UNSW Law & Justice Research Series

State and territory human rights legislation

Peter Cashman

[2024] *UNSWLRS* 25

UNSW Law & Justice
UNSW Sydney NSW 2052 Australia

E: LAW-Research@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

Research Paper 6: State and territory human rights legislation

Contents

9.1 The Australian Capital Territory
9.2 Queensland
9.3 Victoria

10. International law, foreign, international and domestic jurisprudence

11. The scope and content of protected human rights

11.1 Recognition and equality before the law

11.1.1 The Australian Capital Territory
11.1.2 Victoria
11.1.3 Queensland

11.2 The right to life

11.2.1 The Australian Capital Territory
11.2.2 Victoria
11.2.3 Queensland

11.3 Protection from torture and cruel, inhuman or degrading treatment

11.3.1 The Australian Capital Territory
11.3.2 Victoria
11.3.3 Queensland

11.4 Protection of the family and children

11.4.1 The Australian Capital Territory
11.4.2 Victoria
11.4.3 Queensland

11.5 Privacy and reputation

11.5.1 The Australian Capital Territory
11.5.2 Victoria
11.5.3 Queensland

11.6 Freedom of movement

11.6.1 The Australian Capital Territory
11.6.2 Victoria
11.6.3 Queensland

11.7 Freedom of thought, conscience, religion and belief

11.7.1 The Australian Capital Territory
11.7.2 Victoria
11.7.3 Queensland

11.8 Peaceful assembly and freedom of association

11.8.1 The Australian Capital Territory
11.8.2 Victoria
11.8.3 Queensland

11.9 Freedom of expression

11.9.1 The Australian Capital Territory
11.9.2 Victoria
11.9.3 Queensland

11.10 Right to participate in public life

11.10.1 The Australian Capital Territory
11.10.2 Victoria
11.10.3 Queensland

11.11 Right to liberty and security of the person

11.11.1 The Australian Capital Territory
11.11.2 Victoria
11.11.3 Queensland

11.12 Humane treatment when deprived of liberty

11.12.1 The Australian Capital Territory
11.12.2 Victoria
11.12.3 Queensland

11.13 Children in the criminal process

11.13.1 The Australian Capital Territory
11.13.2 Victoria
11.13.3 Queensland

11.14 Fair trial/hearing

11.14.1 The Australian Capital Territory
11.14.2 Victoria
11.14.3 Queensland

11.15 Rights in criminal proceedings

11.15.1 The Australian Capital Territory
11.15.2 Victoria
11.15.3 Queensland

11.16 Compensation for wrongful conviction

11.16.1 The Australian Capital Territory

11.17 Right not to be tried or punished more than once

1. Introduction

The Australian *Constitution* establishes a federation between the Commonwealth Government and six state governments. The Australian *Constitution* also empowers the Commonwealth to legislate to establish self-governing territories, of which there are two: the Australian Capital Territory ('ACT') and the Northern Territory ('NT').

The powers of the Australian state and territory governments are constrained to differing degrees by the rights protections in the Commonwealth *Constitution.* As discussed in research paper 3,

within its constitutional competence, the Commonwealth Parliament can also enact legislation that overrides state or territory legislation to the extent of any inconsistency.[1]

In addition, some state constitutions contain select rights protections, as does the Commonwealth legislation establishing the ACT and the NT.[2] For example, among other political guarantees, section 48 of the South Australian *Constitution* guarantees equal franchise for women.[3] Section 73(2)(c) of the Western Australian *Constitution* entrenches the requirement that the people directly elect the Western Australian ('WA') Legislative Assembly and Legislative Council.[4] The Tasmanian *Constitution* guarantees 'freedom of conscience and the free profession and practice of religion' and religious equality in public office, although this protection is not entrenched.[5] The current Commonwealth legislation providing for self-government of the ACT and the NT prohibits the legislatures of the territories from unjust acquisition of property.[6]

Subject to those limitations, under their constitutions, the Australian states have broad legislative powers in comparison to the Commonwealth's powers, which are constrained by section 51 of the Australian *Constitution* and other constitutional limitations. In particular, the states are not limited by any equivalent of the Commonwealth's external affairs power in giving effect to international human rights treaties in domestic legislation, although any such legislation is capable of being voided under s 109 of the Australian Constitution if inconsistent with valid Commonwealth legislation.[7]

In a step towards a more comprehensive legal framework for human rights protection in Australia, three state and territory jurisdictions – the ACT, Victoria and Queensland - now have statutory human rights charters imposing human rights protective obligations and procedures on each branch of government. Each of those statutes require parliament to scrutinise and consider draft legislation for its human rights compatibility. Courts and tribunals must interpret legislation compatibly with human rights so far as consistent with its purpose. The Supreme Court of each jurisdiction can also notify the local parliament through a declaration of incompatibility or inconsistency that legislation is inconsistent with human rights, without impacting the legislation's validity.

'Public authorities' or 'public entities' - terms comprehensively defined in the human rights statutes – must also comply with human rights in their administrative decision-making and

---

[1] *Australian Constitution* ss 109 and 122.

[2] For further description and analysis of the protections for human rights in the state Constitutions, see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 12 - 13.

[3] *South Australia Constitution Act 1934* (SA), s 48. Section 77 also provides for a level of voter equality, by requiring that in the event of an electoral redistribution, the number of electors should not deviate by more than 10 per cent from the electoral quota.

[4] *Constitution Act 1889* (WA), s 73(2)(c).

[5] *Constitution Act 1934* (Tas) s 46 (however, this guarantee is not entrenched).

[6] *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth) s 50.

[7] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 8.

conduct. While damages are not generally available in any of the three jurisdictions for breaches of those obligations, other remedies may be available, for example through other powers of the court.[8] In Queensland, a human rights complaint procedure is also available through the Queensland Human Rights Commission.

The elimination of discrimination and equal treatment are principles enshrined in international human rights law. As discussed in research paper 5, each of the states and territories has now enacted anti-discrimination or equal opportunity legislation imposing obligations not to treat individuals or groups unfavourably or disadvantageously in defined areas of public activity on the basis of protected attributes such as race or sex. The protections in some state and territory jurisdictions go beyond those in the equivalent Commonwealth anti-discrimination legislation. This is an important consideration in determining the appropriate jurisdiction in which to pursue remedies for discriminatory treatment.

Other than Victoria, all state and territory anti-discrimination legislation provides a mandatory two-stage system to resolve complaints of unlawful discrimination. Except in Victoria, access to legal proceedings is subject to first making a complaint to state and territory anti-discrimination bodies and attempting its resolution by conciliation. If the complaint cannot be resolved, only then is it open to pursue legal proceedings in state and territory civil and administrative tribunals.

With some jurisdictional differences as to what conduct is proscribed, state and territory anti-discrimination and equal opportunity legislation also makes other attribute-based harmful activity unlawful: for example, sexual harassment and racial vilification.

While more limited than the right to privacy as defined in international law, state and territory statutes also impose privacy protective responsibilities on public authorities in handling personal information. At the state and territory level, these protections often operate in concert with statutory regimes that enable individuals, in defined circumstances, access to government information and amendment of personal information held by public authorities.

Statutory Ombudsman and police accountability regimes also provide for oversight and complaint mechanisms in respect of the conduct of state and territory public authorities. While not 'human rights' legislation as understood within the Australian legal system per se, these statutes provide additional complaints and dispute settlement mechanisms through which to hold public authorities accountable for conduct breaching human rights, as they are understood in international law. We address those statutory regimes here.

2. Overview of state and territory human rights acts

The *Human Rights Act 2004* (ACT) ('ACT Human Rights Act') came into force in the Australian Capital Territory ('ACT') on 1 July 2004. Its passage was a milestone as the first comprehensive statutory protection of human rights in Australia. Two further Australian jurisdictions have now

[8] Under s 23(2) of the *Human Rights Act 2004* (ACT), there is a right to compensation for wrongful conviction. See: *Eastman v The Australian Capital Territory* [2019] ACTSC 280; 14 ACTLR 195.

enacted comprehensive human rights statutes, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter')[9] and the *Human Rights Act 2019* (Qld)[10] ('Human Rights Act (Qld)'), the latter of which came into full effect on 1 January 2020.[11]

Both the *Human Rights Act* (Qld) and the Victorian *Charter* contain transitional provisions:

- the statutes apply to all Acts and statutory instruments whether passed before or after their commencement;[12]
- the statutes have no effect on any proceedings commenced or concluded before their commencement;[13]and
- the obligations on public entities (Queensland) and public authorities (Victoria) to act and make decisions compatibly with human rights do not apply to acts or decisions before the statutes' commencement.[14]

Both the *Human Rights Act* (Qld) and Victorian *Charter* also contain a savings provision that the statute will not affect any laws relating to termination of pregnancy or the killing of an unborn child, either before or after their commencement.[15]

The *Human Rights Act* (Qld) also contains a provision providing that the Act will not affect native title rights and interests other than in accordance with the *Native Title Act 1993* (Cth) (s 107).[16]

To date, human rights legislation has not been introduced in the other Australian states or in the Northern Territory. There has however been some progress.

There were consultations in 2007 in Western Australia with a view to human rights legislation. A *Human Rights Bill* was introduced to the South Australian Legislative Council by a private member in 2004 but not passed. There are ongoing efforts to encourage the introduction of human rights

---

[9] See generally Alistair Pound and Kate Evans, Annotated Victorian Charter of Rights, Second Edition, 2019, LawBook Co., 2019. See also Judicial College of Victoria, *Charter of Human Rights Bench Book* https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm. The website of the Victorian Equal Opportunity and Human Rights Commission has detailed information on human rights law in Victoria: https://www.humanrights.vic.gov.au/.

[10] On the development of the Queensland legislation see Aimee McVeigh and Monica Taylor, 'Human Rights in Action: The community's role in creating a human rights culture in Queensland' *Proctor*, 16 December 2020.

[11] The Queensland Human Rights Commission publishes note on cases in which the Human Rights Act 2019 (Qld) has been considered: https://www.qhrc.qld.gov.au/resources/legal-information/case-notes-human-rights. Cases referred to are available from legal websites:

- AustLII website (Australasian Legal Information Institute) for all Australian decisions
- Supreme Court Library Queensland website for decisions of all Queensland courts and tribunals
- Queensland Judgments website (Incorporated Council of Law Reporting Qld).

[12] *Human Rights Act 2019* (Qld) s 108(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 49(1).

[13] *Human Rights Act 2019* (Qld) s 108(2)(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 49(2).

[14] *Human Rights Act 2019* (Qld) s 108(2)(b); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 49(3).

[15] *Human Rights Act 2019* (Qld) s 106; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 48.

[16] *Human Rights Act 2019* (Qld) s 107.

statutes in other states. In Tasmania, a campaign for the introduction of human rights legislation recommenced in 2018, ten years after the Tasmanian Law Reform Institute recommended that such legislation should be introduced.[17] A campaign supported by a broad coalition of civil society and community organisations for the introduction of human rights legislation in New South Wales has also gathered some momentum.[18]

The institutional features and procedures of the ACT, Victorian and Queensland human rights statutes have much in common. These are set out in the following Table. They are discussed in more detail below.

Table 1 – Features and procedures of the ACT, Victorian and Queensland human rights statutes

Features and procedures of the ACT, Victorian and Queensland human rights statutes	
	The role of the Parliament (Victoria) and the Legislative Assembly (the ACT and Queensland)
Legislation – statements of compatibility	Each bill presented to the Parliament (Victoria) and the Legislative Assembly (Queensland) must be accompanied by a statement of compatibility prepared by the Member of Parliament tabling it, addressing why in the member's opinion it is compatible with human rights or the nature and extent of any incompatibility.[19] In the ACT, the Attorney General is responsible for tabling a statement of compatibility in respect of Ministerial bills before the Legislative Assembly.[20] The requirement to provide a statement of compatibility does not extend to non-government bills. Legislation will be valid and enforceable notwithstanding the statement of compatibility procedure was not complied with. [21] Statements of compatibility are not binding on any court or tribunal.[22]
Subordinate legislation – statements of compatibility	In Queensland, the responsible Minister for subordinate legislation is required to table a certificate about its human rights compatibility.[23] Failure to comply with the statement of compatibility procedure does not impact upon the validity of the subordinate legislation.[24]

[17] https://www.tashumanrightsact.org/.
[18] https://humanrightsfornsw.org/news.
[19] *Human Rights Act 2019* (Qld) s 38; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.
[20] *Human Rights Act 2004* (ACT) s 37.
[21] *Human Rights Act 2004* (ACT) s 39; *Human Rights Act 2019* (Qld) s 42; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 29.
[22] *Human Rights Act 2019* (Qld) s 38(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28(4).
[23] *Human Rights Act 2019* (Qld) s 41.
[24] *Human Rights Act 2019* (Qld) s 42.

	There is no obligation to prepare a statement of compatibility for subordinate legislation in the ACT .[25] There is an obligation to prepare a human rights certificate for subordinate legislation in Victoria.[26]
Parliamentary committee human rights scrutiny	In each jurisdiction, a parliamentary committee must scrutinise and report to the parliament on any human rights issues raised by bills before it.[27] In Queensland, parliamentary committee scrutiny also applies to subordinate legislation.[28] In the ACT and Queensland, there is express provision that legislation will be valid and enforceable notwithstanding the human rights scrutiny committee procedure was not complied with.[29] There is no requirement that the human rights scrutiny committee report to Parliament before passage of legislation in Victoria, so it is implicit that the same position applies. In Queensland, 'non-Queensland laws' can also be subject to portfolio committee human rights scrutiny on referral by the Legislative Assembly.[30] 'Non-Queensland laws' refer to Commonwealth laws extending to Queensland by virtue of s 51(xxvii) of the Commonwealth *Constitution* or laws of other jurisdictions applying as a Queensland law.[31] In Queensland only, on tabling in the Legislative Assembly, declarations of incompatibility from the Supreme Court are also referred to a parliamentary committee to report back to the Legislative Assembly.[32]
Override declarations	In Queensland and Victoria, 'in exceptional circumstances', the Parliament can make an override declaration providing that the human rights obligations of the statute do not apply to an Act or statutory

[25] A recommendation of the 2009 section 43 review of the ACT Human Rights Act that subordinate legislation be subject to scrutiny was not adopted: Simon Rice, 'Culture, what culture? Why we don't know if the ACT Human Rights Act is working' chapter in Matthew Groves, Janina Boughey and Dan Meagher (eds) *The Legal Protection of Rights in Australia* (Oxford, Hart Publishing, 2019) 185.

[26] See ss 12A and 12D of the *Subordinate Legislation Act 1994* (Vic). See also s 15 of that Act.

[27] *Human Rights Act 2004* (ACT) s 38 (note that the committee scrutiny procedure applies to government and non-government bills, unlike the s 37 statement of compatibility procedure); *Human Rights Act 2019* (Qld) s 39 (in addition to the bill, the portfolio committee is also required to consider the s 38 statement of compatibility tabled with it); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30. See also ss 15A and 21 of the *Subordinate Legislation Act 1994* (Vic) with respect to Victoria.

[28] *Human Rights Act 2019* (Qld) s 41(4).

[29] *Human Rights Act 2004* (ACT) s 39; *Human Rights Act 2019* (Qld) s 42.

[30] *Human Rights Act 2019* (Qld) s 40.

[31] *Human Rights Act 2019* (Qld), as defined in Schedule 1.

