportionality analysis the limitation was proportionate, given that it did not seek to go further than to redress clear disadvantage, the number of positions was ‘a small fraction of the total public sector workforce’ and there was no less restrictive way of achieving the same purpose.
Property rights

Section 24 | Article 17 UDHR

Nature of the right

This right protects the right of all persons to own property (alone or with others) and provides that people have a right not be arbitrarily deprived of their property.

The right does not provide a right to compensation.

Property is likely to include all real and personal property interests recognised under general law (e.g. interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

Public entities may be obliged to take steps to prevent the unlawful deprivation of property occurring.

Internal limitation

The scope of this right (the second limb) is limited by an internal limitation.

The right provides that a person has the right not be arbitrarily deprived of their property.

Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

Possible policy triggers

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

Case examples

Swancom Pty Ltd v Yarra CC [2009] VCAT 923

- VCAT considered that refusal under the planning framework of an application to extend the permissible trading hours in a beer garden and the maximum patron numbers at a hotel would be in accordance with the law.
- Bensz M explained (at [22]): “Whilst the refusal of the application might arguably interfere with Swancom’s broader property rights, s 20 of the Charter only provides that a person must not be deprived of property ‘other than in accordance with law’. Here, Swancom is not deprived of any legal or proprietary interest in the land, or the ability to use or develop its land in accordance with the relevant planning framework. The imposition of reasonable
restrictions on the use or development of the land under that regulatory framework is in accordance with the law, and neither unlawful nor arbitrary.”

*R (Fisher) v English Nature* [2005] 1 WLR 147

- Restrictions imposed on the use of farmland in order to protect an area designated to be of particular environmental significance were found to be reasonable and justified.

*James and Others v UK* (1986) 8 EHRR 123

- The purpose of the measure [which limited property rights] in question was legitimate and proportionate because ‘eliminating what are judged to be social injustices is an example of the functions of a democratic legislature’.

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

- VCAT held that the right for a lot owner to use common property equally with other lot owners, although a valuable right, ‘is not a right of property’.

*Marcx v Belgium* (1979) 2 EHRR 330

- The right includes only ‘existing’ rights to property, not rights to acquire property. For example, an expectation of a future inheritance is not protected.
Privacy and reputation

Section 25 | Article 17 ICCPR

Nature of the right

The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The scope of the right to privacy is very broad.

It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual’s private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation.

The task of identifying a person’s home is to be approached in a common-sense and pragmatic way, relying on a person demonstrating ‘sufficient and continuous links with a place.

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

Internal limitation

The scope of this right is limited by an internal limitation.

The right provides that a person has the right to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. A person has the right not to have the person’s reputation unlawfully attacked.

Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

Possible policy triggers

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

Case examples

Re Beth [2013] VSC 189

• The court found that orders authorising the use of restrictive interventions in respect of a teenage girl with an intellectual disability in a residential facility were a reasonable limitation on her right to privacy (as well as other rights) because the order were limited in duration, provided for progress reports and required independent supervision of the order.

DPP v Kaba [2014] VSC 52

• The defendant was stopped by police for a random check of his licence and vehicle registration. There was no suspicion involved in the stop. He exited the car but did not produce his licence, and was subsequently detained by police who continued to ask him verbal questions which he refused to answer. The defendant was subsequently charged with using offensive language and assault in the course of his arrest.

• At trial, the Magistrate refused to admit the evidence of the police officer who conducted the random stop and registration check, on the grounds that the stop was unlawful because the Road Safety Act did not confer any power on police to take such action, and because the stop, and subsequent verbal questioning, had breached the defendant’s right to freedom of movement and privacy under the Charter.

• The DPP applied to the Supreme Court for judicial review of the Magistrate’s decision to exclude the evidence.

• On judicial review, the Supreme Court considered that the random stop was lawful under the Road Safety Act, but that the subsequent questioning became coercive and breached the defendant’s right to freedom of movement and right to privacy.

• Justice Bell held that, up to a certain point, police questioning does not unlawfully interfere with the rights and freedoms of individuals. Police questioning does unlawfully interfere with these rights and freedoms, however, when the questioning becomes coercive, which is when the individual is made to feel that they cannot choose to leave or refuse to co-operate. In drawing the line between voluntary and coerced questioning, Justice Bell stated that courts will consider the duties of the police to protect the community and prevent crime, as well as the imbalance of power between police in uniform and ordinary members of the community.
• The police have ordinary powers to ask questions to prevent crime and protect the community. However, this power is limited to the extent that it does not interfere with individual rights of liberty, privacy and freedom of movement.

• The reasonable person test applies when judging the limit of police interference to these rights; that is, if it can objectively be said that individuals are made to feel that he or she cannot choose to cease co-operating or leave in those circumstances, the police may have breached their rights.

• The original decision was quashed and the proceeding remitted to the Magistrate. The Magistrate then re-considered to admit the evidence, taking into account the finding that the police questioning was in breach of the defendant’s rights.

_Carips v Victoria Police (Health and Privacy) [2012] VCAT 1472_

• The applicant attended a climate change protest where Victoria Police filmed and took photographs of the event and retained the images and video footage. The applicant appears in four segments of video footage, with her image visible for less than 20 seconds. The footage and seven still photographs were retained in a locked cupboard. No record existed of the identities of the people in the footage or the photographs, not even their names.

• The applicant complained to the Privacy Commissioner—who referred the complaint to VCAT—that the retention of the images and footage was an interference with her right to privacy under the Information Privacy Act and the Charter, that the video and photographs interfered with her right to privacy, were no longer required by the Victorian Police and in accordance with the Information Privacy Act, should be destroyed or de-identified.

• Victoria Police submitted that: the photographs and video footage did not reveal personal information nor identify the applicant; the photographs and video footage were still needed by Victoria Police for intelligence, planning and briefing purposes; and the Public Records Act 1973 required retention of the photographs and footages as records “documenting the planned Police response to events such as demonstrations” for seven years.

• VCAT accepted the arguments of Victoria Police.