[32] *Human Rights Act 2019* (Qld) s 57.

	provision while it remains in force.[33] The ACT *Human Rights Act* does not contain provision for override.
	The role of the executive
Administrative duties	It is unlawful for 'public authorities' (the ACT and Victoria) or 'public entities' (Queensland) to act in a way that is incompatible with a human right or to fail to give proper consideration to relevant human rights in decision-making.[34] 'Public authorities' (the ACT and Victoria) and 'public entities' (Queensland) are defined terms.[35] For the availability of relief or remedies for the failure of a public authority or public entity to comply with those obligations, refer to 'The role of the Courts - Relief or remedy for breaches of human rights' below.
Intervention in and joinder to proceedings	The Attorney General may intervene in proceedings: • in the ACT, involving application of the legislation;[36] and • in Queensland and Victoria, in which a question of law relating to the application of the human rights legislation or statutory interpretation in accordance with the human rights legislation is at issue (and may also be joined as a party to proceedings concerning the same).[37]
Responding to declarations of incompatibility (ACT, Queensland) or inconsistent interpretation (Victoria)	When the Supreme Court issues a declaration of incompatibility (in Queensland) or declaration of inconsistency (in Victoria), the Minister responsible for administering the applicable statute must prepare a written response to the declaration and present it to the Legislative Assembly and Parliament, respectively.[38] In the ACT, on receipt of a declaration of incompatibility, the Attorney-General is required to table and provide a written response to it.[39] In Queensland, the Minister is required to have regard in preparing their response to the report prepared by a parliamentary committee

[33] *Human Rights Act 2019* (Qld) ss 43, 45; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.
[34] *Human Rights Act 2004* (ACT) s 40B; *Human Rights Act 2019* (Qld) s 58; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.
[35] *Human Rights Act 2004* (ACT) s 40 – s 40A; *Human Rights Act 2019* (Qld) s 9; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.
[36] *Human Rights Act 2004* (ACT) s 35.
[37] *Human Rights Act 2019* (Qld) s 50(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 34(1). Under s 50(1) of the Human Rights Act (Qld) and s 34(2) of the Victorian Charter, if the Attorney-General intervenes, the Attorney-General is deemed a party for the institution and prosecution of any appeal.
[38] *Human Rights Act 2019* (Qld) s 56; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 37 (the Minister's response is also published in the Government Gazette).
[39] *Human Rights Act 2004* (ACT) s 33.

	on the declaration (refer to 'Parliamentary scrutiny of legislation – committee oversight' above).[40]
Human Rights Commission reports	• In the ACT, the Minister is required to table any reports of the ACT Human Rights Commission on the effect of Territory laws on human rights in the Legislative Assembly.[41] • In Queensland, the Attorney-General must table a copy of each annual report, and each report given under s 92(3) in the Legislative Assembly within 6 sitting days after receiving the report • In Victoria, the Attorney-General is required to table in Parliament annual Victorian Equal Opportunity and Human Rights Commission reports on the Charter's operation and effect and any reports on the effect of any statutory provisions or the common law on human rights.[42]
	The role of the judiciary
Statutory interpretation	Courts must interpret laws compatibly with human rights, so far as it is possible to do so consistently with their purpose.[43] Courts cannot invalidate legislation that is incompatible with human rights.[44]
Declarations of incompatibility (ACT, Queensland) or inconsistent interpretation (Victoria)	The Supreme Court of each jurisdiction can issue a 'declaration of incompatibility' (the ACT and Queensland) or 'declaration of inconsistent interpretation' (Victoria) where a law or statutory provision cannot be interpreted consistently with human rights.[45] In Queensland and Victoria, the power to issue a declaration is subject to any override declaration.[46]

[40] *Human Rights Act 2019* (Qld) ss 56(1)-(2), 57.
[41] *Human Rights Act 2004* (ACT) s 41(2). 'The Minister' is defined in s 162(2) of the *Legislation Act 2001* (ACT).
[42] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 43(1).
[43] *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2019* (Qld) s 48(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.
[44] *Human Rights Act 2004* (ACT) s 32(3); *Human Rights Act 2019* (Qld) s 54; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5) .
Human Rights Act 2019 (Qld) s 48(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.
[45] *Human Rights Act 2004* (ACT) s 32(1)-(2); *Human Rights Act 2019* (Qld) s 53(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.
[46] *Human Rights Act 2019* (Qld) s 53(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(2).

	In the ACT, the declaration can be made in proceedings before the Supreme Court where an issue arises in the proceeding about the consistency of a Territory law with a human right.[47] In Queensland and Victoria, the declarations can be issued in Supreme Court proceedings in circumstances: • Where a question of law about the application of the statute or the interpretation of a legislative provision in accordance with it arises in proceedings, or in an appeal before the Court of Appeal in Queensland and Victoria on those issues; or • Where the Supreme Court has had a question referred to it (see the section on referrals below).[48] In Queensland and Victoria, a declaration made by the Supreme Court can be subject of appeal to the Court of Appeal.[49] The declaration is provided by the Court to the Attorney-General[50] and tabled in the relevant parliament.[51] The power to issue the declaration is clearly expressed as discretionary in each jurisdiction. In the ACT[52] and Victoria[53], the Supreme Courts have both declined to issue declarations in circumstances where they have found statutory provisions cannot be interpreted consistently.[54]

[47] *Human Rights Act 2004* (ACT) s 32(1).
[48] *Human Rights Act 2019* (Qld) s 53(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(1).
[49] *Human Rights Act 2019* (Qld) s 53(6) (the declaration of incompatibility is deemed an order of the Supreme Court in the Trial Division, meaning it may be appealed to the Court of Appeal); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(6).
[50] *Human Rights Act 2004* (ACT) s 32(4); *Human Rights Act 2019* (Qld) s 55(1)(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(6).
[51] *Human Rights Act 2004* (ACT) s 33(2); *Human Rights Act 2019* (Qld) s 56(1)(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 37.
[52] *Pappas v Noble* [2006] ACTSC 39 [17]-[18] (After finding incompatibility with s 21 of the ACT *Human Rights Act*, 'The court is given power to make what is called in the Act a declaration of incompatibility. This is not a case where it is appropriate for the court to go as far as that, involving as it does notice to the Attorney-General and to the Human Rights Commissioner, and the provision of an opportunity to the holders of both of those offices to intervene in the proceedings…it seems to me that that is sufficient to decide the objection and that it would not be appropriate to proceed further with the procedure available.')
[53] *Rich v The Queen* (2014) 43 VR 558 (in which the Court declined to make a declaration because of its limited use in circumstances in which the statutory provision in question was due to be repealed).
[54] In *Momcilovic v The Queen* (2011) 245 CLR 1, Crennan and Kiefel JJ suggested that a declaration of inconsistent interpretation under the Victorian Charter would rarely be prudent in criminal trial proceedings because of potential to undermine a criminal conviction.

	The declaration does not have any effect on the validity or enforceability of the legislation or create any legal rights or obligations.[55] It does not give rise to a civil cause of action.[56] Particular notice obligations apply in proceedings where the Court is considering issuing a declaration of incompatibility or of inconsistent interpretation: see the section on notice requirements below.
Relief or remedy for breaches of human rights	The failure of a public authority/entity to comply with their obligations to act compatibly with human rights or to fail to give proper consideration to relevant human rights in decision-making may give rise to the availability of relief or remedy: • by way of legal proceedings against the public authority for contravening the Human Rights Act (ACT) or by relying on the person's rights under the Act in other legal proceedings (in the ACT);[57] and • by relying on unlawfulness under the legislation in proceedings brought on the grounds that an act or decision is unlawful on grounds arising other than under the legislation (in Queensland and Victoria).[58] In Queensland, human rights complaints can also be made to the Queensland Human Rights Commission.[59] The role of the Queensland Human Rights Commission is addressed below.
Direct application of human rights to courts and tribunals	In Victoria the *Charter* applies to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3.[60] In Queensland s 5(2)(a) of the *Human Rights Act 2019* directly applies the legislation to courts and tribunals when exercising functions under specific parts of the legislation. There is no provision directly applying the statutory rights to courts and tribunals in the ACT *Human Rights Act 2004*.[61]

[55] *Human Rights Act 2004* (ACT) s 32(3); *Human Rights Act 2019* (Qld) ss 48(4) and 54; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5).
[56] *Human Rights Act 2019* (Qld) s 54(b); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5)(b).
[57] *Human Rights Act 2004* (ACT) s 40C.
[58] *Human Rights Act 2019* (Qld) s 59; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.
[59] *Human Rights Act 2019* (Qld) s 65.
[60] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6 (2) (b).
[61] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6.

Procedural requirements in human rights proceedings	For further information on the role of the Courts under the statutes, see parts 12 and 13 below. Various procedural requirements in respect of proceedings relying upon the statutes are also discussed below.
	The role of the ACT, Queensland and Victorian Human Rights Commissions
Intervention in proceedings	In the ACT the Human Rights Commissioner can intervene in proceedings involving the application of the ACT *Human Rights Act,* with the leave of the court (s 36). In Queensland both the Attorney General and QHRC may intervene, and be joined, as a party to a proceeding before a court or tribunal in which: • a question of law arises that relates to the application of the *Human Rights Act* (Qld); or • a question arises in relation to the interpretation of a statutory provision in accordance with the *Human Rights Act* (Qld) (s 50(1), in respect of the Attorney-General; s 51(1), in respect of the QHRC). If the Attorney General or QHRC intervene, they become a party to the proceeding for the purpose of any appeal from an order made in the proceeding (ss 50(2), 51(2)). In Victoria the Victorian Equal Opportunity and Human Rights Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of the *Charter* or a question arises with respect to the interpretation of a statutory provision in accordance with the *Charter* (s 40 (1)).
Human rights complaints function (Queensland only)	In Queensland, in specified circumstances, a human rights complaint that a public entity has breached its *Human Rights Act 2019* (Qld) obligations can be made to the Queensland Human Rights Commission.[62]
	Other non-public entities

[62] *Human Rights Act 2019* (Qld) s 65.

Opting in to human rights obligations	The ACT *Human Rights Act* and Queensland *Human Rights Act* allow for entities that are not public authorities to opt-in to the obligations of a public authority (ACT) or public entity (Queensland) under statute.[63] In both the ACT[64] and Queensland[65], only a small number of entities have opted into the regimes.

Each of the statutes is ordinary legislation vulnerable to parliamentary amendment and the possibility of repeal. Thus, rights are not protected to the same standard of entrenched constitutional bills of rights. However, their enactment significantly enhances human rights protections in those jurisdictions. Each of the statutes recognises, protects and promotes more individual rights than available protections under the Commonwealth *Constitution* and other national and state and territory human rights legislation.

In interpreting and applying the various human rights protections courts should give them as wide a construction as their terms permit. The appropriate approach has been explained by the High Court:

> … the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation "the courts have a special responsibility to take account of and give effect to the statutory purpose". It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation." [66]

In a number of instances courts have stated that the provisions of the Victorian *Charter* should be broadly interpreted[67] and this has also been endorsed with reference to other Australian human rights legislation.[68]

---

[63] *Human Rights Act 2004* (ACT) s 40D; *Human Rights Act 2019* (Qld) s 60(1).

[64] *Human Rights (Private Entity) Declaration 2010 (No 1)* (ACT) (for Women's Legal Centre); *Human Rights (Private Entity) Declaration 2010 (No 2)* (ACT) (for Centre for Australian Ethical Research); *Human Rights (Private Entity) Declaration 2012* (ACT) (for Relationships Australia Canberra and Region); *Human Rights (Private Entity) Declaration 2012 (No 2)* (ACT) (for Amnesty International Australia); *Human Rights (Private Entity) Declaration 2012 (No 3)* (ACT) (for ACT Disability, Aged and Carer Advocacy Service); *Human Rights (Private Entity) Declaration 2013* (ACT) (for Advocacy for Inclusion Incorporated).

[65] Section 60 provides, inter alia, that an entity may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public entity under the legislation.

[66] *AB v Western Australia* (2011) 244 CLR 390 at [24].

[67] *Re Application under the Major Crimes (Investigative Powers) Act 2004,* (2009) 24 VR 415 at 434 [80] per Warren CJ;. *WBM v Chief Commissioner of Police,* (2012) 43 VR 446 at 489 [201] per Bell AJA and *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 at 182 [160] per Warren CJ. These cases are cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [120].

[68] See with reference to the Queensland human rights legislation: *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J) at [120].

There are nevertheless fundamental limitations to the protections they provide that are inherent in the parliamentary human rights model to which they conform. As its name suggests, the model is intended to maintain parliamentary sovereignty 'as the ultimate expression of the will of the people.'[69] Kolodizner describes this as 'both the crux of democracy and the primary weakness' of the model.[70]

Key features of parliamentary sovereignty in the statutes are reflected in provisions whereby:

- parliament may pass legislation that is incompatible with human rights;
- courts cannot strike down law that is incompatible with human rights, they are circumscribed to issuing a 'declaration of incompatibility' (ACT, Queensland) or 'declaration of inconsistent interpretation' (Victoria), referring the issue back to Parliament; and
- in Queensland and Victoria, the statutes provide for a mechanism known as an 'override declaration' by which Parliament can override the operation of the human rights statutes with respect to legislation or particular legislative provisions.

The model is designed to enhance rights protections through imposing processes on the three branches of government that require them to engage in dialogue about the protection and lapses in the protection of human rights, with an emphasis upon policy development and administrative practice.[71] Thus, the parliamentary model is also sometimes described as the 'dialogue model'.[72]

While it is open to the legislature to pass legislation that is incompatible with human rights, the human rights legislative procedures in the ACT, Queensland and Victoria require the executive and legislature to consider rights protection in developing legislation. Members of parliament are required to notify parliament of the human rights compatibility of bills that they introduce to parliament. The process is intended to require the reasons for and explanation of departures from human rights standards to be put before the parliament for its consideration. Bills in each jurisdiction also undergo parliamentary committee human rights scrutiny intended to inform parliamentary debate to ensure that new laws are as human rights compatible as possible.

There are limitations on the effectiveness of these procedures. Legislation is not rendered invalid or unenforceable if it is passed without complying with them. In research paper 2, in addressing the Commonwealth Joint Committee Human Rights Scrutiny process, we note that the meaningfulness of parliamentary committee scrutiny can be contingent upon the willingness of the executive and members of parliament to engage with the process. The same criticism can be made of the state and territory human rights statement of compatibility and scrutiny processes. A 2015 review of the Victorian *Charter* , for example, raised concerns about the variable quality of statements of compatibility and lack of robust engagement with the scrutiny process by the

[69] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 18.
[70] Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16 *Australian International Law Journal* 219, 226.
[71] Ibid.
[72] See however the High Court decision in *Momcilovic v The Queen* (2011) 245 CLR 1 discussed below.

executive.[73] In the ACT concerns have arisen about the need for statements of compatibility to include fuller reasoning. However, at least in the ACT, the introduction of the statement of compatibility and committee scrutiny procedures has reportedly had a positive impact. On the tenth-anniversary of the ACT *Human Rights Act*, the ACT Human Rights Commissioner observed that the Act has significantly improved the development of law and policy against human rights standards.[74] A similar finding was made by the five-year independent review of the ACT *Human Rights Act*.[75]

In Victoria, there has been only one incompatibility declaration and, as discussed below, this was set aside by the High Court in *Momcilovic*.[76]

Rights are also protected by statutory duties that bodies carrying out public functions – defined as 'public authorities' (ACT, Victoria) and 'public entities' (Queensland) – act and make decisions that are consistent with human rights, subject to reasonable limitations (a concept defined in the statutes). As Rice observes in writing about the ACT *Human Rights Act*, it is at the level of government service delivery that most people directly experience human rights issues.[77] Imposing a duty to exercise administrative power in accordance with recognised human rights is a significant step. It is also consistent with one of the main objects of the statutes, which is to create a culture respecting human rights in public administration.

However, the practical impact of this duty is mitigated by the limited recourse to judicially enforceable remedies provided by the statutes. Only the ACT *Human Rights Act* provides for a standalone cause of action against public authorities for failing to act in accordance with their obligations.[78] It was recommended in 2015 that the Victorian *Charter* be amended to incorporate the same right.[79]

---

[73] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf, at pp 172 and 178.

[74] Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 137.

[75] Australian National University ACT Human Rights Act Research Project, *The Human Rights Act 2004 (Act): The First Five Years of Operation (2009)*, 27.

[76] In *WBM v Chief Commissioner of Police* (2010) 27 VR 469 an application for a declaration that the provisions of the *Sex Offenders Registration Act 2004* (Vic) were inconsistent with the provisions of the Victorian Charter was rejected by Kaye J. The Court of Appeal (Warren CJ, Hanse JA and Bell AJA dismissed the appeal: *WBM v Chief Commissioner of Police* [2012] 43 VR 446.

[77] Simon Rice, 'Culture, what culture? Why we don't know if the ACT Human Rights Act is working' chapter in Matthew Groves, Janina Boughey and Dan Meagher (eds) *The Legal Protection of Rights in Australia,* Oxford, Hart Publishing, 2019, 185.

[78] Section 40 C *Human Rights Act 2004* (ACT).