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

_Castles v Secretary to the Department of Justice [2010] VSC 310_

• Emerton J held that the right does not include the right to found a family. Under the European Convention on Human Rights, the art 8 obligation to respect a person’s private and family life has been extended to include respecting their decision to become a genetic parent. However, the Charter’s Explanatory Memorandum clearly states that Parliament did not intend for the protection of families and children provided by the Charter to contain a right to found a family. Emerton J held that this statement indicated that ‘Charter rights which might otherwise have encompassed rights to ART (artificial reproductive technology), recognition of legal parentage and adoption should be construed as not encompassing such rights’.
McAdam v Victoria University (Anti-Discrimination) [2011] VCAT 1262

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

Section 26 | Articles 23(1) & 24(1) ICCPR

Nature of the right

The right entitles families to protection by both the State and society.

It also recognises that children have the same rights as adults, but with additional protections according to their best interests and the fact that they are children. One of the underlying principles of the International Convention on the Rights of the Child is that ‘the best interests of the child’ shall be a primary consideration in all actions concerning children.

The right also includes the right to a name and to birth registration.

The broad term ‘families’ recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ. Cultural traditions may be relevant when considering whether a group of persons constitute a ‘family’.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

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

Case examples

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

- One family’s right to protection may be limited by the general need to protect all families in the community.
- Giving effect to the scheme established by the *Confiscation Act 1997* (Vic), which was enacted to protect all Victorian families from the effects of illegal drugs on the family unit, was determined to be of greater importance than protecting the individual families who will be affected by the Act’s operation.

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

- Limitations on human rights imposed by Orders in Council declaring the premises (within an adult prison) a youth justice and remand centre, and transfer decision in relation to each child plaintiff, were not reasonable and justifiable.
**Castles v Secretary to the Department of Justice [2010] VSC 310**

- Emerton J held that the right does not include the right to found a family.
- Under the European Convention on Human Rights, the art 8 obligation to respect a person’s private and family life has been extended to include respecting their decision to become a genetic parent.
- However, the Charter’s Explanatory Memorandum clearly states that Parliament did not intend for the protection of families and children provided by the Charter to contain a right to found a family.
- Emerton J held that this statement indicated that ‘Charter rights which might otherwise have encompassed rights to ART (artificial reproductive technology), recognition of legal parentage and adoption should be construed as not encompassing such rights’.

**Application for Bail by H L [2017] VSC 1**

- The Supreme Court has indicated that the right requires the State to ensure the survival and development of a child to the maximum extent possible. In the context of youth justice, it will generally not be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.

**Hugg v Driessen (2012) 261 FLR 324; Aldridge v R [2011] ACTCA 20**

- The need to make proper arrangements for children will be a relevant factor in the sentencing of a parent. ACT courts are directed to consider ‘the probable effect that any sentence or order under consideration would have on any of the offender’s family or dependants’. This must be interpreted to be compatible with the human rights which have been specifically adopted by the ACT.

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

- Bell J considered that an interpretation of s 13(2) of the Working with Children Act 2005 should not go as far as preventing a person from working in their chosen employment where there would be no real risk of harm to children. In his view, the ‘unjustifiable risk’ tests provided by both the Working with Children Act 2005 and the Transport (Compliance and Miscellaneous) Act 1983 appropriately balanced children’s right to protection against a person’s right to work.
Cultural rights – generally

Section 27 | Article 27 ICCPR

Nature of the right

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. It affirms the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or with others who share their background.

It is concerned with protecting a person from being denied the right to enjoy their culture, religion or language. A person may have been denied the right in this section if their enjoyment of a right is substantially restricted.

‘Culture’ is broadly interpreted as the maintenance of traditional beliefs and practices (for example, the wearing of traditional dress), but it may also include those social and economic activities that are part of a group’s tradition (for example, it may include traditional activities such as fishing or hunting). The High Court has given a broad interpretation of what constitutes a ‘religion’.

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

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that limits the observance of any religious practices, regardless of the religion.
- A policy or statutory provision that restricts the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group.
- A policy or statutory provision that limits or prohibits communication in languages other than English, including through the provision of information.
- A policy or statutory provision that restricts the provision of services or trade on religious holidays.
- A policy or statutory provision that regulates cultural or religious practices around the provision of secular public education.
- A policy or statutory provision that provides government information only in English and allows for access to services only by English speaking persons.
A policy or statutory provision that licences or provides a restriction on the preparation and serving of food.

Case examples

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

- ‘[A] cultural practice ... is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community’.
- On this understanding, it will be important to establish that a particular practice is shared within at least a part of the relevant cultural community, rather than being an individual’s personal preference.


- The Rehoboth community claimed that a Council policy endangered their traditional culture of being cattle-raising farmers.
- However, they could not demonstrate ‘that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands... Their claim [was], essentially, an economic rather than a cultural claim and [did] not draw the protection of article 27’.
Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Section 28 | Articles 8, 25, 29, & 31 UNDRIP

Nature of the right

Aboriginal and Torres Strait Islander peoples are recognised as having a rich and diverse culture. There are many hundreds of distinct Aboriginal Torres Strait Islander groups in Australia, each with geographical boundaries and an intimate association with those areas. Many of these groups have their own languages, customs, laws and cultural practices.

Aboriginal and Torres Strait Islander are defined in the Acts Interpretation Act 1954.

It explicitly protects the right to live life as an Aboriginal person or Torres Strait Islander who is free to practise their culture. They must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment.

Providing explicitly for the rights of Aboriginal peoples and Torres Strait Islander peoples to culture is consistent with Australia’s international human rights commitments under UNDRIP.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that prohibits the use of a traditional language.
- A policy or statutory provision that allows or limits the ability of Aboriginal or Torres Strait Islander persons to continue to take part in a cultural practice, or otherwise interferes with their distinct culture practices.
- A policy or statutory provision that interferes with the relationship between Aboriginal or Torres Strait Islander persons and land, water and resources.
- A policy or statutory provision that relates to the protection of Aboriginal and Torres Strait Islander cultural heritage, including Aboriginal human remains and secret or sacred objects.