[79] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf, p 117

A standalone cause of action would undoubtedly increase the remedies available to individuals for breaches of human rights under the Victorian *Charter* and the *Human Rights Act* (Qld). In an extra curial speech Justice Henry James of the Supreme Court of Queensland commented that 'to the cynic it does nothing, because it does not make a breach of…rights directly actionable.'[80]

However, to date the availability of a standalone cause of action has only been relied on in the ACT in a small number of cases and for the most part unsuccessfully.[81]

In addition to the standalone cause of action in the ACT, all three statutes provide for access to judicial remedies by allowing human rights claims to be brought in proceedings in which an individual already has a cause of action. This is sometimes referred to as 'piggy-backing' on another legal claim.[82] Those other causes of action are not circumscribed under the statutes. In practice, for example, they have included applications for judicial review, orders in civil or criminal proceedings, applications for the stay of proceedings and the exclusion of evidence.[83] However, the need for another cause of action available in the same court or tribunal to bring a human rights claim has, in the Victorian context, been criticised as undermining the effectiveness of the entire statutory regime.[84] In Queensland, a mandatory review of the *Human Rights Act* will consider 'whether further or different provision should be made' for proceedings against public entities for breaching their human rights duties.' [85] On 27 February 2024 Professor Susan Harris Rimmer was appointed by the Queensland Attorney-General to undertake an independent review of the *Human Rights Act 2019* (Qld).

The judicial remedies available for breaches of human rights by public authorities and entities are discretionary. They are also limited in each jurisdiction by a statutory bar on the award of damages. Only the ACT *Human Rights Act* contains discrete rights to compensation, pursuant to s 23 for wrongful conviction[86] and pursuant to s 18(7) for unlawful arrest or detention.[87]

---

[80] http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/QldJSchol/2019/10.html?context=1;query=%22hra2019148%20s36%22;mask_path=

[81] Simon Rice, 'Culture, what culture? Why we don't know if the ACT Human Rights Act is working' chapter in Matthew Groves, Janina Boughey and Dan Meagher (eds) *The Legal Protection of Rights in Australia*, Oxford, Hart Publishing, 2019, 185.

[82] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf p 119.

[83] Explanatory Statement to the Human Rights Amendment Bill 2007, cited in *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* [2014] ACTSC 26 [21].

[84] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf, p 118, submission of the Victorian Council of Social Service.

[85] S 95(4)(b)

[86] See *Eastman v the Australian Capital Territory* [2019] ACTSC 280 which is discussed further below.

[87] For a review of the different approaches to remedies in a number of jurisdictions see Harry Hobbs, 'Ubi jus ibi remedium or not: damages for executive breaches of human rights', (2013) 116 *Precedent* 10.

If a measure of creating a rights-respecting culture of public administration is robust human rights jurisprudence in which the executive is held accountable for breaches of human rights, the human rights statutes define various rights but confer limited remedies and their normative impact is unclear.

The ACT *Human Rights Act* has generated a substantial number of cases that consider human rights. However, as noted by Chief Justice Murrell of the ACT Supreme Court in 2014:

> '… despite the significant number of cases in which the [ACT *Human Rights Act*] has been mentioned, there are very few in which it has made a difference to the outcome.'[88]

From our review of jurisprudence since 2014, this largely remains the case, notwithstanding the striking exception of the *Eastman* case[89] which is discussed below.

The 10-year review of the legislation noted that a key factor that may have contributed to the limited success of the *Human Rights Act* before the ACT courts and tribunals was the lack of clarity regarding the extent to which ACAT and lower courts may assess and remedy breaches of public authority obligations under the Act.[90]

In its first 10 years of operation of the ACT legislation only one declaration of incompatibility was made by the ACT Supreme Court.[91]

In 2015, in recommending the need to introduce a standalone human rights cause of action under the *Charter*, a review of the Victorian *Charter* found that human rights claims are usually a 'second or third string argument' and commented on 'a perception that the Charter is not worth raising because it adds nothing to an existing cause of action.'[92]

---

[88] Chief Justice Helen Murrell, ACT Supreme Court , 'The judiciary and human rights', paper presented at Ten Years of the ACT Human Rights Act: Continuing the Dialogue Conference, ANU, 1 July 2014; available at: http://www.hrc.act.gov.au/content.php/content.view/id/385 quoted in Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004 by the ACT Human Rights Act and Discrimination Commissioner* (2014), ACT Human Rights Commission < http://www.hrc.act.gov.au/res/HRA%2010%20yr%20snapshot%20HRDC%20webversion.pdf>, 5.

[89] *Eastman v the Australian Capital Territory* [2019] ACTSC 280.

[90] Human Rights and Discrimination Commissioner, *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004 by the ACT Human Rights Act and Discrimination Commissioner* (2014), ACT Human Rights Commission < http://www.hrc.act.gov.au/res/HRA%2010%20yr%20snapshot%20HRDC%20webversion.pdf>, 6.

[91] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147. The Supreme Court found and declared that s 9C of the *Bail Act 1992* (ACT) was inconsistent with the s 18 right to liberty.91 In May 2012, the ACT Government undertook to consider various amendments to s 9C and related provisions to address its incompatibility with s 18(5): ACT Government, *Final Government Response: Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is incompatible with section 18(5) of the Human Rights Act 2004,* ACT Legislation (May 2012).

[92] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf, p 120.

In part, this may be a product of the design of the legislation. Proceedings invoking human rights against public authorities outside of the Supreme Court are predicated upon an individual having an independent cause of action. Many of the statutory human rights restate aspects of common law protections. To that extent, combined with limited substantive invocation of human rights principles in proceedings in the ACT to date, it is perhaps not surprising that the legislation has had little impact on the outcomes of proceedings. The parliamentary dialogue model of human rights protection envisages a limited role for the courts.

Unlike the ACT *Human Rights Act* and the Victorian *Charter*, the *Human Rights Act* (Qld) vests a human rights complaint and conciliation function in the Queensland Human Rights Commission. While this provides a less costly avenue than pursuit of legal proceedings to resolve human rights complaints, conciliation does not result in binding legal precedent that can generate systemic change quickly.

One of the primary remedies available under each human rights statute is a mechanism for obtaining a 'declaration of incompatibility' (the ACT and Queensland) or 'declaration of inconsistent interpretation' (Victoria).[93] This does not provide individual relief for a breach of human rights. Where the Supreme Court in each jurisdiction finds that it cannot interpret a law consistently with human rights, subject to various notice requirements, it can make such a declaration. The declaration does not invalidate the law, impact upon its enforceability or operation or any rights or obligations.[94] In each jurisdiction, the declaration is provided to the Attorney General and there is a requirement – within times differing between jurisdictions - to present a copy to the Parliament and to prepare a written response to it.[95] There is no obligation on the Parliament to repeal or amend the legislation. Ultimately, the balance of human rights compatibility and other interests remains a matter for the Parliament.

In *Momcilovic* the High Court considered the constitutional validity of s 36 of the Victorian *Charter* and found it valid even though it involves the exercise of non-judicial power. Of the four judges who formed the majority on this question, Crennan and Kiefel JJ found that s 36 involved a function incidental to an exercise of judicial power. French CJ and Bell J found that s 36 declarations were not incidental to the Court's judicial function, but that they were nevertheless compatible with the powers of a State Supreme Court. [96]

[93] The relevant provisions are: *Human Rights Act 2004* (ACT) s 32(2); *Human Rights Act 2019* (Qld) s 53(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

[94] *Human Rights Act 2004* (ACT) s 32(3); *Human Rights Act 2019* (Qld) ss 48(4) and 54; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5).

[95] In Victoria the declaration is provided to the Attorney-General (s 36(6)) but it is the Minister responsible for administering the relevant statute who is required to table the declaration and respond to it (s 37).

[96] *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 [6], [89]–[91], [96]–[97] (French CJ), [584], [589] (Crennan and Kiefel), [661] (Bell J)).

However, members of the High Court criticised applying the term 'dialogue model' [97] to the Victorian *Charter*. [98]

3. Override declarations by Parliament

3.1 Victoria

All human rights in the Victorian *Charter* are subject to section 31, which is an override provision. Section 31 allows the Victorian Parliament to declare that an Act or provision has effect notwithstanding that it is incompatible with human rights or anything else in the Victorian Charter.[99] An override declaration is extended to any subordinate instrument made under the overriding Act or provision.[100] The effect of the declaration is to suspend the operation of specified rights, or the entire Victorian *Charter*, in relation to an overriding Act or statutory provision.[101] The legislation is therefore neither subject to the obligation under section 32 to interpret a statutory provision in a way compatible with human rights, nor the section 36 power of the Supreme Court to declare the provision is inconsistent with human rights.

The use of an override declaration is subject to a number of safeguards. The legislation provides that Parliament intends an override declaration to be made only in '*exceptional circumstances*'.[102] On introducing a Bill containing an override declaration to Parliament, the member tabling the Bill, or another member on their behalf, is required to make a statement to the relevant house of the Victorian Parliament explaining the circumstances justifying the inclusion of the declaration.[103] Override declarations are also subject to a sunset clause under section 31(7), which provides that an override declaration will expire five years after it comes into effect, if an earlier date is not given in the overriding legislation. However, the declaration can also be renewed by Parliament.[104]

International human rights law recognises that rights guarantees can be temporarily suspended in exceptional circumstances. For example, article 4(1) of the *ICCPR* provides that:

---

[97] The model enacted in each jurisdiction is often referred to as the 'dialogue model' because the procedures imposed upon the three branches of government require them to engage in a kind of institutional dialogue about human rights and their importance and application in the jurisdiction. However, in *Momcilovic v The Queen*, members of the High Court of Australia criticised applying the term 'dialogue model' to the Victorian Charter for its potential to mischaracterise the legislative relationship between the Parliament and judiciary as equal. The use of the term 'dialogue' is discussed by George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, note 97 p 901.

[98] (2011) 245 CLR 1 [2011] HCA 34 [534] – [535] (Crennan and Kiefel JJ; see also [95] (French CJ)).

[99] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1).

[100] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(2).

[101] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(6).

[102] *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 31(3)-(4).

[103] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(3). Section 31(5) also imposes requirements that the section 31(3) statement accompanying the Bill is required to be made within certain time periods.

[104] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(8).

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the [*ICCPR*] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion of social origin.

However, as Julie Debeljak has noted, the override provision in the Victorian *Charter* falls short of the standards of international human rights law instruments.[105] The safeguards in section 31 do not meet the standards confining permitted derogation from human rights under international law. While Parliament's intention stated in section 31(4) is that '*exceptional circumstances*' must exist to justify the use of the override power, what constitute exceptional circumstances is left undefined in the Victorian *Charter*.

The *Explanatory Memorandum* to the draft legislation provides some guidance by including two examples: 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria'.[106] The exceptional circumstances standard, taking into account those examples, is less stringent than the standard in article 4(1) of the *ICCPR* that derogation requires a 'public emergency' of a type threatening 'the life of a nation'. The two types of circumstances described in the *Explanatory Memorandum* are also, arguably, of the kind that would justify ordinary limitations on human rights pursuant to the section 7(2) general limitations clause, which is subject to judicial review, rather than necessitating the use of an absolute override provision.[107]

Under international human rights law, some rights are also recognised as non-derogable even in circumstances of public emergency. For example, article 4(2) of the *ICCPR* excludes from article 4(1) derogation, among others, the right to life (article 6) and the right to protection from torture, inhumane and degrading treatment and medical or scientific experimentation without consent (article 7).[108] As Debeljak notes, the UN Human Rights Committee has expanded the list of non-derogable rights in article 4(2) of the *ICCPR* further.[109]

---

[105] Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 432-433.

[106] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 21.

[107] Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 444.

[108] *ICCPR*, art 4(2). Article 4(2) also provides that a State party cannot derogate from its obligations in respect of articles 8(1) and (2) (freedom from slavery and servitude), 11 (protection from imprisonment for breaching contractual obligations), 15 (prohibition on retrospective punishment), 16 (right to legal recognition) and 18 (right to freedom of thought, conscience and religion).

[109] Human Rights Committee, *General Comment No 29: Article 4: Derogations During a State of Emergency*, 72nd sess, CCPR/C/21/Rev.1/Add.11 (31 August 2001). For further discussion see: Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 437 – 439.

It has also stated that it does not consider that derogating measures that would indirectly undermine the operation of non-derogable rights are permissible under article 4(1).[110] A number of domestic jurisdictions adopting override mechanisms in human rights bills and charters also recognise certain rights as non-derogable.[111]

In addition, under international law, the effects of derogation are regulated so that minimum standards are not breached.[112] For example, article 4(1) of the *ICCPR* provides that derogating measures can only be taken to 'the extent strictly required by the exigencies of the situation' and that they cannot be inconsistent with other international legal obligations or involve discrimination on certain protected grounds.

The Victorian *Charter* override provision contains no such qualifications. Section 31 is inconsistent with international standards. It does not expressly limit the application of override declarations to only those human rights that are derogable, in exceptional circumstances, under international law, nor regulate what derogating measures are permissible in accordance with equivalent international standards.

George Williams has described the requirement that the Member of Parliament introducing an override declaration make a statement on the circumstances justifying its use as requiring a 'level of transparency and compelling political justification' for overriding human rights that protects against the abuse of the override provision.[113] However, section 31(9) provides that failure to comply with this procedural requirement does not impact on the validity of legislation subject to the declaration.[114] Accordingly, the operation of that requirement depends greatly upon the Victorian Parliament ensuring that a statement of justification is provided prior to passing legislation. Further, it also rests upon the Victorian Parliament to ensure that a high standard is applied in determining what constitutes *exceptional circumstances* justifying abrogation of the Victorian Charter's human rights guarantees. Section 31(4) is non-justiciable.

The Victorian Parliament has exercised its power to make an override declaration on a number of occasions, but in circumstances that would justify derogation from human rights under international law.

---

[110] Human Rights Committee, *General Comment No 29: Article 4: Derogations During a State of Emergency*, 72nd sess, CCPR/C/21/Rev.1/Add.11 (31 August 2001). For further discussion see: Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 437 – 439.

[111] For example, *Canadian Charter*, s 33(1); *South African Bill of Rights* s 37.

[112] For further analysis, see Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 448 - 453.

[113] George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880 at 900.

[114] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(9).

In 2014, the Victorian Parliament enacted legislation containing an override declaration imposing a requirement on any parole order that Julian Knight, a convicted mass murderer, serve the full or almost full term of his life sentence.[115]

In *Minogue*, a person who had killed a police officer was sentenced to life imprisonment with a non-parole period of 28 years. In order to circumvent release on parole legislation was passed that provided that parole could only be granted if the prisoner was in imminent danger of dying or was so seriously incapacitated that he no longer had the physical capacity to do harm to any person. The changes to the parole legislation excluded the application of the *Charter*.[116]

The *Legal Profession Uniform Law Application Act 2014* (Vic) also contains an override provision. The exceptional circumstances said to justify the use of that override were the necessity of ensuring uniformity in interpretation and application of the legislative scheme across participating jurisdictions.[117]

While the override provision has only been used in Victoria on limited occasions, its inclusion in the Victorian *Charter* nevertheless highlights parliamentary supremacy. However, in any event the Victorian *Charter* can be amended or repealed by subsequent legislation and a judicial declaration that legislation is inconsistent with human rights has no impact upon its validity.[118] The override mechanism provides a convenient means by which to notify parliament's intention to put legislation and the actions of public authorities beyond judicial scrutiny under the Victorian *Charter*, wherein lies its risk to the strength of the human rights protections under the *Charter*.

3.2 Queensland

As with the Victorian *Charter*, the *Human Rights Act* (Qld) contains a procedure by which the Queensland Parliament can override its effect with respect to an Act or statutory provision by declaration (s 43). Many of the concerns addressed above in respect of the override provision in the Victorian *Charter* also apply to that provision

Section 43(1) provides:

> Parliament may expressly declare in an Act that the Act or another Act, or a provision of the Act or another Act, has effect despite being incompatible with 1 or more human rights or despite anything else in this Act.

Once an override declaration is made, it excludes the application of the *Human Rights Act* (Qld) to the Act or provision subject of the declaration while it remains in force (s 45(1)). Neither the s 48 obligation to interpret the Act or provision in a way that is compatible with human rights nor

---

[115] See *Knight v Commonwealth of Australia (No 3)* [2017] ACTSC 3 (Mossop AsJ); *Knight v Victoria* (2017) 261 CLR 306. See also *Knight v Sellman* [2020] VSC 320, where, having been declared a vexatious litigant, an application was made for leave to commence further proceedings.