Case examples

_Cemino v Cannan and Ors_ [2018] VSC 535

- The Victorian Supreme Court confirmed that courts must consider the distinct cultural rights of Aboriginal people under the Charter when making a decision in relation to an Aboriginal person’s request to be heard in the Koori Court (relevant to the exercise of the court’s discretion to transfer proceedings).
**Donnell v Dovey (2010) 42 Fam LR 559**

- The concept of ‘kinship’ within Aboriginal culture differs from that used in non-Aboriginal culture. Aboriginal kinship networks are generally understood to extend broadly into the community, beyond a person’s immediate family.

- Judicial officers exercising family law jurisdiction are expected to take judicial notice of the fact that there are differences in how Aboriginal and non-Aboriginal people approach the concept of ‘family’, recognising that the practices and beliefs of different Aboriginal groups are not uniform.

**Clark-Ugle v Clark [2016] VSCA 44**

- The right does not, and does not purport to, distinguish between Aboriginal persons who live on the land with which they have a connection under traditional laws and customs and other Aboriginal persons who do not live on the land with which they have a connection under traditional laws and customs, but whom maintain a distinctive spiritual, material and economic relationship with that land nevertheless.
Right to liberty and security of person

Section 29 | Article 9 ICCPR

Nature of the right

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

The right to security means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm. The right to security applies independently of the right to liberty and applies whether or not the individual is detained. It includes bodily and mental integrity, or freedom from injury to the body and mind.

The concept of detention includes not only detention in a prison but all forms of detention, including detention for the purposes of mental illness or medical treatment, as well as detention in a range of facilities such as mental health facilities, hospitals, disability services or other types of detention facilities.

Subsection (8) of the right (relating to a person’s inability to perform a contractual obligation) is both an absolute\(^8\) and non-derogable\(^9\) right at international law.

Internal limitation

The scope of this right is limited by internal limitations and qualifications.

The right is limited in the following terms:

- a person must not be subject to arbitrary arrest;
- a person must not be deprived of their liberty except on grounds and in accordance with procedures, established by law; and
- a person who is arrested or detained on a criminal charge, has the right to brought to trial without unreasonable delay.

Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable or unjust and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

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\(^8\) International human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms. Certain rights, however, are considered ‘absolute’ meaning they cannot be limited for any reason. Absolute rights cannot be suspended or restricted, even during a declared state of emergency.

\(^9\) Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a ‘state of emergency’ and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
Possible policy triggers

- A policy or statutory provision that authorises a person with a mental illness to be detained for treatment.
- A policy or statutory provision that allows for the detention of a person on safety grounds, such as intoxication.
- A policy or statutory provision that provides powers of arrest.
- A policy or statutory provision that provides for detention on remand or release on bail conditions.

Case examples

**Carolan v the Queen [2015] VSCA 167**

- In Victoria, the right to liberty of convicted sex offenders who have already served their sentences may be limited under relevant legislation (the *Serious Sex Offenders (Detention and Supervision) Act 2009* and the *Serious Sex Offenders Monitoring Act 2005* for the purpose of community protection.

- When assessing the degree of risk posed to the community by a sex offender in making a supervision order under the *Serious Sex Offenders (Detention and Supervision) Act 2009*, the court can consider statutory regimes that mitigate the risk to the community other than preventative detention. Courts may therefore consider such risk controls when weighing up whether the right to liberty has been justifiably limited.

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

- In the first instance, the respondents had failed to make instalment order payments in respect of outstanding fines and so the fine order was quashed and the Magistrate ordered that they be imprisoned under section 160(1) of the *Infringements Act 2006*. The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.

- Both respondents had a disability. They applied for judicial review of the decision.

- The Court accepted the submissions that the Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law.

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

- An involuntary treatment order under the *Mental Health Act 1986* was confirmed following evidence that indicated that the applicant would be a risk to himself and others, including by sexually inappropriate behaviour towards women, if released. The applicant’s behaviour only stabilised under the structured, supervised environment of the high security psychiatric treatment facility to which he was confined. The order was necessary to fulfil the applicant’s treatment needs, and was thereby in his interests and a reasonable limitation on the right.

**Kracke v Mental Health Review Board [2009] VCAT 646**

- The involuntary treatment order under the *Mental Health Act 1986* was found to be a justifiable limit on the right to liberty for two main reasons. First, the purposes of the Act were to ensure mentally ill people get medically necessary care, treatment and protection, an
important purpose in itself. Secondly, the legislation provided strict safeguards to protect the human rights of patients as far as possible, such as strict criteria for the making of such orders, oversight by a registered medical practitioner and authorised psychiatrist, and review.

*Re Beth* [2013] VSC 189

- The Court found that an order authorising Beth’s placement in a secure residential facility operated by a social welfare agency, and the use of lock-up facilities and restrictive interventions in the course of her care would involve a ‘continuing substantial invasion’ of Beth’s Charter rights, including her right to liberty. However, the limits on Charter rights were reasonable, necessary and proportionate in the circumstances, and did not go beyond what was required to protect Beth’s interests. Some of the factors supporting this decision were that:
  - the order was protective: there was substantial evidence that the measures were necessary to protect Beth from self-harm;
  - Beth’s care had to be appropriately planned, supervised and monitored;
  - the order was for a limited time and subject to independent review;
  - the conditions restricted the use of seclusion and restrictive interventions to what was reasonably necessary and Beth’s carers were to use the least restrictive measures necessary; and
  - detailed progress reports were to be provided to the court.

*Biddle v State of Victoria* [2015] VSC 275

- The Supreme Court has held that a police officer discharged the obligation under the right to inform the arrestee in circumstances where it was satisfied that the police officer had informed the plaintiff he was under arrest for breach of an intervention order, and the angry, abusive behaviour of the plaintiff prevented him from communicating any more.

*Re Dickson* [2008] VSC 516

- The Supreme Court has stated that because the meaning of ‘unreasonable delay’ is not defined, it should be regarded as ‘descriptive given the particular circumstances’. For a delay to be considered unreasonable, it should not have occurred through the fault of the arrestee or detainee.