[116] *Minogue v Victoria* (2019) 268 CLR 1.

[117] See s 6 *Legal Profession Uniform Law Application Act 2014* (Vic).

[118] See George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 903.

the s 53 power of the Supreme Court to make a declaration of incompatibility in relation to the Act or provision apply.[119]

Public authorities will also not be subject to the s 58 obligation in acting or decision-making under the Act or provision subject of the override declaration. The declaration extends to any statutory instruments made under the Act or provision (s 43(3)).

Section 45(2) provides that an override declaration will expire 5 years after it commences, or on an earlier day provided for in the Act. However, the Queensland Parliament may re-enact an override declaration (s 45(1)).

Section 43(4) provides:

> 'It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.'

'*Exceptional circumstances'* are not defined, but a note to s 43(4) provides examples including 'war, a state of emergency, or an exceptional crisis situation constituting a threat to public safety, health or order.'

The member introducing a Bill containing the override declaration, or moving an amendment to a Bill that contains an override declaration, is required to make a statement to the Legislative Assembly when it is introduced explaining the '*exceptional circumstances'* justifying it (s 44(1)-(3)). However, failure to comply with this procedural requirement will not affect the validity of the Act or statutory provision (s 46). The override declaration, if passed, will still be effective.

Unlike the Victorian *Charter*, the *Human Rights Act* (Qld) does provide (albeit limited) guidance on the meaning of 'exceptional circumstances'[120] in which derogation from non-absolute human rights may be justified. This is broadly consistent with international law and jurisprudence.

However, s 43(4) is inconsistent with international law in that there is no qualification that some rights are absolute and non-derogable in nature, even in exceptional circumstances; nor does it qualify what derogating measures are permissible in a manner consistent with international law. The override declaration is unnecessary to preserve parliamentary sovereignty. However, the override mechanism does enable the Parliament to clearly signal its intention that the human rights statute does not apply. It also, at least *formally*, requires Parliament to publicly justify the reasons for doing so, although a failure to comply with that obligation has no effect.

The first four override declarations were made in the *Strengthening Community Safety Act 2023*, and apply to the:

1. *Bail Act 1980* section 29 that makes it an offence for a child to break a condition of bail.
2. *Youth Justices Act 1992* sections 150A and 150B, the effect of which is that a court may declare a child a serious repeat offender when sentencing for an indictable offence, and

[119] *Human Rights Act 2019* (Qld), s 45 (note to s 45(1)), ss 48(5) and 53(3).

[120] A statement about 'exceptional circumstances' is available on the following website: https://documents.parliament.qld.gov.au/tp/2023/5723T167-5723.pdf.

the court must have regard to the need to protect members of the community, the impact of the offence on public safety, and the offending and bail history of the child.

3. *Youth Justices Act 1992* section 246A that requires the court to revoke a conditional release order in relation to a prescribed indictable offence where the child has breached the conditional release order, unless there are special circumstances. The child will be ordered to serve the sentence of detention for which the conditional release order was made.

Another four override declarations were made in the *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023*, and apply to:

1. Section 640(1)(a) and (b) of the *Police Powers and Responsibilities Act 2000* with respect to the transfer of a child between watchhouses or to other specified places (such as a holding cell at a police station).
2. Section 56 of the *Youth Justice Act 1992* (as amended) relating to a child remanded in custody. The child is in the custody of the Commissioner of Police until the Commissioner is notified that the Chief Executive will accept the custody of the child (at a youth detention centre). The Chief Executive is required to consider various matters such as the child's age and medical conditions, however a failure of the Chief Executive to provide procedural fairness to the child in deciding the date for delivery into custody does not affect the validity of the decision.
4. Section 210 of the *Youth Justice Act 1992* (as amended) relating to a child sentenced to detention. The child is in the custody of the Commissioner of Police until the Commissioner is notified that the Chief Executive will accept the custody of the child (at a youth detention centre). The Chief Executive is required to consider various matters such as the child's age and medical conditions, however a failure of the Chief Executive to provide procedural fairness to the child in deciding the date for delivery into custody does not affect the validity of the decision.
5. Section 262 of the *Youth Justice Act 1992* (as amended) in relation to establishing places of detention and other places for the purposes of the *Youth Justice Act 1992*. The declaration does not apply to places of detention established before 23 August 2023.[121]

3.3 The Australian Capital Territory

The *Human Rights Act 2004* (ACT) does not contain a provision for statutory override.

4. The cultural impact of human rights legislation

[121] A 'Statement of Compatability' in respect of the amendments made by the *Child Protection (Offender Reporting and offender Prohibition Order)* and *Other Legislation Amendment Bill 2022* is available on the following website : https://www.legislation.qld.gov.au/view/pdf/bill.third.hrc/bill-2022-008.

Notwithstanding the obligations on public authorities to comply with human rights, as Rice has observed with reference to the ACT *Human Rights Act*, measuring the cultural impact of human rights statutes both on the day-to-day work of government officials and in the development and application of administrative policies is difficult.[122] Rice notes the absence of any plan or framework for achieving and measuring cultural change within the ACT bureaucracy, for example.[123]

There are however various mechanisms for the periodic review of the impact of human rights legislation and the role of the various human rights bodies in Victoria, the ACT and Queensland. These are discussed below.

5. Review of the operation of the legislation

The *Human Rights Act* (QLD) requires the Queensland Attorney-General to ensure its review twice, with the assistance of the Queensland Human Rights Commission.[124] The first review will consider the operation of the legislation prior to 1 July 2023 and is to occur as soon as practicable after that date.[125] The second review is to take place as soon as practicable after 1 July 2027, considering the operation of the legislation after 1 July 2023.[126]

'An independent and appropriately qualified person' must conduct both reviews.[127] The Queensland Attorney-General will decide the terms of reference for the reviews.[128] However, the *Human Rights Act* (QLD) mandates that both reviews consider:

- Whether additional human rights should be included, including rights under each of the core international human rights treaties (excluding the *ICCPR*);
- Whether further or different provisions should be made for proceedings that can be brought, or remedies available, for acts or decisions of public authorities that are unlawful under the Act; and
- Whether the amendments made by the legislation to the *Corrective Services Act 2006* and the *Youth Justice Act 1992* are operating effectively.[129]

[122] Simon Rice, 'Culture, what culture? Why we don't know if the ACT Human Rights Act is working' chapter in Matthew Groves, Janina Boughey and Dan Meagher (eds) *The Legal Protection of Rights in Australia*, (Oxford, Hart Publishing, 2019) 185.
[123] Ibid.
[124] *Human Rights Act 2019* (Qld) ss 95(1) and 96(1) (the role of the Queensland Attorney-General); s 61(g) (the role of the Queensland Human Rights Commission).
[125] *Human Rights Act 2019* (Qld) s 95. As noted above, a Review was commissioned by the Attorney-General in February 2024.
[126] *Human Rights Act 2019* (Qld) s 96.
[127] *Human Rights Act 2019* (Qld) ss 95(2) and (5), 96(2) and (5).
[128] *Human Rights Act 2019* (Qld) ss 95(3) and 96(3).
[129] *Human Rights Act 2019* (Qld) ss 95(4) and 96(4).

The results of both reviews will be tabled in the Queensland Legislative Assembly.[130] The second review will contain a recommendation as to whether further review of the *Human Rights Act* (QLD) is necessary.[131]

The ACT *Human Rights Act* and Victorian *Charter* also provided for their review in provisions that no longer operate.[132] In the ACT, the *Human Rights Act* was reviewed in 2005, 2009 and 2014 under now repealed s 43. The 2009 review was conducted independently of the ACT Government.[133] Its recommendations were critical to expanding and strengthening human rights protections in the legislation. It resulted in statutory amendments to:

a. recognise the right to education (s27A);
b. directly apply human rights obligations to public authorities (s40B); and
c. create a right to proceedings against public authorities for contravention of their human rights obligations (s40C).

The 2012 introduction of the right to education in Part 3A of the ACT *Human Rights Act* was the first statutory recognition of an economic and social right in any jurisdiction in Australia.[134] The ten-year review, which considered whether the legislation should protect additional economic, social and cultural rights, was criticised for a lack of transparency and public consultation in its procedure.[135]

The Victorian *Charter* was reviewed in 2011 and 2015 pursuant to sections 44 and 45 of the Victorian legislation. Those provisions, which required the Victorian Attorney-General to arrange for the reviews, no longer operate. The all-party Joint House Scrutiny of Acts and Regulations Committee of the Victorian Parliament completed the first review of the operation of the Victorian *Charter* to 2011. While the review recommended a number of amendments to the Victorian *Charter* including repeal of some provisions, none of those recommendations were ultimately implemented.[136]

---

[130] *Human Rights Act 2019* (Qld) ss 95(5) and 96(5).
[131] *Human Rights Act 2019* (Qld) s 96(6).
[132] *Human Rights Act 2004* (ACT) s 43 (repealed); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 44-45.
[133] See, for example, Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 137; Jeremy Gans, The Impact of the *Human Rights Act 2004* (ACT) on Other Australian jurisdictions, available at https://regnet.anu.edu.au/sites/default/files/uploads/2015-06/Jeremy%20Gans_The%20Impact%20of%20the%20Human%20Rights%20Act%202004%20(ACT)%20on%20Other%20Australian%20Jurisdictions.pdf.
[134] *Human Rights Amendment Bill 2012* (ACT). *Human Rights Act 2004* (ACT) ss 27A(1)-(2) recognises the right of every child to have access to free school education appropriate to their needs, and the right of everyone to have access to further education and vocational and continuing training. While the provision is broadly aligned with article 13 of the ICESCR on the right to education, it is limited to the immediately realisable aspects of non-discrimination and choice of schooling in accordance with religious convictions: see ACT Human Rights Research Project Report, *Economic, social and cultural rights in the Human Rights Act 2004: Section 43 review* (November 2014), 7.
[135] Simon Rice, 'Human Rights Act Review' (2015) 40(3) *Alternative Law Journal* 211.
[136] https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57254.htm

The former CEO of the Law Institute of Victoria Michael Brett-Young conducted the 2015 review. The review recommended a number of statutory amendments to strengthen and clarify the operation of the Victorian *Charter*. For example, the Victorian Government accepted the following proposed amendments among others:[137]

- amending the *Charter* to include a non-exhaustive prescriptive list of functions of a public nature for the purpose of defining public authorities within the meaning of the *Charter*, including for example the operation of prisons and other correctional facilities, public health and public disability services;
- use of regulations to prescribe entities to be or not be public authorities;
- provision for entities to opt-in to the obligations under the *Charter* of public authorities;
- clarification that decisions of public authorities must be substantively compatible with human rights; and
- the Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the *Charter*.

To date the amendments recommended in the 2015 review and accepted by the Victorian Government have not been made.

The review also recommended amending the *Charter* to enable claims that public authorities acted incompatibly with human rights to be made to the Victorian Civil and Administrative Tribunal or relied upon in any legal proceedings, modelled on s 40C of the ACT *Human Rights Act*.[138] At the time of writing, this recommendation remains under consideration by the Victorian Government.

6. Protected human rights under the legislation

In this section we provide an overview of the structure and operation of the statutes with particular reference to the specific human rights protected. As the legislation between the three jurisdictions is substantially similar, we discuss their operation together, highlighting where differences arise. Practitioners should of course pay careful attention to the text and operation of the legislation in their applicable jurisdiction.

We outline the individual rights protected under the statutes, the interpretation of their scope and content to date and what limitations can be lawfully imposed upon them. We discuss what remedies are available for breaches of human rights and various procedural requirements in respect of proceedings.

6.1 What are 'human rights' within the meaning of the legislation?

[137] https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act.

[138] https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act.

Under the legislation in each jurisdiction, 'human rights' are defined to mean the rights recognised in the statutes.[139] The rights protected are primarily drawn from the *ICCPR*. The particular cultural rights of Aboriginal and Torres Strait Islander peoples are also recognised in forms drawn from the *UN Declaration on the Rights of Indigenous Peoples*, in addition to article 27 of the *ICCPR* which provides for the right to culture.

In the ACT and Queensland only, some economic, social and cultural rights are also protected (the right to education (ACT and Queensland), health services (Queensland) and the right to work (ACT)).

In Queensland and Victoria, the right to property, which is recognised in the *Universal Declaration of Human Rights* but not the *ICCPR* or *ICESCR*, is also protected.

6.2 Who has human rights under the legislation?

Each of the ACT *Human Rights Act*, *Human Rights Act* (QLD) and Victorian *Charter* contain provisions to the effect that the human rights in the statutes only apply to 'individuals' or 'persons'.[140] In each statute, this formulation expressly excludes the statutory protections from applying to unnatural or non-human legal persons such as corporations.[141]

Section 11(a) of the *Human Rights Act* (QLD) provides that all individuals 'in Queensland' have human rights, which requires that individuals be physically present 'in Queensland' for the rights to apply to them.

The approach of the Queensland Human Rights Commission is that s11 does not confine the obligations on public entities in s58 to individuals who are physically present in Qld – their decisions and actions may affect people who are not in Qld, e.g., those seeking to enter Qld, those facing criminal charges in Qld, those transacting with a public entity in Qld. Some of the rights themselves are limited to people in Qld, e.g., s19 'Every person lawfully in Qld …'; s23 'Every person in Qld…';s26(3) is limited to 'Every person born in Qld'.

While there is no similar provision to s 11 of the Queensland legislation in the ACT or Victorian legislation, in some respects such legislation has limited territorial application including by virtue of the legislation applying only to ACT and Victorian public authorities.

[139] *Human Rights Act 2004* (ACT) s 5 (defined as the civil and political rights in Part 3 and the economic, social and cultural rights in Part 3A); *Human Rights Act 2019* (Qld) s 7 (defined as the rights in Part 2, Divisions 2 and 3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(1).

[140] *Human Rights Act 2004* (ACT) s 6; *Human Rights Act 2019* (Qld) s 11 (there is a note to s 11 stating that, 'A corporation does not have human rights'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 3, 6(1)).

[141] Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 146 (explaining that the formulation of s 6 in the ACT Human Rights Act was intended to prevent use of the statute by corporations to protect corporate interests).

There are no limitations on the application of the rights to individuals on the basis of citizenship or residency in any jurisdiction. However, the application of certain rights to 'eligible persons' may in effect limit them to citizens or residents because of applicable eligibility requirements (in particular aspects of the right to participate in public life).

6.3 Rights apart from the legislation

Each of the statutes recognises that the legislation is not the only source of rights in Australian law, expressly or impliedly. Each contains a provision acknowledging that the legislation does not abrogate, limit or exclude rights or freedoms under other law because they are not recognised in the legislation.[142]

6.4 What human rights are protected?

There is a large degree of consistency, with some variation, in the rights recognised and protected in each jurisdiction. We discuss the scope and content of those rights in more detail below.

Table 2 – Human rights recognised in the ACT, Queensland and Victorian human rights statutes

Right	*Human Rights Act* (ACT)	*Human Rights Act* (Qld)	*Charter* (Victoria)
Recognition and equality before the law	s 8	s 15	s 8
Right to life	s 9	s 16	s 9
Protection from torture and cruel, inhuman or degrading treatment	s 10	s 17	s 10
Protection of the family and children	s 11	s 26	s 17
Privacy and reputation	s 12	s 25	s 13
Freedom of movement	s 13	s 19	s 12
Freedom of thought, conscience, religion and belief	s 14	s 20	s 14

[142] *Human Rights Act 2004* (ACT) ss 5, 7; *Human Rights Act 2019* (Qld) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 5.

Peaceful assembly and freedom of association	s 15	s 22	s 16
Freedom of expression	s 16	s 21	s 15
Right to participate in public life	s 17	s 23	s 18
Right to liberty and security of the person	s 18	s 29	s 21
Humane treatment when deprived of liberty	s 19	s 30	s 22
Children in the criminal process	s 20	s 33	s 23
Fair trial	s 21	s 31	s 24
Rights in criminal proceedings	s 22	s 32	s 25
Compensation for wrongful conviction	s 23	N/A	N/A
Right not to be tried or punished more than once	s 24	s 34	s 26
Retrospective criminal laws	s 25	s 35	s 27
Freedom from forced work	s 26	s 18	s 11
Cultural rights – generally	s 27(1)	s 27	s 19(1)
Cultural rights - Aboriginal and Torres Strait Islander peoples	s 27(2)	s 28	s 19(2)
Right to education	s 27A	s 36	N/A

Right to work and other work-related rights	s 27B	N/A	N/A
Property rights	N/A	s 24	s 20
Right to health services	N/A	s 37	N/A

7. The human rights obligations of 'public authorities' (ACT, Victoria) and 'public entities' (Queensland)

In each of the three jurisdictions public authorities are subject to the ordinary principles applicable to judicial review of administrative decision-making and to statutory obligations in respect of human rights.