*R v Ahmad Niazi* [2008] VMC 3

- The prosecution had a strong case on a charge of drug trafficking for which the defendant was likely to serve a significant custodial sentence. Despite this, the rights were found to enact the common law right to be tried without unreasonable delay, and the delay in the case of over 2 years before the charges would be heard, informed the meaning of the ‘exceptional circumstances’ that led to bail being granted.
Humane treatment when deprived of liberty

Section 30 | Articles 10(1) & 10(2)(a) ICCPR

Nature of the right

The right recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. It generally complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment.

The right to humane treatment when deprived of liberty applies not only to persons detained under the criminal law but also to persons detained elsewhere under the laws and authority of the State (for example, in an approved mental health facility).

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

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

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

Internal limitation

The scope of this right is limited by an internal limitation.

The terms of the limit are that an accused person has the right to be segregated from convicted, unless reasonably necessary.

‘Reasonably necessary’ is, in effect, recognition in the Act that the importance of segregation can always be balanced against other social goals that meets the general limitation test (under section 13 of the Act).

Possible policy triggers

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

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

- The court considered the treatment of detained children, following an event at a youth detention centre, when a number of children were transferred to a section within Barwon Adult Correctional Facility that had been ‘rezoned’ as a youth detention facility.

- The main limitations on the rights of the children arose from the location of the unit within a maximum security adult jail, extensive lockdown periods in cells designed for adult men, the use of handcuffs when children were released from their cells, the presence of adult prison security staff, guards with capsicum spray and extendable batons, and the children’s uncertainty about the kind of treatment they would receive.

- The court found that these limitations on the right to humane treatment when deprived of liberty, as well as other rights, were not reasonable and justifiable because, among other reasons, the affected rights protected important values; the purpose of the limitations was essentially managerial; and other, less restrictive, ways of achieving the stated purposes were available.

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

- Prior to her incarceration, Ms Castles had been receiving IVF treatment for over a year. From 27 November 2009, Ms Castles and her lawyers made repeated requests for approval for Ms Castles to continue to access IVF at her own cost, emphasising that she would become ineligible for treatment from December 2010 by reason of her age. By late-April 2010, the Secretary for the Department of Justice had still failed to make a decision, despite the prospects of Ms Castles becoming pregnant through IVF decreasing significantly with the passage of time.

- Eventually in 2010, the Secretary of the Department of Justice made a decision to deny Ms Castles’ request to access IVF treatment. The Secretary reasoned that Ms Castles ‘does not have an entitlement to this form of medical treatment’ and cited, among other things, resource constraints and the precedent that may be set by allowing Ms Castles to access treatment.

- Ms Castles relied on her right under the Corrections Act (Vic) to ‘have access to reasonable medical care and treatment necessary for the preservation of health’ and also her Charter rights to privacy and family, equality and to humane treatment in detention.

- The Charter did not ultimately determine the outcome of the case (which was decided on the basis of the provision under the Corrections Act), but there was significant commentary about the right to humane treatment in detention which was engaged (the Court found the right to privacy and family were not engaged) – “prisoners should not be subjected to hardship or constraint other than that which results from the deprivation of liberty and accepted that access to health care is a fundamental aspect of the right to dignity. Like other citizens, prisoners have a right to...a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.”

- The Court stated that the right under the Corrections Act ‘must be construed consistently with the requirement that prisoners be treated with humanity and with respect for their human dignity’.
• This right does not entail access to any treatment that a prisoner may want or have access to were he or she not imprisoned, but does require provision of ‘a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health’.

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

• The Supreme Court considered whether the detention order regime under the *Serious Sex Offenders (Detention and Supervision) Act 2009* was consistent with the right to humane treatments when deprived of liberty.

• The Act provides for the ongoing detention of offenders who have served custodial sentences for certain sexual offences and present an unacceptable risk of harm to the community. Section 115 of the Act states that persons detained under the Act are unconvicted prisoners, who ‘must be treated in a way that is appropriate’ to that status and ‘must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences’ (s 115(1)-(2)). Section 115(3) sets out certain exceptions:

  (3) An offender may be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences—

  (a) if it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation and other group activities of this kind; or

  (b) if it is necessary for the safe custody or welfare of the offender or prisoners or the security or good order of the prison; or

  (c) if the offender has elected to be so accommodated or detained.

• The Court found that section 115 reflects the principles embodied in the right, and is protective of these rights. The Court also described section 115(3) as providing for ‘reasonable limitations’ on the right.
Fair hearing
Section 31 | Article 14(1) ICCPR

Nature of the right

The right affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

When thinking about whether a court or tribunal is competent, independent and impartial, the following factors may be relevant: it is established by law; it is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings; it is free to decide the factual and legal issues in a matter without interference; it has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings; it presents the appearance of independence; and its officers have security of tenure.

In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant.

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

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

Case law has determined that what is ‘fair’ in the context of a fair hearing will involve a triangulation of the interests of the victim, the accused, and the community (R v A (No 2) [2002] 1 AC 45). In other words, a fair trial does not require a hearing with the most favourable procedures for the accused. It must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime.

Internal limitation

The scope of this right is limited by an internal qualification.

Section 31(2) provides an exception to the right to a public hearing, whereby a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of the hearing if it is in the public interest or the interests or justice.

Section 31(3) provides that all judgments or decisions made by a court or tribunal in a proceeding must be publicly available. However, there is an acknowledgement that certain proceedings or circumstances will justify a court suppressing all or part of a judgment.
There is also a logical relationship between subsections (3) and subsection (2). For example, if it is in the interests of justice to exclude the public from a trial under subsection (2) to protect the identity of a party, there may also be a legitimate need to withhold certain parts of a judgment that would identify that party.