As to the former: there are a variety of factors that may lead to a decision or act being successfully challenged independently of or in conjunction with a failure to comply with statutory human rights obligations. A number of these grounds are summarised below.

A failure to afford *procedural fairness* or a *denial of natural justice* may give rise to judicial review which may also facilitate a challenge to a decision or act on human rights grounds.

As noted by Gleeson CJ:

> '[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice'.[143]

Decision makers must consider submissions to them and respond to arguments relying upon established facts.[144] The nature of the consideration required by decision-makers was elaborated by the Full Federal Court[145] and summarised by Martin J in noting that the principles are of general application:

> (a) it is not necessary for a decision-maker to refer to every piece of evidence and every contention made by an applicant in written submissions,

[143] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam,* (2003) 214 CLR 1 at 13-14 [37], approved by the majority (Hayne, Crennan, Kiefel And Bell JJ) in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156], cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [31].

[144] See *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) ALD 321 (Gummow and Callinan JJ at 326 [24]) adopted by a unanimous High Court in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia* (2010) 243 CLR 319 at 356 [90], cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [32].

[145] *Mundele v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 221 at [46]-[47] per Middleton, Farrell and White JJ.

(b) an administrative body or decision-maker is not a court and its reasons are not to be scrutinised "with an eye keenly attuned to error",

(c) nor is it necessarily required to provide reasons of the kind that might be expected of a court of law,

(d) the inference that a decision-maker has failed to consider an issue may be drawn from a failure to expressly deal with that issue in the reasons,

(e) such an inference should not too readily be drawn whether reasons are otherwise comprehensive, and the issue has at least been identified at some point, and

(f) where there is an issue raised by the evidence advanced on behalf of an applicant and submissions made and that issue, if resolved one way, would be dispositive of the matter, then a failure to deal with it in the reasons may raise a strong inference that it has been overlooked.[146]

This does not encompass judicial review of the *merits* of the decision.

The principles to be applied in determining whether a decision or act was *unreasonable* have been outlined in a number of cases[147] and summarised by the Full Federal Court:

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (*Li* at [63] per Hayne, Kiefel and Bell JJ; *Singh* at [43] per Allsop CJ, Robertson and Mortimer JJ; *Stretton* at [4] per Allsop CJ and at [53] per Griffiths J);

- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (*Li* at [66]; Stretton at [56] per Griffiths J);

- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (*Li* at [66]; Stretton at [8] per Allsop CJ) and [76] per Griffiths J);

- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (*Li* at [68]);

- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (*Li* at [74]; *Stretton* at [62] and [70] per Griffiths J);

---

[146] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [34].

[147] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (*Singh*) and *Minister for Immigration and Border Protection v Stretton* (2017) 248 FCR 1 (*Stretton*).

- legal unreasonableness "is invariably fact dependent" and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (*Singh* at [48]; *Stretton* at [10] per Allsop CJ and at [61] per Griffiths J);

- the concept of legal unreasonableness can be "outcome focused", such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error (*Singh* at [44]; *Stretton* at [12]-[13] per Allsop CJ);

- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (*Singh* at [45]-[47]).[148]

Although the decision was overturned by the High Court[149] this was not due to any error of law in respect of these principles. The nature of the court's task was summarised by Nettle and Gordon JJ:

> The task of the court, where it has been alleged that a decision is legally unreasonable, is to ask whether the exercise of power by the decision-maker was beyond power because it was legally unreasonable.
>
> That task requires the court to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power.
>
> Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker. The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed has been *abused* by the decision-maker or, put in different terms, the decision is beyond power. That question is critical to an understanding of the task for a court on review.
>
> How that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome. …[150]

As Martin J has noted:

> In his examination of the task of a court, Gageler J emphasised that whether a decision-maker has exercised a power in a manner which is unreasonable does not

---

[148] *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at [38], cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [55].
[149] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.
[150] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [78]-[81, cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [56].

> depend upon the exercise of any discretion by the primary judge. The analogy drawn between judicial review of administrative action and appellate review of judicial discretion by the Court in *Li* does not mean that a *House v The King* [1936) 55 CLR 499 error must be established in the context of judicial review of administrative decisions. A court should not interfere with an administrator's exercise of discretion just because the Court would have exercised the discretion in a different way. [151]

Judicial review proceedings may also arise out of a *failure to take account of relevant considerations* and/or *taking into account irrelevant considerations*.[152]

In addition to these and other principles applicable generally to judicial review of administrative decisions and acts, the additional grounds of review on human rights grounds are discussed below.

7.1 The Australian Capital Territory

7.1.1 The role of public authorities

Broadly, public authorities within the meaning of the legislation are required, subject to specified exceptions, to act compatibly with and give proper consideration to human rights in decision-making.

Failure to do so is unlawful, and gives rise to the availability of a direct cause of action in the ACT Supreme Court, as well as the right to rely on human rights in other available legal proceedings, for which relief is available.

7.1.2 Meaning of a 'public authority'

Section 40(1) defines 'public authority' within the meaning of the ACT *Human Rights Act*. The provision deems certain entities to be public authorities, as well as provides for entities to be public authorities for the purpose of carrying out particular functions.

Subsections 40(1)(a)-(f) designate certain institutional entities and persons to be public authorities: (a) an administrative unit, (b) a territory authority, (c) a territory instrumentality, (d) a Minister, (e) a police officer, when exercising a function under a Territory law, and (f) a public employee. Each of those terms is defined in the Dictionary to the *Legislation Act 2001* (ACT).

Section 40(1)(g) provides for functional public authorities, that is those entities 'whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise)'. That provision requires both that

---

[151] Martin J, *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [57] citing *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 574 [85]-[86] per Nettle and Gordon JJ.

[152] See *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; *Minister for Aboriginal-Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J., cited by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [65][67][68][72].

the entity be exercising functions 'for' the ACT or a public authority and that the functions be 'of a public nature'.

Section 40A(3) deems certain functions to be 'of a public nature':

- the operation of detention places and correctional centres; and
- provision of the following services: gas, electricity and water supply; emergency services; public health services; public education; public transport; public housing.[153]

Section 40A(1), without limiting the matters that may be considered in deciding whether a function is of a public nature, sets out factors that may be considered:

- whether the function is conferred on the entity under a Territory law (s 40A(1)(a));
- whether the function is connected to or generally identified with functions of government (s 40A(1)(b));
- whether the function is of a regulatory nature (s 40A(1)(c));
- whether the entity is publicly funded to perform the function (s 40A(1)(d));
- whether the entity performing the function is a company (within the meaning of the *Corporations Act*) the majority of the shares in which are held by or for the Territory (s 40A(1)(e)).

The definition of public authority expressly excludes, under section 40(2), the Legislative Assembly, as well as courts, except when a court is 'acting in an administrative capacity'.[154] 'Court' is defined to include the ACT Administrative & Civil Tribunal ('ACAT').[155]

Courts exercising *judicial* functions are not therefore public authorities for the purpose of the ACT *Human Rights Act*. There is no further guidance in the legislation as to when a court will be considered to be acting in judicial rather than administrative capacity and, in respect of the latter, a public authority within the meaning of section 40(1).

That issue has been subject of very limited consideration in ACT jurisprudence. In the context of the Victorian *Charte*r, the Victorian Supreme Court in *PJB v Melbourne Health; Patrick's Case* ('*Patrick's* Case') has considered that the relevant distinction between a court, or tribunal, acting in judicial rather than administrative capacity is found in considering the legal character of the function in question.[156] The relevant principles identified in that case are discussed further below. An instructive note to the Victorian *Charter* also gives the following examples of when a court will be considered to act in its administrative capacity, including: committal proceedings; issuing warrants; listing cases; adopting practices and procedures.[157]

[153] *Human Rights Act 2004* (ACT) s 40A(3)(a)-(b).
[154] *Human Rights Act 2004* (ACT) s 40(2)(a)-(b).
[155] 'Court' also includes an entity prescribed by regulation': *Human Rights Act 2004* (ACT) Dictionary (definition of 'court').
[156] *PJB v Melbourne Health* (2011) 39 VR 373 (*Patrick's Case*).
[157] *Charter of Human Rights and Responsibilities Act 2006* (Vic) note to s 4 (1) (j).

When exercising its administrative review jurisdiction, rather than acting in its own right, ACAT 'stands in the shoes' of the original decision-making authority.[158] In doing so, it is considered to be acting in its administrative-capacity and subject to the obligations of a public authority under s 40B(1), in addition to the section 30 interpretative obligation.[159]

Some uncertainty has arisen as to whether s 40B applies to courts in exercising 'quasi-judicial' functions.[160] For example, where ACAT considers evidence and submissions that were not before the original decision-maker in undertaking administrative review.[161] The ACT Supreme Court has not yet addressed the issue. The Victorian Supreme Court has, however, in respect of the Victorian *Charter* rejected the relevance of the 'quasi-judicial category' in determining whether or not a court or tribunal is acting in its administrative or judicial capacity.[162] In applying the analysis in *Patrick's Case*, an administrative review decision by ACAT would remain one of an administrative character notwithstanding that the Tribunal is required to act judicially.[163]

7.1.3 Obligations on public authorities

Section 40B(1) of the ACT *Human Rights Act* makes it unlawful for a public authority to:

(a) act in a manner incompatible with the statutory human rights (a 'substantive' limb); or
(b) fail to give proper consideration to a relevant human right in decision-making (a 'procedural' limb).

To 'act', for the purpose of Part 5A (obligations of public authorities), is defined by s 5 to include 'a failure to act or to propose to act'.[164] The obligations under s 40B(1) encompass the obligation under s 30 to interpret Territory law compatibly with human rights, where it is possible to do so consistently with its purpose. Public authorities are also required to consider whether a decision or act limiting human rights is reasonable and justified within the meaning of s 28.

---

[158] See, for example: *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 [64]; *Thomson v ACT Planning and Land Authority* (Administrative Review) [2009] ACAT 38 [35]; *Anyar v Commissioner for Social Housing* [2017] ACAT 33 [13].
[159] See, for example: *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 [64]; *Thomson v ACT Planning and Land Authority* (Administrative Review) [2009] ACAT 38 [35]; *Anyar v Commissioner for Social Housing* [2017] ACAT 33 [13]. In the Victorian context, see *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [312].
[160] See, for example: *Peters & Environment & Sustainable Development Directorate (Administrative Review)* [2013] ACAT 3 [53]; *Gardner & Beaver v ACT Planning and Land Authority (Administrative Review)* [2010] ACAT 64 [48].
[161] See, for example: *Peters & Environment & Sustainable Development Directorate (Administrative Review)* [2013] ACAT 3 [53]; *Gardner & Beaver v ACT Planning and Land Authority (Administrative Review)* [2010] ACAT 64 [48].
[162] Judicial College of Victoria, *Charter of Human Rights Bench Book* 2.4[6].
[163] Judicial College of Victoria, *Charter of Human Rights Bench Book* 2.4 [7].
[164] *Human Rights Act 2004* (ACT) Dictionary.

Section 40B(2) sets out an exception to s 40B(1). Section 40B(1) does not apply if the act is done or decision is made under a law in force in the Territory (including either a Territory or Commonwealth law) and:

(a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or
(b) the law cannot be interpreted in a way that is consistent with a human right.

The general approach to be taken in assessing whether a public authority has fulfilled its section 40B obligations is one of fact and degree, to be assessed in consideration of all the circumstances.[165] A 'number of factors will feed into the evaluative judgment of the Court' which are dictated by the circumstances of the case.[166] Not 'every failure or inadequacy will result in a finding that a public authority has contravened a person's human rights.'[167]

7.2 Victoria

In considering where a body is a public authority for the purpose of being subject to various provisions of the *Charter* it is necessary to distinguish *core* public authorities from *functional* public authorities.

Section 4(1) of the *Charter* states that a public authority is:

(a) a public official within the meaning of the *Public Administration Act 2004* (Vic)[168]

(b) an entity established by a statutory provision that has functions of a public nature[169]

(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)[170]

(d) Victoria Police

(e) a local Council and Councillors and members of Council staff

---

[165] *Islam v Director-General of Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [48].
[166] *Islam v Director-General of Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [55].
[167] *Islam v Director-General of Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [55].
[168] According to the Note this includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Victorian Public Sector Commissioner; the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.
[169] In section 38 of the *Interpretation of Legislation Act 1984* (Vic) entity is defined to include a person (both a human being and a legal person) and an unincorporated body.
[170] The example given: a non-government school in educating students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of the *Charter*.

(f) a Minister

(g) Members of a Parliamentary Committee when the Committee is acting in an administrative capacity

(h) an entity declared by regulations to be a public authority within the meaning of the *Charter* but *excluding* (i) Parliament, or a person exercising functions in connection with proceedings in Parliament, (j) a court or tribunal except when acting in an administrative capacity (k) an entity declared by regulations not to be a public authority.

Section 4(2) sets out a list of non-exhaustive factors that may be taken into account when determining whether a function is of a public nature. The presence of one or more of the factors on the list may be relevant but does not necessarily mean that a function is of a public nature.

- Is the function conferred on the entity by or under a statutory provision?
- Is the function connected to or generally identified with functions of government?
- Is the function of a regulatory nature?
- Is the function one that the entity is publicly funded to perform?
- Is the entity a company, the shares of which are held by or on behalf of the State?

The first case to deal with the ambit of public authorities in Victoria was *Sabet*[171] where Hollingsworth J found that the fact that the Medical Practitioners Board performed functions of a regulatory nature that were publicly funded was conclusive that it was a public authority.

In *Metro West*[172], Bell J sitting as President of VCAT, determined that the provision of public housing was a function of a public nature and that the provider was a public authority within the meaning of the *Charter*. In *Goode*[173], an unlisted not for profit company limited by shares (none of which were held by or on behalf of the State) was held to be a public authority in connection with the provision of affordable social or community housing for low income tenants.

In relation to courts and tribunals the Victorian Supreme Court has adopted the approach that the relevant distinction is the legal character of the function in question; that is, where a court or tribunal makes a decision that is administrative in nature, notwithstanding that decision-making procedure may have required them to act 'quasi-judicially'.[174]

Following reference to his earlier analysis[175] of the authorities on the legal character of powers exercised by courts and tribunals, Bell J enunciated the following *general principles*:

· ' it is necessary to determine the capacity in which the court or tribunal is acting when exercising the particular power

[171] *Sabet v Medical Practitioners Board of Victoria* (2008) VR 414 [113] and [118].
[172] *Metro West Housing Services Ltd v Sudi* [2009] VCAT 2025.
[173] *Goode v Common Equity Housing limited (Human Rights)* [2016] VCAT 93.
[174] See *PJB v Melbourne Health* (2011) 39 VR 373 (Bell J) (*Patrick's case*).
[175] In *Kracke v Mental Health Review Board* (2009) 29 VAR 1.

· it is a legislative function to create new rules of law having general application while it is an administrative function to apply such rules to particular cases; it is a judicial function to make binding determinations of existing legal right, while it is an administrative function to exercise discretionary authority to make orders creating new rights and obligations, especially on the basis of policy considerations

· history, precedent and legal tradition operate to characterise certain powers as plainly judicial, including the determination of criminal guilt and actions in contract and tort and, generally, actions for the enforcement of existing legal rights

· making a binding and authoritative determination of legal rights and duties according to existing legal principles is judicial; but, as a necessary incident of acting in an administrative capacity, courts and tribunals can also make final decisions between contending parties in ways that affect their legal rights and duties

· certain powers may be administrative or judicial in character, depending on whether it is a court or tribunal which is exercising the power, and its purpose; the mechanism for enforcing the decision, determination or order may be a guide in borderline cases.'

[footnotes omitted][176]

In *Patrick's case* VCAT appointed an administrator to the estate of a person with a disability as a result of mental illness. A question considered by the Supreme Court was whether the Tribunal was required to exercise its discretion to appoint an administrator in a manner that was compatible with the human rights of the person.