Possible policy triggers

- A policy or statutory provision that creates a reverse onus.
- A policy or statutory provision that creates or restricts reviews of administrative decision-making and appeal processes.
- A policy or statutory provision that provides special procedures to provide safeguards for witnesses when giving evidence in a court or tribunal (such as special measures for children and other vulnerable persons).
- A policy or statutory provision that regulates the procedures for challenging the impartiality and independence of courts and tribunals.
- A policy or statutory provision that restricts the publication of cases/decisions
- A policy or statutory provision that disadvantages or fails to take into account the particular circumstances of a litigant, for example, a litigant with a disability.

Case examples

**Karam v Palmone Shoes Pty Ltd** [2018] VSC 206

- Making a litigation restraint order under the *Vexatious Proceedings Act 2014* (Vic) represented a reasonable and justified limit on the right to a fair hearing, because the order had the legitimate purpose of preventing the overuse of court services by a few vexatious litigants, to ensure ongoing availability and reasonable costs for the community and other litigants.

**Tomasevic v Travaglini** [2007] VSC 337

- The Court found that trial judges as well as ‘masters, magistrates, commissions and tribunals’ have a positive duty to assist self-represented litigations in criminal and civil trials and in interlocutory proceedings.
- The judge’s overriding duty is to ensure a fair trial, but the judge must maintain neutrality, and the appearance of neutrality, and so cannot become the advocate of the self-represented litigant.
- The judge must make sure the ‘accused is fully aware of the legal position in relation to the substantive and procedural aspects of the case’ but without advising the accused to take a particular course.

**Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)** [2017] VSC 646

- An unrepresented litigant was convicted of road safety offences and applied to the Supreme Court to have the conviction set aside. It was held that the magistrate breached the defendant’s right to a fair hearing (and the rules of natural justice) by not assisting the defendant sufficiently during the hearing, as it is a responsibility of the Court to ensure self-represented litigants receive a fair trial in accordance with the Charter.
The magistrate did not attempt to determine the defendant’s state of knowledge about legal procedure and principles or assist him to make his submissions in relation to jurisdiction.

A fair hearing includes a reasonable opportunity to each party to present its case. This includes the opportunity to be informed of the opposing party’s case and to respond.

The order was quashed and the matter remitted to the Magistrate’s Court.

**Matsoukatidou v Yarra Ranges Council [2017] VSC 61**

- Two applicants, one with a disability, were self-represented at a hearing in the Magistrates’ Court in respect of offences against the *Building Act 1993*. Both applicants were fined.

- At the hearing of the appeal in the County Court, the applicants were again unrepresented and the appeal was struck out. The applicants sought judicial review of the judge’s orders (on the grounds of breach of natural justice and procedural fairness as well as unlawfulness under the Charter).

- The judge was found not to have applied the human rights protected by the Charter to the applicants, i.e. the right to equality before the law and the right to a fair hearing.

- The judge did not recognise the applicants as self-represented (one with a disability); appreciate there were two separate applications; explain the court procedure to the applicants; or explain to the applicants the central issue raised in their applications.

- The County Court orders were set aside and the applications were remitted to be heard and determined by a different judge.


- The Court has found that the right of a person who has been compelled to give evidence not to have their evidence, or any evidence derived from it, used against that person extends to use and derivative use immunity. They are, therefore, aspects of the right against self-incrimination, so that where the right against self-incrimination has been abrogated by statute, for example, by compelling a person to give evidence, the courts will not lightly conclude that these immunities have been abrogated as well.

- The Supreme Court considered what use could be made of evidence derived from compelled testimony under the *Major Crime (Investigative Powers) Act 2004*.

- The Court considered whether admitting evidence obtained on the basis of compelled testimony in a future criminal trial of a person was an unjustified limitation on the privilege against self-incrimination and the right to a fair hearing under the Charter.

- The case involved an application by a Detective of Victoria Police for a coercive powers order under the Act, which would allow an individual to be compelled by witness summons to attend before the Chief Examiner to provide evidence, without the protection of the privilege against self-incrimination.

- The Court held that the coercive power could be interpreted in a way that is compatible with human rights and also consistent with the purpose of the provision.

- Warren CJ held that the purpose of the provision would not be undermined by reading it to exclude the admissibility in future criminal proceedings of “evidence obtained pursuant to compelled testimony ... unless the evidence is discoverable through alternative means.”
In short, Her Honour found that in interpreting the Act, derivative use immunity must be extended to a witness interrogated pursuant to the terms of the Act, where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. Derivative use of the evidence obtained pursuant to compelled testimony must not be admissible against any person affected by the Act unless the evidence is discoverable through alternative means.

Her Honour noted that the applicant has shown ‘no real reason why this should not be the case in Victoria ... This is a less restrictive means of achieving the purpose of the limitation, but which also gives effect to a reasonable limitation on the right against self-incrimination’.

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

- In the first instance, the respondents had failed to make instalment order payments in respect of outstanding fines and so the fine order was quashed and the Magistrate ordered that they be imprisoned under section 160(1) of the *Infringements Act 2006*. The Magistrate declined to exercise discretion to discharge the fine or vary the mode of imprisonment.
- Both respondents had a disability. They applied for judicial review of the decision.
- The Court accepted the submissions that the Charter required the Magistrate to interpret section 160 in a way that least infringed on the human rights of the individuals concerned, in particular, the right to liberty, the right to a fair hearing, and the right to equal protection of the law.

**Bray (A Pseudonym) v The Queen [2014] VSCA 276**

- Leading evidence from a witness who cannot be cross-examined will not necessarily render a trial unfair.
- The Court found that it would not necessarily be unfair to convict an accused based on evidence that cannot be the subject of cross-examination at trial, particularly where the witness could have been cross-examined at the committal, and that strong directions to the jury could ameliorate any potential unfairness.

**Knight v Wise [2014] VSC 76**

- Mere inconvenience is not enough to show that the right to a fair hearing has been limited. A prisoner’s lack of access to a computer in his or her cell would not result in the kind of substantial disadvantage required to breach the right, nor constitute a breach of the common law right of unimpeded access to courts.
Rights in criminal proceedings

Section 32 | Article 14 ICCPR

Nature of the right

The right explicitly protects the right to be presumed innocent until proven guilty. This imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle.