As Bell J noted: the Tribunal did not identify which of Patrick's human rights were engaged but it did proceed on the basis that his human rights were affected and that the interference had to be justified. Patrick submitted that the rights engaged were freedom of movement (s 12), privacy and home (s 13) and property (s 20). The Victorian Equal Opportunity and Human Rights Commission, as intervenor, relied on equality (s 8), freedom of movement and privacy. The Attorney-General, as intervenor, submitted the principal right engaged was privacy and home.[177]

The intervenors were at odds as to whether the Tribunal in exercising its jurisdiction to make an administration order was a 'public authority' required to act compatibly with human rights.

In determining whether the tribunal was acting in a judicial or administrative capacity Bell J had regard to the abovementioned *general principles* note to s 4 (1) (j) which refers to administrative actions as including: 'Committal proceedings and the issuing of warrants by a court or tribunal … A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedure.' The explanatory notes are part of the *Charter*.[178]

Bell J concluded that the guardianship and administration jurisdiction of the Tribunal is administrative. Thus, subject to s38(2), s 38(1) provides that it is unlawful for a public authority to

[176] *PJB v Melbourne Health* (2011) 39 VR 373 (Bell J) (*Patrick's case*) [124].
[177] Ibid. [39]-[40].
[178] Section 36(3A) of the *Interpretation of Legislation Act* (Vic),

act[179] in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Following an exhaustive review of the facts and the law, Bell J held that the discretionary appointment of the administrator over Patrick's estate was incompatible with his human rights and therefore unlawful under the *Charter*. It was an error of law to make the appointment, whether or not the tribunal misinterpreted the *Guardianship and Administration Act*.[180]

The question of what amounts to a '*proper*' consideration of a human right has been considered in a number of cases.

According to Emerton J, under s 38 of the *Charter* 'proper consideration need not involve formally identifying the "correct" rights':

> Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the *Charter* like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified. [181]

That analysis was subsequently endorsed in *Bare* where Tate JA explained the test as follows:

> … for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.[182]

---

[179] Under the ACT and Qld sections it is specified that 'act' is defined to include 'a failure to act and a proposal to act' – this is also the case in Victoria, see s 3(1) of the Victorian Charter.
[180] *PJB v Melbourne Health* (2011) 39 VR 373 (Bell J) (*Patrick's case*) [374].
[181] See *Castles v Secretary, Department of Justice* (2010) 28 VR 141 [184]-[186].
[182] *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 at 223 [288].

More recently, the issue arose in *Minogue*[183] where a prisoner had been required to undergo random alcohol and drug tests, along with strip searches which were alleged to be incompatible with various human rights. This decision was successfully appealed[184] and an application for special leave to appeal to the High Court was refused.

The Court of Appeal was in general agreement with Richards J that notions of 'deference' or 'latitude' should not dilute the requirements of the procedural limb (see [92]-[93]) but disagreed about the extent of proper consideration required (point (d) in this list).

The principles adopted by Richards J in *Minogue* have been conveniently summarised by Martin J[185] in considering analogous provisions in the Queensland human rights legislation:

> (a) No latitude is to be given to a decision-maker in determining whether the decision-maker gave proper consideration to relevant human rights in making a decision. It is primarily a question of fact whether, in a given case, a decision-maker has given proper consideration to relevant rights, as required by the procedural limb of [s 58 HRA]. This is a different exercise from proportionality review of a decision for compatibility with human rights.
>
> (b) While some deference might be given to a decision-maker's assessment that a limit on human rights is justifiable – that will depend on the context in the circumstances including the extent to which the decision is supported and objectively justified by a transparent process of reasoning.
>
> (c) There is no place for deference in determining whether a decision-maker has given proper consideration to relevant human rights.
>
> (d) Proper consideration requires more than simply balancing the impact of the decision on a prisoner's human rights against the countervailing considerations of a prison administration. It requires both the identification of the human rights impacts of a decision on those it may affect, and, where a right may be limited, assessing whether the limit is justifiable in accordance with [s 13(2) HRA].(footnotes omitted)[186]

In a number of instances courts have considered the role of the court and the nature of the judicial task in determining whether decisions or actions are unlawful having regard to human rights obligations. This has been held to be a more intensive or higher standard of review than that applicable in traditional judicial review of decisions.

In *Patrick's Case* Bell J explained the difference:

> The difference between judicial reviewing for unlawfulness against applicable human rights standards and doing so for unlawfulness against

[183] *Minogue v Thompson* [2021] VSC 56.
[184] *Thompson v Minogue* [2021] VSCA 358.
[185] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.
[186] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [140]. As noted above, the decision at first instance in Minogue was overturned by the Victorian Court of Appeal.

the *Wednesbury* unreasonableness standard was explained by Lord Steyn in his "justly-celebrated and much-quoted" judgment in *R (Daly) v Secretary of State for the Home Department*. In his Lordship's view, the proportionality criteria "are more precise and more sophisticated than the traditional grounds of review". Lord Steyn went on to identify certain differences between the two standards of review, of which these are relevant to us:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relevant weight accorded to interests and considerations.

It can be seen that, by its very nature as a standard of review, proportionality draws the court more deeply into the facts, the balance which has been struck and the resolution of the competing interests than traditional judicial review. This gives rise to the issue of how the court is to provide effective judicial protection for human rights while at the same time respecting the administrative function of the public authority under its legislation and not drifting into merits review. One important way of addressing that issue is by affording weight and latitude to the acts and decisions of primary decision-makers. (citations omitted)[187]

The Victorian Charter also contains a number of exceptions to the obligations on public authorities[188] (similar to those in Qld).

7.3 Public entities in Queensland

Division 4 of Part 2 of the *Human Rights Act* (Qld) imposes obligations on public entities – as defined by s 9 to include, for example, government entities and public service employees – to act compatibly with human rights. Other entities may opt-in to the obligations of public entities, for the purpose of the statute.

Public entities within the meaning of the legislation are required, subject to express exceptions, to act compatibly with and give proper consideration to human rights in decision-making (s 58). It is unlawful for public entities to fail to comply with those obligations and remedies and relief can be sought in legal proceedings, in certain circumstances (s 59). In addition, complaints about contraventions of public entities' obligations under s 58 can be made to the QHRC (s 64). For further information on the QHRC human rights complaints procedures, see part 16 below.

---

[187] *PJB v Melbourne Health; Patrick's Case* (2011) 39 VR 373 at [316]-[317]. This analysis was adopted by Martin J, with reference to the Queensland human rights legislation in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [149].
[188] See ss 38(2)-38(4).

7.3.1 Meaning of a 'public entity'

Section 9 defines the term 'public entity' for the purposes of the *Human Rights Act* (Qld). The s 9 definition, while not adopting that terminology, distinguishes between 'core' public entities and 'functional' public entities.[189] The use of the term 'entity' is defined at s 9(5) to clarify that in s 9, 'entity' only means those that are 'in and for Queensland'.[190]

Section 9(1) designates certain 'core' entities to be 'public entities' at all times, that is regardless of the function they are performing: (a) a government entity within the meaning of section 24 of the *Public Service Act 2008* (Qld),[191] (b) a public service employee, (c) the Queensland Police Service, (d) a local government, a councillor of a local government or a local government employee, (e) a Minister, (i) a staff member or executive officer of a public entity and (j) an entity prescribed by regulation to be a public entity. A 'public entity' is also deemed by s 9 (3) to include those entities for which an s 60 declaration is in force.

Section 9 also makes provision for functional public entities, that is entities that will be considered 'public entities' only when performing certain functions, including exercising particular powers:

- an entity established under an Act when the entity is performing functions of a public nature (s 9(2)(f));
- a member of a portfolio committee when the committee is acting in an administrative capacity (s 9(1)(g));
- an entity whose functions are, or include, functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise) (s 9(2)(h));
- a registered provider of supports or a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (Cth), when they are performing functions of a public nature in the State (s 9(2)(a) and (5)); and
- a non-State police officer under the *Police Service Administration Act 1990*, section 5.17, in specified circumstances (s 9(2)(b)).

Without limiting the matters that can be taken into account in determining whether an entity is carrying out a function 'of a public nature' for the purpose of the *Human Rights Act* (Qld), s 10(1) sets out matters that may be considered: [192]

---

[189] Explanatory Notes, *Human Rights Bill 2018*, 14.

[190] *Human Rights Act 2019* (Qld), s 9(5). This is the definition of 'entity' in s35 of the *Acts Interpretation Act 1954* (Qld).

[191] For the purpose of s9(1)(a), s 24(1) of the *Public Service Act 2008* (Qld) defines a 'government entity' to be '(a) a department or part of a department; (b) a public service office or part of a public service office; (c) an agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act or under State authorisation for a public or State purpose; (d) a part of an entity mentioned in paragraph (c); or (e) another entity, or part of another entity, declared under a regulation to be a government entity; or (f) a registry or other administrative office of a court of the State of any jurisdiction.' Section 24(2) defines entities excluded from being a 'government entity' (for example, local government entities, the Executive Council and Legislative Assembly).

[192] *Human Rights Act 2019* (Qld), ss 10(1)-(2).

- whether the function is conferred on the entity under a statutory provision (s 10(1)(a));
- whether the function is connected to or generally identified with functions of government (s 10(1)(b));
- whether the function is of a regulatory nature (s 10(1)(c));
- whether the entity is publicly funded to perform the function (s 10(1)(d)); and
- whether the entity is a government owned corporation (s 10(1)(e)).

Section 10(3) also deems the following to be 'of a public nature' for the purpose of the statute: (a) operating a corrective services facility under the *Corrective Services Act 2006* or another place of detention, and (b)(i) providing (i) emergency, (ii) public health or (iii) public disability services, (iv) public education, (v) public transport, or (vi) a housing service by a funded provider of the State under the *Housing Act 2003*.[193] Section 10(3) does not limit what functions may be considered 'of a public nature' under ss 10(1) and (2).

The definition of 'public entity' expressly excludes certain entities, under s 9(4):

- the Legislative Assembly or a person performing functions in connection with proceedings in the Assembly, except when acting in an administrative capacity (paragraph (a)); and
- a court or tribunal, except when acting in an administrative capacity (paragraph (b)); or
- an entity prescribed by regulation not to be a public entity (paragraph (c)).

Pursuant to s 9(4)(b), courts or tribunals acting in judicial capacity will not be public entities for the purpose of the *Human Rights Act* (Qld).[194] There is no guidance on when a court or tribunal is considered within the meaning of the legislation to act in its administrative rather than judicial capacity. Nor is guidance provided in the Explanatory Notes to the legislation.

Both QCAT and QIRC have confirmed they are acting in an administrative capacity when considering an application under s113 of the *Anti-Discrimination Act 1991* (Qld) for an exemption from the operation of the Act.[195] The State Coroner has found that it acts in an administrative capacity for the purposes of the HR Act when directing or requesting which unit within the QPS should be responsible for the investigation of a death in custody.[196]

---

[193] *Human Rights Act 2019* (Qld), s 10(3).

[194] 'Court' is defined to mean 'is defined to mean the Supreme Court, the District Court, the Magistrate's Court, the Children's Court and the Coroner's Court': *Human Rights Act 2019* (Qld) Dictionary (definition of 'court').

[195] see *Re Ipswich City Council* [2020] QIRC 194; *Burleigh Town Village Pty Ltd (2)* [2022] QCAT 285 at [20] and the cases referred to therein.

[196] At [42] of the decision delivered on 20.06.2022 in the Inquest into the death of Selesa Tafaifa published at https://www.courts.qld.gov.au/__data/assets/pdf_file/0016/723202/tafaifa-v-ryan-state-coroner-2021-5437.pdf.

The Land Court considers it is acting in an administrative capacity when considering and making recommendations to the Minister and Chief Executive when dealing with the referral of objections to an application for a mining lease and environment authority. [197]

Decisions of Magistrates in committal proceedings have been subject to judicial review under the *Judicial Review Act 1991,* the likely implications being that Magistrates are acting in an administrative capacity in committal proceedings. In administrative review, in exercising functions with reference to the jurisdiction of the original administrative decision-maker, should the administrative capacity carve out be interpreted similarly to Victorian and ACT jurisprudence, the Queensland Civil & Administrative Tribunal is likely to be considered act in an administrative capacity.

In *MB*[198] the Tribunal said at [17] 'The tribunal is held to be acting in its administrative capacity when exercising its review jurisdiction through a fresh hearing on the merits …' and cited two earlier decisions of QCAT.

Without saying so specifically, the Mental Health Court has said that when reviewing a decision of the Mental Health Tribunal (by appeal) that it stands in the shoes of the Tribunal. [199]We also discuss section 5(2)(a) of the *Human Rights Act* (Qld), which directly applies the legislation to a court or tribunal when exercising certain functions under parts of the legislation.

7.3.2 Obligations on public entities

Section 58(1) of the *Human Rights Act* (Qld) makes it unlawful for public entities to:

(a) act or make a decision in a way that is not compatible with human rights; or
(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

'To act', for the purpose of the statute, is defined to include 'a failure to act or a proposal to act'.[200] The obligations under s 58(1) encompass the obligation under s 48(1) and (2) to interpret statutory provisions compatibly with human rights, to the extent possible consistent with their purpose, or in accordance with the most human rights compatible interpretation consistent with their purpose.

If a public entity does not interpret statutory provisions compatibly, then they may fall foul of s58. In a strict sense, the obligation in s48 falls on courts and tribunals at all times, including when they are acting in an administrative capacity and thus a public entity for the purposes of s58.[201]

---

[197] See *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.
[198] [2022] QCAT 185 (review of a Blue Card decision).
[199] See *Attorney-General for the State of Queensland v GLH* [2021] QMHC 4 at [41].
[200] *Human Rights Act 2019* (Qld) Dictionary (definition of 'act').
[201] See s4(f) – how main objects are achieved – requiring courts and tribunals to interpret statutory provisions …

Section 58(5) gives a definition of 'giving proper consideration to a human right in making a decision' for the purpose of s 58(1)(b), as including but not limited:

(a) identifying the human rights that may be affected by the decision; and
(b) considering whether the decision would be compatible with human rights.

As noted by Martin J, this statutory formulation in s 58(5) is different from the analogous provision in the Victorian *Charter* given that proper consideration under the Queensland legislation requires identification of the human rights that may be affected by the decision.[202] This is said to be 'an exercise that must be approached in a common sense and practical manner' and decision makers 'are not expected to achieve the level of consideration that might be hoped for in a decision given by a judge.'[203] Martin J went on to agree with the observations of Emerton J in *Castles*[204] with reference to the Victorian *Charter*, referred to above.

The reference in both ss 58(1)(a) and 58(5)(b) to compatibility invokes the s 8 definition of 'compatible with human rights'. For the purpose of s 58(1)(a), for an act of a public entity to be 'compatible with human rights', s 8 requires that the act either not limit human rights (s 8(a)) or that a limitation is only to the extent that it is justified within the meaning of s 13 (s 8(b)). For the purpose of s 58(5)(b), section 8 requires that a decision-maker consider if any limitation the decision imposes on a right is a justified one in accordance with s 13. That necessarily includes the proportionality analysis prescribed in that provision.

Section 58 contains a number of exceptions to the s 58(1) obligation.