The right also provides a set of specific rights to be afforded to accused persons in criminal trials, and includes specific provisions applicable to children charged with criminal offences and preserving the right of appeal for convicted persons.

It also includes the right for persons to be tried without unreasonable delay. For the purposes of deciding whether a delay has been unreasonable, the relevant starting point is the time at which the accused is officially notified that they are going to be charged for allegedly criminal conduct. That official notification will occur through the service of a summons to answer charges laid, or when an accused is served with an arrest warrant.

The right of an accused to defend himself or herself includes the right to instruct their lawyer on the case and to testify on their own behalf, and is therefore not mutually exclusive with the right to counsel of their choosing. However, an accused is entitled to reject the assistance of counsel, although this right may be limited in certain circumstances, for example, where the accused is facing a very serious charge or to protect vulnerable witnesses.

The right not to be compelled to testify against himself or herself or to confess guilt includes the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that impacts on the presumption of innocence.
- A policy or statutory provision that deals with the admissibility of evidence.
- A policy or statutory provision that deals with reverse onus of proof.
- A policy or statutory provision that delays trial proceedings.
- A policy or statutory provision that restricts cross examination.
- A policy or statutory provision that deals with the provision of legal aid.
- A policy or statutory provision that restricts access to information and material to be used as evidence.
- A policy or statutory provision that limits appeal rights.
• A policy or statutory provision that regulates the procedures for investigation and prosecution of offences.
• A policy or statutory provision that deals with the provision of assistants and interpreters.

Case examples

*R v Momcilovic [2010] VSCA 50*

• The Victorian Court of Appeal found that a reverse onus in section 5 of the Drugs, Poisons and Controlled Substances Act (Vic) was not a reasonable and justified limit on the presumption of innocence.

• Relevant factors in considering whether a reverse onus is compatible with the right include the seriousness of the sentence likely to be imposed on conviction for the offence, whether the nature of the offence makes it difficult for the prosecution to prove an element of the offence compared to the accused disproving it, and whether the provision requires the accused to prove an exception, proviso or excuse rather than an element of the offence.

• In analysing whether limits on the presumption of innocence are reasonable and justified, the Court of Appeal identified the apparent paradox that ‘an infringement of the presumption of innocence becomes harder to justify the more serious is the punishment to which the defendant is exposed [and] that an infringement of the presumption of innocence becomes harder to justify the less serious is the offence in question’. The more serious the crime and the greater the public interest in securing convictions of the guilt, the more important protections of the accused become. Conversely, the less serious the crime and the public interest in securing convictions, the less compelling the reasons for denying the accused normal protection.

• Relevant factors in assessing whether a reverse onus is compatible with the Charter may include the seriousness of the sentence likely to be imposed on conviction for such an offence, whether the nature of the offence makes it very difficult for the prosecution to prove an element of the offence compared to the accused disproving it, and whether the provision requires the accused to prove an exception, proviso or excuse rather than an element of the offence.

• Note: on appeal to the High Court, the court interpreted the legislation so that section 5 did not apply and therefore the High Court did not make a binding decision about whether the limit on the right effected by section 5 was reasonable and justifiable.

*R v Benbrika (Ruling No 12) [2007] VSC 524*

• A group of 12 accused were to be tried together on terrorism charges. They were to be tried in a court with perspex screens separating them from their legal representatives, and each other, and with a large number of prison officers in attendance. The accused argued that they would suffer ‘severe and irremediable prejudice’ to their case, because the jury would likely believe that “the authorities” or "the Government" had already decided they were a danger to the community’.

• The Supreme Court held that the way the trial was proposed to proceed would ‘materially diminish [the accused’s] right to the presumption of innocence’ in the rights in criminal proceedings. The Court ruled that the perspex screens be removed and restricted the number of uniformed prison officers allowed into the court room at one time.
The Supreme Court has found that the right to the presumption of innocence appears to apply only in criminal proceedings. The presumption of innocence was therefore found not to apply in the context of disciplinary proceedings involving allegations of professional misconduct, where no findings of guilt were to be made.

The right requires that the nature of the offence of which the accused must be informed (including particulars) is that with which he is charged. The right gives rise to a right to know the basis of the prosecution case. It is a right to know what the prosecution case against him will be so that he can prepare to meet that case. In this sense he is entitled to know what the particulars are insofar as they are available.

The circumstances of the case were such that the evidence did not enable the prosecution to provide more particularity. The Court then accepted that the right was not engaged – “an unavoidable vagueness about particulars such as dates would not be in breach of this section”.

Leading evidence from a witness who cannot be cross-examined will not necessarily render a trial unfair.

The Court found that it would not necessarily be unfair to convict an accused based on evidence that cannot be the subject of cross-examination at trial, particularly where the witness could have been cross-examined at the committal, and that strong directions to the jury could ameliorate any potential unfairness.

Drawing on international jurisprudence, Bell J noted that ‘[t]he general principle ... is that courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress and to assist him or her effectively to participate in the proceeding’.

Delay may be unreasonable even when time spent on remand is unlikely to be greater than time upon a custodial sentence.

The prosecution had a strong case on a charge of drug trafficking for which the defendant was likely to serve a significant custodial sentence. Despite this, the rights were found to enact the common law right to be tried without unreasonable delay, and the delay in the case of over two years before the charges would be heard, informed the meaning of the ‘exceptional circumstances’ that led to bail being granted.
Children in the criminal process

Nature of the right

The right recognises that young persons that become involved in the criminal justice system deserve special protections by virtue of their age.

An accused child must not be detained with adults and must be brought to trial as quickly as possible. A convicted child must be treated in a way that is appropriate for their age.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that provides for the detention of children for any length of time.
- A policy or statutory provision that provides for the detention of children in locations that have limited facilities or services for the care and safety of the child (for example, watch houses).
- A policy or statutory provision that relate to sentencing laws.
- A policy or statutory provision that relate to standards in detention centres.

Case examples

*LM v Children’s Court of the Australian Capital Territory [2014] ACTSC 26*

- In the ACT, a minor accused sought to have the proceedings against her stayed as an abuse of process arguing, among other things, that the six-month delay between laying the first charge and laying the second charge breached her right to be brought to trial a quickly as possible under the *Human Rights Act 2004* (ACT).

- The accused had initially been charged with the less serious offence of assault occasioning actual bodily harm, and had entered a guilty plea. The DPP, however, subsequently indicated that they would not accept the guilty plea and would instead be seeking to charge the accused with the more serious offence of recklessly inflicting grievous bodily harm.

- The presiding Magistrate in the Children’s Court rejected this argument, saying the phrase ‘as quickly as possible’ in the right meant ‘with all reasonable expedition of which the circumstances allow’.

- The Magistrate said: ‘Such a meaning does impose a higher obligation than one requiring that an outcome be achieved or a result occur ‘without unreasonable delay’. I see the obligation to act as quickly as possible as connoting an obligation to give something priority and to take positive steps to expedite completion, albeit within what the circumstances prevail or will
allow. An obligation to do something without unreasonable delay on the other hand may be met by allowing the ordinary course of events to transpire and requiring only that unnecessary or unusual delay be avoided.’

- The Magistrate concluded that, in the absence of evidence to explain the delay, the prosecution had not brought LM to trial ‘as quickly as possible’, and therefore there had been a breach of the rights of children in the criminal process.

*R v KMW & RJB [2002] VSC 93*

- Significant consideration is to be given to rehabilitation when sentencing child offenders.
Right not to be tried or punished more than once

Section 34 | Articles 14(7) ICCPR

Nature of the right

The right upholds the rule against double jeopardy – that is, that a person should not be taken to court or punished more than once for an offence of which they have already been convicted or acquitted.

The right applies only to criminal offences (and not civil proceedings). All criminal, quasi-criminal and regulatory offences, no matter how minor the consequences, fall within the provision, including, for example, parking offences.

The right does not prevent other non-penal consequences from flowing from the same conduct that gave rise to a criminal conviction and punishment (for example, professional regulatory disbarment or the like).

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that creates new offences.
- A policy or statutory provision that is related to the double jeopardy exceptions under the Criminal Code.

Case examples

Psychology Board of Australia v Ildiri [2011] VCAT 1036

- The convictions of a psychologist for fraud through misappropriation of funds and failing to maintain adequate client notes did not prevent disciplinary proceedings by VCAT, referred to it by the Psychology Board of Australia, relating to the same conduct.

- VCAT found that the disciplinary proceedings, and resulting consequences such as disbarment, were aimed at protecting the public and not punishing the practitioner so that right not to be tried or punished more than once was not engaged.

Sim v Business Licensing Authority [2011] VCAT 583

- In denying a motor car traders licence to an applicant, VCAT considered that his previous convictions for unlicensed motor car trading, and also for a range of other activities, such as drug, dishonesty and driving offences, ‘could well be relevant to the reasonableness of an expectation that there will be compliance with the Motor Car Traders Act 1986 and regulations in the future’ and demonstrated a ‘continued failure to accept responsibility for [his] conduct’.
VCAT did not consider that taking the convictions into consideration in this way would engage the right not to be tried or punished more than once or amount to double punishment.

**LM (Guardianship) [2008] VCAT 2084**

- In deciding an application for a supervised treatment order under the *Disability Act 2006*, VCAT considered whether making such an order was compatible with section 26 of the Charter.

- That was because LM, the subject of the order had been charged with a number of offences before being admitted into a secure psychiatric ward owing to her mental ill health and behavioural issues. As a result, the order, if made, would result in her detention as a result of behaviour for which she had already been convicted and released on a good behaviour bond.

- However, the purpose of the detention under the Disability Act was not to punish LM but to protect members of the public and LM herself, and so VCAT found that the right not to be tried or punished more than once was not engaged.
Retrospective criminal laws

Section 35 | Article 15 ICCPR

Nature of the right

The right to protection from retrospective criminal laws is both an absolute\(^\text{10}\) and non-derogable\(^\text{11}\) right at international law.

The right is aimed at protecting people from being unfairly and harshly penalised in situations where there has been a change in the criminal law since the time they committed the offence. In these situations, a person is not liable to punishment that is more severe than that which existed at the time of the offence.

Similarly, if the penalty for the offence is reduced at law after the offence is committed, but before the person is sentenced for the offence, the person is entitled to the reduced penalty.

It also protects people from being found guilty of an offence for an action which was not an offence at the time it was committed.

The right does not extend to prevent retrospective changes that do not form part of the penalty or punishment of an offender, or to changes in procedural law (for example, shifts in trial practice or changes to the rules of evidence).

The criminal law must be sufficiently accessible and precise to enable a person to know in advance whether his or her conduct is criminal.

Internal limitation

Section 35(5) ensures that the right does not apply where an offence is created after the act or omission and the offence was at the time of the act or omission, an offence under international law.

Possible policy triggers

- A policy or statutory provision that creates new offences.
- A policy or statutory provision that amends offence provisions.

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\(^{10}\) International human rights law recognises that few rights are absolute and reasonable limits may be placed on most rights and freedoms. Certain rights, however, are considered ‘absolute’ meaning they cannot be limited for any reason. Absolute rights cannot be suspended or restricted, even during a declared state of emergency.

\(^{11}\) Article 4 of the ICCPR provides a derogation power which allows governments to temporarily suspend the application of some rights in the exceptional circumstance of a ‘state of emergency’ and subject to certain conditions. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency.
Case examples

**WBM v Chief Commissioner of Police [2010] VSC 219**

- A penalty for the purposes of the right means a ‘criminal punishment’ or ‘sentence’.

- In WBM, the plaintiff had argued that the right prohibited his registration and supervision under the *Sex Offenders Registration Act 2004*. The court rejected the characterisation of the registration as a penalty for the purposes of the right, finding that: the question of whether a particular statutory scheme, such as that established by the [Sex Offenders Registration Act], constitutes the imposition of penalty is to be decided as a matter of substance, and not form. ... the question is not to be determined by whether the principal Act expressly characterises the various requirements ... as a ‘punishment’.