First, s 58(1) will not apply to a public entity if they could not reasonably have acted or decided differently due to a requirement of law, whether under a statutory provision, Commonwealth or another State law or otherwise (s 58(2)).[205] It is clear that public entities must give effect to the law even where it is incompatible with human rights.[206]

Second, there is an exception for bodies established for a religious purpose, in respect of acts or decisions made in accordance with the religious doctrine of the religion concerned that are necessary to avoid offending the religious sensitivities of people of that religion.[207]

The *Human Rights Act* (Qld) itself does not provide guidance on when a body is considered one 'established for a religious purpose'; for example, whether that should be assessed at the time the body is established or with reference to its activities at the time of the relevant act or decision. However, some guidance on the religious body exception in s 58(1) may be provided by interpretation of s 109 of the *Anti-Discrimination Act 1991* (Qld), which also contains an

[202] at [136].
[203] At [137].
[204] Castles *v Secretary, Department of Justice* (2010) 28 VR 141 at 184 [185]-[186].
[205] *Human Rights Act 2019* (Qld), s 58(2).
[206] Explanatory Notes, *Human Rights Bill 2018*, 34.
[207] *Human Rights Act 2019* (Qld), s 58(2)-(3).

exemption from that legislation for acts of religious bodies 'established for a religious purpose' which requires analysis of whether the act is done in conformity with religious doctrine.[208]

Third, s 58(4) states that s 58(1) will not apply to acts or decisions 'of a private nature', which is likely to be interpreted in distinction to the s 10 definition of 'function of a public nature'. The exemption is particularly relevant to those entities deemed to be public entities regardless of whether they are exercising public or private functions, in determining the extent of their s 58(1) obligations.[209]

7.3.3 Consequences of public entities breaching the *Human Rights Act* (Qld)

Failure of a public entity to comply with its s 58(1) obligations in undertaking an act or making a decision will not invalidate the act or decision (s 58(6)(a)). It is also not an offence for a public entity to act or make a decision in contravention with s 58(1) (s 58(6)(b)). Failure by a public entity, however, to act in accordance with its s 58(1) obligations may give rise to the availability of relief or remedy in certain circumstances under s 59.

Section 59 deals exhaustively with a person's rights to seek relief or remedy in relation to breaches of s 58 (s 59(5)). The provision provides for the availability of a dependent, or conditional, cause of action. No direct cause of action is available under the *Human Rights Act* (Qld).

Subsections 59(1) and (2) state:

> (1) Subsection (2) applies if a person may seek relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of s 58, unlawful.
> (2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1).

That is, where a person has an available cause of action in relation to an act or decision of a public entity on the ground that it was unlawful, other than on s 58 grounds, and the act or decision is also unlawful within the meaning of s 58(1), the person may rely on s 58 unlawfulness to seek the *same* relief or remedy, notwithstanding they are not successful in their other cause of action.

'Person' - used in s 59(1) and (2) - is not a defined term within the *Human Rights Act* (Qld). However, only 'individuals' have human rights under the legislation (s 11). Section 59 therefore may arguably, if interpreted consistently with ACT and Victorian jurisprudence, only be interpreted to give standing to individuals.[210]

---

[208] *Anti-Discrimination Act 2009* (Qld) s 109.

[209] See analysis in Victorian Judicial College Bench Book: http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57276.htm.

[210] 'Person' is defined by s 32D(1) of the *Acts Interpretation Act 1954* (Qld) to generally include 'a reference to a corporation as well as an individual.' Section 32D(2) states that presumption 'is not displaced merely because there is an express reference to either an individual or a corporation elsewhere in the Act.'

However, the preferable view would appear to be that s11 does not limit standing under s59. The ACT is different in that s40C specifically limits the cause of action to 'victims'. That is not the case with s59 of the Queensland legislation. The Queensland Human Rights Commission is of the view that if an organisation has standing to bring the claim (e.g., judicial review of a decision) there is no bar to the applicant arguing that the public entity did not comply with s58.[211] The availability of a right to seek relief or remedy under s 59 will not affect any other right a person has to seek any relief or remedy in relation to an act or decision of a public entity (s 59(4)).

7.3.4 Available remedies in legal proceedings

On the ground of unlawfulness under s 58, s 59(2) entitles a court or tribunal to award the relief or remedy that a person seeks in relation to the independent ground of unlawfulness (ss 58(1) and (2)).

Section 59(3) provides, however, that damages are *excluded* as a remedy for a ground of unlawfulness arising under s 58 (s 59(3)). Pursuant to s 59(6), the operation of s 59 does not affect any right a person has to damages apart from the operation of s 59.

Unlike the ACT *Human Rights Act*, the right to liberty and security of the person in the *Human Rights Act* (Qld) does not contain a provision recognising a right to compensation for unlawful arrest or detention, nor does the legislation contain a right to compensation for wrongful conviction.

7.3.5 Reporting requirements of public entities

Public entities required to prepare annual reports, under s 63 of the *Financial Accountability Act 2009* (Qld), must report on details of actions taken to further the objects of the *Human Rights Act* (Qld), details of human rights complaints received and details of policies, programs, procedures, practices or services undertaken in relation to their human rights compatibility (s 97).

7.3.6 The human rights obligations of courts and tribunals

When acting in an administrative capacity courts and tribunals are public entities for the purpose of the *Human Rights Act* (Qld) and subject to the s 58 obligations of public entities in their conduct and decision-making.

However, section 5(2)(a) states that the *Human Rights Act* (Qld) applies to 'a court or tribunal, to the extent the court or tribunal has functions under part 2 and part 3, Division 3' (s 5(2)(a)). Within the meaning of the statute, a 'function' includes 'a power'.[212]

Part 3, Division 3, of the *Human Rights Act* (Qld) confers specific functions on courts and tribunals in respect of statutory interpretation and declarations of incompatibility, for example. Part 2 of

[211] See also the obiter comments about a body seeking a declaration in its representative role – *Victorian Taxi Families Inc and Redfield Court Holdings Pty Ltd v Commercial Passenger Vehicle Commission* [202] VSC 762 at [94].
[212] *Human Rights Act 2019* (Qld) Dictionary (definition of 'function').

the *Human Rights Act* (Qld) sets out the twenty-three rights protected by the statute. Section 5(2)(a) appears to apply those rights directly to courts and tribunals, notwithstanding that s 9(4)(a) provides that courts and tribunals will only be 'public entities' when acting in an administrative capacity'.

The Victorian *Charter* contains a similar provision[213] and various potential interpretations of its operation have arisen. First, that the provision requires courts and tribunals to directly enforce and apply all rights in Part 2, whether they have been invoked in proceedings or not. Second, that the function of courts and tribunals is to directly enforce those rights in Part 2 that refer to court or tribunal proceedings. Third, that courts and tribunals are required to enforce those rights specifically directed to them.[214]

The approach that has been preferred is the second, to directly apply and enforce those rights relating to court and tribunal proceedings, even when acting in a judicial capacity.[215] In respect of the Queensland legislation, those might include, for example, the right to a fair hearing (s 31), rights in criminal proceedings (s 32) and right of children in the criminal process (s 33), among others.

That interpretation would appear consistent with the intention expressed in the Explanatory Notes to the *Human Rights Bill 2018*, which provided, 'Subclause (2) makes it clear that the Bill applies to courts and tribunals, the Parliament and public entities to the extent that they have a function under specific parts of the Bill.'[216]

8. Limitations upon human rights

8.1 The Australian Capital Territory

Section 28 is a general limitations provision that recognises that some limitations on human rights are reasonable and justified. Section 28(1) sets out the test for when human rights may be limited:

> Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) sets out factors that must be considered, among 'all relevant factors', in determining whether a limit on a human right is reasonable within the meaning of s 28(1):

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;

---

[213] Section 6(2)(b) of the Victorian *Charter*.
[214] http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57270.htm.See,eg, *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 [32].
[215] http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57270.htm. See, eg, *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [241]-[254].
[216] Explanatory Notes, *Human Rights Bill 2018*, 13.

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.[217]

Section 28 will only be engaged where a right has been limited either by legislation or action of a public authority. A 'limitation' is to be understood 'simply as a burden on the right' in the first instance, 'without reference to whether the burden is reasonable or proportionate.' [218] In interpreting each right, the court construes it in the broadest possible way. [219] Where the conclusion is reached that legislation limits one or more of the human rights recognised in the statute, it is then necessary to determine whether the limitation is reasonable within the meaning of s 28.[220]

Section 28, as noted by the ACT Supreme Court in *Islam*:

> acknowledges that the human rights under the Act are not absolute or always completely consistent with each other. It produces a conclusion that where a law limits a human right under the Act, the Act permits the right to be reduced in a case where the limitation is justified or reasonable. In this way, following such adjustment, the human right under the Act is rendered compatible with the limit, and therefore lawful: *Momcilovic* at [572] per Crennan and Kiefel JJ; at [684] per Bell J.[221]

Conversely, where the limitation is not justified or reasonable, then the law or conduct in question will be incompatible with the human right under the Act. Various considerations of reasonableness are said to invoke what is known as the '*proportionality test*'.[222]

Thus, the application of s 28 involves the following questions:

- Is a human right under the ACT *Human Rights Act* engaged and what is its content?
- If yes, has the right been 'limited'?
- If yes, was the limitation reasonable and justified within the meaning of s 28(1)?

The onus of justifying any limitation as consistent with s 28 rests on the party that seeks to have the court uphold the limitation as compatible with the human right.[223] The requirement under s 28(1) that the limitation be *demonstrably justified* clearly incorporates a requirement that evidence be brought forward in justification of the limitation. The requirement that the limitation be one *set by laws* also imposes a requirement of legality to satisfy the s 28(1) test. No further guidance on whether this incorporates both legislation and the common law is provided in the ACT *Human Rights Act*.

---

[217] *Human Rights Act 2004* (ACT) s 28(2).
[218] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [38].
[219] Ibid, [39].
[220] Ibid, [40].
[221] Ibid, [41].
[222] Ibid, [42] citing *Momcilovic* at [22] and [34] per French CJ, [432] per Heydon J, [555]-[557] per Crennan and Kiefel JJ. As noted by McWilliam AsJ, the High Court was there considering s 7(2) of the Victorian *Charter* which is in substantially the same terms as s 28 of the Act.
[223] *Re Application for Bail by Islam* 4 ACTLR 235, 290 (Penfold J).

As noted above, the test in s 28(1) that limitations on human rights be 'reasonable' and 'justified in a free and democratic society' and the considerations in s 28(2)(a) to (e) in assessing s 28(1) reasonableness have been described by the ACT Supreme Court as incorporating a 'proportionality' analysis in s 28.[224] When applying this proportionality assessment, it is clear from s 28(2) that courts will not be limited to those factors at ss 28(2)(a) to (e) and that other relevant factors may be considered.

Section 28 applies to all of the human rights in the ACT *Human Rights Act*. This does not conform to international law, where some human rights – including those incorporated in the statute, for example, the prohibition upon torture at s 10 – are considered non-derogable. In applying s 28 proportionality analysis, however, it is unlikely that ACT courts would consider any purpose sufficiently important to justify overriding those rights that are of an absolute nature under international law.[225]

Some of the rights contained in the ACT *Human Rights Act* include what are termed 'specific' or 'internal' limitations. For example, s 18(2) contains the internal limitation that 'No-one may be deprived of liberty, *except on the grounds and in accordance with the procedures established by law* [emphasis added].' In the context of the Victorian *Charter*, there are different judicial approaches to the relationship between internal limitations and s 28 (or, rather the Victorian *Charter* equivalent of s 28, s 7(2)). One view is that internal limitations reduce the plain scope of the right; if impugned laws or conduct meet the standard of the internal limitation, the right is not considered 'limited' and s 28 is not applied.[226] On the other view, internal limitations should be considered as part of the s 28 analysis in determining what sort of limitations are reasonable and justified.[227] The issue does not appear to have been subject of any significant discussion to date in the context of the ACT *Human Rights Act.*

We further discuss the relationship between ss 28 and 30 of the ACT *Human Rights Act* in part 12 below.

8.2 Victoria

[224] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [42]-[45].

[225] Julia Debeljak has suggested in respect of the equivalent provision in the Victorian *Charter* that the courts may read down the limitations clause so that it does not apply to those absolute rights under international law. Debeljak's reasoning rests on the application of section 32(2) of the Victorian *Charter* which provides that international law is a legitimate influence in the interpretation of all statutory provisions in a way compatible with human rights: Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 434. That Victorian provision is framed slightly differently to the equivalent provision in the ACT *Human Rights Act*, which allows for the influence of international law in 'interpreting the human rights' protected in the Act: *Human Rights Act 2004* (ACT), s 31(1).

[226] See discussion at: http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57292.htm.

[227] See discussion at: http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57292.htm.

Section 7(2) is a general limitation power providing that all rights in the Victorian *Charter* may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

Section 7(2) requires 'all relevant factors' to be considered when assessing the lawfulness of limitations on human rights, including:

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

This is said to involve a 'proportionality test'.[228]

In considering Victorian legislation which abrogated the privilege against self-incrimination Warren CJ observed that the question was whether the legislative limitation on the right against self-incrimination was 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors?'[229]Her Honour cited with approval the remarks of Dixon CJ:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[230]

In relation to the *onus* of proof Warren CJ said[231]:

> (a) the onus of demonstrably justifying a limitation in accordance with s 7 resides with the party seeking to uphold the limitation,
>
> (b) given what is required to be justified, the standard of proof is high,
>
> (c) it requires a "degree of probability which is commensurate with the occasion",[232] and

---

[228] *Momcilovic v R* (2011) 245 CLR 1 at [22], [34] French CJ, [432] Heydon J, [555]-[557] Crennan and Kiefel JJ.
[229] *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 [144].
[230] *R v Oakes* [1986] 1 SCR 103 at 136 [40].
[231] *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at 448-449 [147].
[232] See *Bater v Bater* [1951] P 35 at 37 per Denning LJ.

(d) the issue for the Court is to balance the competing interests of society, including the public interest, and to determine what is required for a person to obtain or retain the benefit of the rights recognised or bestowed by the statute.

Thus, the evidence required to prove the elements of s 7 should be 'cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit.'[233]

As noted by Martin J,[234] in considering the analogous provision in the Queensland legislation, the analysis by Warren CJ has been followed by a number of singles justices[235] and approved by the Victorian Court of Appeal.[236] Martin J also adopted the reasoning.[237]

The process for assessing incompatibility has been described as a *two-step process* whereby the applicant for human rights relief need only establish prima facie incompatibility before the burden shift to the defendant public entity to justify the limitations. The burden to justify the limitations is high, requiring a degree of probability commensurate with the occasion and must be strictly imposed in circumstances where the individual in question is particularly vulnerable.[238]

This has also been considered as a *three-step process* involving: (1) the identification of whether any human right is relevant to or engaged by the impugned decision of the public authority (*the engagement question*); (2) determining whether the decision or action has limited that right (*the limitation question*); and (3) considering whether the limit is, under the law, reasonable and demonstrably justified having regard to the matters set out in s 7(2) of the *Charter* (*the proportionality or justification question*). [239]

As with the ACT and Queensland legislation, to the extent that all of the human rights under the Victorian *Charter* are subject to the general limitations provision and none are recognised as absolute - that is subject to no lawful limitation or derogation - the *Charter* is not consistent with international human rights law.

However, it is possible that the general limitations provision will be applied by the judiciary in such a way that no limitation upon those rights by their nature typically understood as absolute

233 *R v Oakes* [1986] 1 SCR 103 at 138 [42].
234 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273
235 For example: *Minogue v Thompson* [2021] VSC 56 at [82]; *Loielo v Giles* (2020) 63 VR 1; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441. See also *R v Oakes* [1986] 1 SCR 103 at 136-137 per Dickson CJ*; Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at 282 [43] per Charron J; *R v Hansen* [2007] 2 NZLR 1 at 42 [108] per Tipping J; *PJB v Melbourne Health* (2011) 39 VR 373 at 441-442 [310] per Bell J ("Patrick's Case") referred to by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [128, note 58].
236 *R v Momcilovic* (2010) 25 VR 436. This decision was overturned by the High Court but not in relation to this aspect.
237 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [110].
238 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 at 504 [203] per Dixon J, referred to also by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [131].
239 *Minogue v Thompson* [2021] VSC 56 at 80, also referred to by Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [132].

in international human rights law would be capable of being considered justified pursuant to section 7(2).

Debeljak has also suggested that it is possible that the judiciary would read the general limitations power 'down so as not to apply to those rights which are viewed as absolute under international law.'[240]

Section 32(2) provides that international law and the judgments of domestic, foreign and international courts and tribunals may be considered in interpreting the statutory provisions. However, as Martin J has noted in a number of Australian cases the view has been expressed that such 'laws and judgments' must be used with discrimination and care. [241]

Statutory provisions are required to be given a rights-compatible interpretation, so far as consistent with their purpose (s 32(1).[242]

In addition to the operation of the general limitations clause, some of the human rights as they are recognised in the Victorian *Charter* are subject to express internal limitations. For example, the right to freedom of expression under section 15 is recognised to be subject to 'lawful restrictions reasonable necessary' to 'respect the rights and reputation or other persons' or 'for the protection of national security, public order, public health or public morality.'[243]

8.3 Queensland

Section 13 is a general limitations provision that recognises that all human rights in the *Human Rights Act 2019* (Qld) may be subject to limitations in accordance with s 13. Pursuant to the s 8 meaning of 'compatible with human rights', a limitation on a human right will only be compatible with human rights to the extent it meets the standard applied in s 13.