- Rather, the question of whether an Act imposes a penalty is to be determined by the circumstances. The Court in WBM looked at the purposes of the Act and the nature of the obligations imposed on an offender. The primary purposes of the Act were to prevent re-offending and to facilitate investigation and prosecution of future offences. Neither of these purposes were found to be penal. In addition, the obligations imposed on an offender, such as prohibitions on child related employment, were protective in nature rather than penal.

**R v AMP [2010] VSCA 48**

- The applicant had committed an offence of indecent assault in 1958. At the time the offence carried a maximum penalty of 10 years imprisonment. The maximum penalty was reduced to five years in 1967, but in 1991 an offence criminalising the same conduct was introduced, with a maximum penalty of 10 years imprisonment. That was also the maximum penalty at the time of the applicant’s sentencing in 2009.

- On appeal, the applicant argued that s 114(2) of the *Sentencing Act 1991* required the judge tosentence the applicant on the basis that the reduction of the maximum penalty to five years imprisonment should apply.

- The Court of Appeal found that neither s 114(2) nor the protection from retrospective criminal laws required the sentencing judge to sentence on the basis that the five year maximum penalty which applied between 1958 and 1991 was relevant, as the maximum penalty that applied at the time of the offence was the same as at the time of sentencing.


- Under the ICCPR, the application of laws that provided for preventative detention of sex offenders after their sentences were complete were found to breach article 15(1) of the ICCPR, on which this right is modelled.
Right to education

Section 36 | Article 13 ICESCR

Nature of the right

The right to education has two limbs, the first provides the right of every child to primary and secondary education appropriate to the child’s needs.

The second limb provides the right to have access, based on a person’s abilities, to further vocational education and training that is equally accessible to all.

The intention is to provide a right to education without discrimination that is consistent with the Education (General Provisions) Act 2006. The right is narrowly drafted and covers aspects of education service delivery that are within the scope of the Queensland Government.

The right to education has been interpreted in international jurisprudence as encompassing the key elements of availability, accessibility, acceptability and adequacy:

- Availability: educational institutions and programs must be available in sufficient quantity, and include the availability of various components likely to be required to function, e.g. buildings, sanitation facilities for both sexes, safe drinking water, trained teachers
- Accessibility: non-discrimination, physical accessibility of school locations (local school or distance learning programs using technology), economic accessibility (affordable to all)
- Acceptability: a commitment to a minimum standard of educational quality, curriculum and teaching methods that are relevant, of good quality, and culturally appropriate
- Adaptable: flexible, open to review, and tailored to the needs of individual strengths.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that deals with the provision of education and training to young people in detention.
- A policy or statutory provision that regulates access to schools by children or young people in a neutral way but has a disproportionate impact on people with a particular attribute (for example, people with a disability).
Case examples

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

- The defendants were not able to produce (or did not produce) evidence to support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them and that “by simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.”
Right to health services

Section 37 | Article 12 ICESCR

Nature of the right

The right to health services does not mean the right to be healthy. It refers to the right to access a variety of goods, facilities and services necessary for a person to be healthy. This recognises that a person’s capacity for full health can be limited by biological, environmental and socio-economic factors, and by an individual’s personal choices.

The right as set out in the Act has two limbs: the first provides for the right to access health services without discrimination and the second provides that a person must not be refused medicinal treatment that is immediately necessary to save their life or to prevent serious impairment.

While the right to health services in the HR Act is narrowly drafted, the right to health has been interpreted in international jurisprudence as encompassing the key elements of availability, accessibility, acceptability and adequacy:

- **Availability**: requires that there is a functioning health system available to the general population, including health care facilities, goods and services, and programs, in sufficient quantity;
- **Accessibility**: requires that health facilities, goods and services are accessible without discrimination, meaning they must be physically accessible, economically accessible (affordable), and accompanied by access to appropriate information;
- **Acceptability**: requires that health services must be respectful of medical ethics, appropriate from a gender, cultural and age perspective, and designed to respect confidentiality and improve the health status of those concerned;
- **Adequacy**: requires that health services provided to the public must be scientifically and medically appropriate and of good quality.

The right is not intended to extend to underlying determinants of health, such as: adequate supply of food, nutrition and housing; access to safe and potable water and adequate sanitation; and healthy and safe working and environmental conditions.

Internal limitation

This right does not have an internal limit or qualification.

Possible policy triggers

- A policy or statutory provision that deals with access to health care for prisoners or other persons under the care of the State.
- A policy or statutory provision that regulates the provision of health services in a neutral way but has a disproportionate impact on people with a particular attribute (for example, people with a disability).
Case examples

*Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)*

- The appellant was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. His life could be prolonged by means of regular renal dialysis. He sought dialysis treatment from the Addington State Hospital in Durban.

- He was not admitted to the dialysis programme of the hospital. Because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure its policy was to admit automatically to the renal dialysis programme those patients suffering from acute renal failure which could be treated and remedied by renal dialysis.

- The appellant made an urgent application to a Local Division of the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. The application was dismissed. The appellant appealed to the Constitutional Court.

- The Court that the obligations imposed on the State by sections 26 and 27 of the Constitution dealing with the right of access to housing, health care, food, water and social security were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited by reason of the lack of resources.

- Given this lack of resources and the significant demands made on them by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services, an unqualified obligation to meet these needs would not at present be capable of being fulfilled. The appellant's case had to be seen in the context of the needs which the health services had to meet, for if treatment had to be provided to the appellant it would also have to be provided to all other persons similarly placed. If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment the cost of doing so would make substantial inroads into the health budget.

- The provincial administration which was responsible for health services in KwaZulu-Natal had to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.

- A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters.

- Further, that the words "emergency medical treatment" (‘no one may be refused emergency medical treatment’) might possibly be open to a broad construction The appellant was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. His life could be prolonged by means of regular renal dialysis.

- He sought dialysis treatment from the Addington State Hospital in Durban which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. But this was not their ordinary meaning and, if this had been the purpose which it was intended to serve, one would have expected that to have been expressed in positive and specific terms.
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