Section 13(1) states the test for when human rights may be limited:

> A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The onus of demonstrating that the limit is justified in the circumstances rests on the state or public entity seeking to limit the human right.[244] Thus, the Applicant bears the onus of establishing

---

[240] Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 434.

[241] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [114-115] citing *Momcilovic v The Queen* (2011) 245 CLR 1 at 36-38 [18]-[19] per French CJ and *WBM v Chief Commissioner of Police* (2010) 27 VR 469 at 482 [49] per Kaye J.

[242] See Julie Debeljak, 'Balancing rights in a democracy: The problems with limitations and overrides of rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 434.

[243] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 15(3).

[244] Explanatory Notes, *Human Rights Bill 2018*, 16.

that a right is limited and if this is established then the onus is then on the public entity to justify the limit.[245] The Explanatory Notes to the legislation provide that the term 'under law', or the legality requirement, is intended to refer to limitations imposed by legislation, subordinate legislation or the common law.[246] The criteria of reasonableness and justification are assessed together.[247]

The factors that may be considered in determining whether a limitation on a human right is reasonable and justifiable within the meaning of s 13(1) are not limited. However, ss 13(2)(a) to (g) set out a non-exhaustive list of factors that 'may be relevant'. The intention of the legislation is that those factors align broadly with the principle of proportionality, a test applied in other jurisdictions.

The Explanatory Notes to the *Human Rights Bill 2018* describe how the factors listed in s 13(2)(a) to (g) apply:[248]

The nature of the human right: s 13(2)(a)	It is important to first consider the nature of the human right. This involves looking at the purpose and underlying values of the human right.
The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom: s 13(2)(b)	Not every purpose can justify a limitation on a human right. Whether the purpose of a law limiting a human right is consistent with the values of a free and democratic society may be relevant in considering whether the limit is reasonable and justified. Another way of saying this is that it may be relevant to consider whether the purpose is sufficiently important to justify limiting a right or the purpose must relate to concerns which are pressing and substantial in a free and democratic society. Examples of such purposes include the protection of the rights of others and public interest considerations, including the protection of the democratic nature of the society. In proportionality analysis, this element is sometimes called legitimate purpose or proper purpose.
The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose: s 13(2)(c)	Having identified the purpose of the limitation, it may be relevant to consider the relationship between the limitation and the purpose. This inquiry includes considering whether the law goes some way towards furthering that purpose. In

[245] See *Owen-D'Arcy v Chief Executive Queensland Corrective Services* [2021] QSC 273 at [128] to [129], [243] (Martin J).
[246] Explanatory Notes, *Human Rights Bill 2018*, 16.
[247] Explanatory Notes, *Human Rights Bill 2018*, 16.
[248] Explanatory Notes, *Human Rights Bill 2018*, 17 – 18.

	proportionality analysis this is sometimes called rational connection or suitability.
Whether there are any less restrictive and reasonably available ways to achieve the purpose: s 13(2)(d)	It may be relevant to consider whether the purpose of the law can be reasonably achieved in more than one way, and whether other options have less impact on human rights. In proportionality analysis this element is sometimes called necessity.
The importance of the purpose of the limitation: s 13(2)(e)	The last three factors involve a balancing exercise. It may be relevant to consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right. The importance of the purpose of limiting the human right may be considered on one side of the scales.
The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right: 13(2)(f)	The importance of the human right and the extent of the limitation of the right may be considered on the other side of the scales.
The balance between the matters mentioned in paragraphs (e) and (f): 13(2)(g)	The balancing exercise involves comparing the importance of the purpose of limiting the human right with the importance of the human right and the extent of the limitation. This comparison considers whether the limiting law strikes a fair balance. The more important the right and the greater the incursion on the right, the more important the purpose will need to be to justify the limitation.

Some of the human rights contained in the *Human Rights Act* (Qld) also contain internal limitations. For example, the right to humane treatment when deprived of liberty (s 30) provides that an accused person who is detained or a person detained without charge must be segregated from persons convicted of offences 'unless reasonably necessary'. The scope of the right to life (s 16) is qualified by reference to the concept of 'arbitrariness'.[249]

The Explanatory Notes to the *Human Rights Bill* (Qld) provide that these limitations operate 'in addition' to the s 13 general limitations provision, that is that internal limitations reduce the plain scope of the right.[250] Limitations on rights that are consistent with those internal limitations would, presumably, therefore be considered compatible with the right and not subject to analysis under s 13.

[249] Explanatory Notes, *Human Rights Bill 2018* (Qld), 18.
[250] Explanatory Notes, *Human Rights Bill 2018* (Qld), 18.

As noted by Martin J:[251]

> An act or decision will limit a human right if it "places limitations or restrictions on, or interferes with, the human rights of a person".[252] This inquiry involves considering the scope of the right. The scope of the right should be "construed in the broadest possible way"[253] by reference to the right's "purpose and underlying values".[254]

As discussed in respect of the ACT *Human Rights Act* and Victorian *Charter*, it is not consistent with international human rights law that all rights under the *Human Rights Act* (Qld) may be limited. Under international law, some rights are considered non-derogable, even in times of grave public emergency.

9. Statutory interpretation in accordance with human rights

In each jurisdiction the human rights legislation imposes a statutory obligation to interpret *all* legislation consistently with human rights.[255] There are however some variations in the nature of this obligation, which are discussed below.

The obligation to interpret statutory provisions compatibly with human rights does not apply to statutory provisions which are the subject of an override declaration.[256]

9.1 The Australian Capital Territory

Section 30 of the ACT *Human Rights Act* provides:

> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

Section 30 applies to all 'Territory laws', defined to mean 'an Act or statutory instrument.'[257] An 'Act' is defined by s 7 of the *Legislation Act 2001* (ACT) to mean an 'Act of the Legislative Assembly' made as a 'law by the Legislative Assembly under the Self-Government Act'. The s 30 obligation

---

[251] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [130].

[252] Citing*: Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 at [291] per Ryan J; *PJB v Melbourne Health; Patrick's Case* at 384 [36] per Bell J.

[253] Citing: *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at 434 [80] per Warren CJ; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 [97] per Bell J; *Re Director of Housing and Sud*i [2010] VCAT 328 at [90] per Bell J; *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at 157-158 [55] per Emerton J ; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at 691 [126] per Riordan J; *Certain Children v Minister for Families and Children* (2016) 51 VR 473 at 496 [143] per Garde J; *Islam v Director-General, Department of Justice and Community Safety Directorate* [2018] ACTSC 322 at [67]-[68] per McWilliam AsJ.

[254] Citing: *DPP (Vic) v Kaba* (2014) 44 VR 526 at 556 [105] per Bell J; *Re Kracke and Mental Health Review Board (2009) 29 VAR 1* at 29 [79] per Bell J.

[255] Although now somewhat dated, a useful overview is provided by Simeon Beckett, *Interpreting Legislation Consistently with Human Rights*, paper presented at the AIAL National Administrative Law Forum, June 2007 and published in *AIAL Forum* No 58.

[256] *Human Rights Act 2019* (Qld), s 48(5); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(6).

[257] *Human Rights Act 2004* (ACT) Dictionary (definition of 'Territory law').

does not therefore extend to Commonwealth laws in operation in the ACT. 'Statutory instrument' is defined by s 13(2) of the *Legislation Act 2001* (ACT) to include subordinate laws, disallowable instruments, notifiable instruments and commencement notices.

The High Court decision in *Momcilovic* is the leading authority on how s 30 is to be applied.[258] While *Momcilovic* concerned the interpretation of s 32 of the Victorian *Charter,* rather than s 30 of the ACT *Human Rights Act*, a Full Bench of the ACT Court of Appeal has stated that there 'is no basis for interpreting the two corresponding sections in any different manner.'[259] While the Court of Appeal adopted the view that *Momcilovic* now dictates the relevant principles and that prior ACT cases concerning the application of s 30 are now 'redundant', *Momcilovic* contained six separate judgments and differently constituted majorities. Thus, the decision left some doubt as to how aspects of s 32 of the Victorian *Charter* operate and, by implication, s 30 of the ACT *Human Rights Act*.[260] ACT courts have not yet clarified some of those aspects and we discuss prior ACT cases below, to that extent.

In its consideration of s 30 in *Andrews v Thomson*, before turning to the *Momcilovic* decision, the Full Bench of the ACT Court of Appeal stated unanimously that the starting point for the application of s 30 is that the provision contains a caveat that a human rights consistent interpretation will only apply, 'So far as it is possible to do so consistently with [the Territory law's] purpose'.[261] It follows that:

> Accordingly, the HRA does not change an interpretation but rather assists with interpretation of a section provided that this assistance can be given in a way that is not inconsistent with the section's purpose.[262]

As described by the Court of Appeal, this point is consistent with the High Court's analysis in *Momcilovic*, as applied to s 30, that the reference to legislative purpose in the provision's text requires courts to commence with the ordinary process of statutory construction to determine the meaning of the statute.[263]

The ordinary approach to construction is explained in *Project Blue Sky Inc v Australian Broadcasting Authority*: 'to construe the relevant provision in order to achieve consistency with the language and the purpose of the statute.'[264] If, according to the ordinary language of the

---

[258] *Momcilovic v The Queen* (2011) 245 CLR 1. See *Andrews v Thomson* [2018] ACTCA 53 [42] ('Turning now to the [ACT Human Rights Act], the appellant correctly submitted that the decision of the High Court in *Momcilovic* now dictated the relevant principles. Any debate arising from prior ACT cases like *R v Fearnside* [2009] ACTCA 3, ACTLR 24 and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147; 4 ACTLR 235 has now become redundant.')

[259] *Andrews v Thomson* [2018] ACTCA 53 [45].

[260] *Andrews v Thomson* [2018] ACTCA 53 [42] ('Any debate arising from prior ACT cases like *R v Fearnside* [2009] ACTCA 3, ACTLR 24 and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147; 4 ACTLR 235 has now become redundant.')

[261] *Andrews v Thomson* [2018] ACTCA 53 [45].

[262] *Andrews v Thomson* [2018] ACTCA 53 [45].

[263] *Andrews v Thomson* [2018] ACTCA 53 [46], citing *Momcilovic v The Queen* (2011) 245 CLR 1 (generally).

[264] *Andrews v Thomson* [2018] ACTCA 53 [46], citing *Momcilovic v The Queen* (2011) 245 CLR 1 [544] (Crennan and Kiefel JJ, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.)

statute, there is only one available meaning of the provision, s 30 'has no part to play'.[265] Where that evident legislative intention is inconsistent with or limits human rights, s 30 does not operate as a remedial provision.[266] Rather, the court is required to give effect to the relevant legislative intention.[267] Those clear steps in the process of statutory interpretation under s 30 can be described as follows:

- determine the meaning or potential meanings of the provision in question according to the ordinary principles of statutory construction, consistent with the purpose of the provision; and
- if the provision has one evident and unambiguous meaning, effect is to be given to that legislative intention, regardless of whether it is incompatible with or limits human rights.

As the ACT Court of Appeal determined that only one construction was available of the provision in the case before it, in applying the *Momcilovic* principles in *Andrews v Thomson*, the Court did not go further to address how s 30 applies in circumstances where multiple available meanings of a provision are available as a matter of statutory construction.[268]

On this point, the Victorian Court of Appeal has adopted the approach taken by French CJ in *Momcilovic*, which is to treat s 32 of the Victorian *Charter* as applying akin to the principle of legality in the process of statutory construction.[269] As that relates to s 30, where a constructive choice is available, the court must adopt the meaning that is most compatible with human rights, to avoid or minimise any encroachment of the legislation on human rights or that best accords with the human right.[270] The interpretation mandated by s 30 must, of course, be consistent with the purpose of the statutory provision being interpreted.[271]

This process can be described in the following steps. After the process of statutory construction has been undertaken, if there are multiple potential meanings of a provision available, their compatibility with human rights must be considered.

If:

- only one potential meaning is compatible with human rights, s 30 requires that meaning be preferred;
- multiple potential meanings are available, of which some are compatible with human rights, s 30 requires the meaning that best accords with human rights be preferred; and

---

[265] *Andrews v Thomson* [2018] ACTCA 53 [45], citing *Momcilovic v The Queen* (2011) 245 CLR 1 (generally).
[266] Ibid, [45], citing *Momcilovic v The Queen* (2011) 245 CLR 1 (generally).
[267] Ibid, [45] ('the HRA does not change an interpretation but rather assists with interpretation of a section provided that this assistance can be given in a way that is not inconsistent with the section's purpose').
[268] Ibid, [45], [51].
[269] For commentary on this, see: http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57264.htm.
[270] For commentary on this, see: http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57264.htm.
[271] *Andrews v Thomson* [2018] ACTCA 53 [50], citing *Momcilovic v The Queen* (2011) 245 CLR 1 [62] (French CJ).

- multiple potential meanings are available, all placing limitations on human rights, the meaning that places least limitation on human rights is to be preferred.

In this process, as noted *In the matter of an application for Bail by Isa Islam* ('*Islam*') by Justice Penfold of the ACT Supreme Court, s 139 of the *Legislation Act 2001* (ACT) is also relevant. Section 139(1) states that, 'In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.' In *Islam*, in applying s 30, Justice Penfold held that if 'one or more available meanings…are human-rights compatible, then that meaning *or* the one of those meanings required by s 139 of the *Legislation Act* to be preferred, is adopted.'[272] While the ACT Court of Appeal has stated that *Islam* is redundant post-*Momcilovic*, Penfold J's analysis on the interaction of s 30 and s 139 of the *Legislation Act 2001* (ACT) may still apply as s 139 informs the process of statutory construction that is the starting point of the application of s 30. The Court of Appeal in *Andrews* did not have to address the application of s 139 as, on its construction of the provision before it, there was only one interpretation available.

One issue that remains uncertain as a result of inconsistent approaches taken by the judgments in *Momcilovic* on the relationship between s 32(1) and s 7(2) of the Victorian *Charter* is the role of s 28 during the s 30 process of interpretation. Section 28 provides for reasonable limitations on human rights. The ACT Court of Appeal stated in *Andrews v Thomson* that, on this issue, 'the law to be applied is that to be derived from *Momcilovic*' and rejected a submission that Justice Penfold's approach to the interaction of ss 28 and 30 in the earlier case of *Islam* should apply, which was to treat the interpretative process as an integrated one.[273] In particular, Penfold J treated s 28 as assisting to choose between competing available interpretations where no human rights compatible interpretations are available under s 30, to favour adoption of an available interpretation that is justified by s 28.[274]

While dictating that *Momcilovic* rather than *Islam* applies, the Court of Appeal in *Andrews v Thompson* proceeded to refer to the inconsistent views taken in the High Court.[275] In relation to the Victorian *Charter,* French CJ and, separately, Crennan and Kiefel JJ, held that the reasonable limitations provision s 7(2) should have no role in influencing the interpretative process under s 32(2). That is, as their Honour's reasoning would apply to the ACT *Human Rights Act*, justification under s 28 should be treated separately to interpretation under s 30 and is also not relevant to the ACT Supreme Court's issue of a declaration of incompatibility under s 32.[276]

[272] *Re Application for Bail by Islam* 4 ACTLR 235, 289.
[273] *Andrews v Thomson* [2018] ACTCA 53 [53]. In *Islam*, Penfold J set out a four-step methodology for the application of ss 30 and 28, under which s 28 is part of the s 30 process, assisting in choosing between competing available interpretations: *Re Application for Bail by Islam* 4 ACTLR 235, 289.
[274] *Re Application for Bail by Islam* 4 ACTLR 235, 289.
[275] *Andrews v Thomson* [2018] ACTCA 53 [53].
[276] *Andrews v Thomson* [2018] ACTCA 53 [53], citing *Momcilovic v The Queen* (2011) 245 CLR 1 [574]-[575].

Gummow and Bell JJ, and Heydon J, took a different approach to the effect that s 28 would play a part in the interpretative process.[277] The ACT Court of Appeal did not have to proceed to address the issue as to which approach is to be preferred, as it had already found that s 30 had no role to play in interpreting the provision in question before it.[278] In the absence of a clear finding by the Court as to what approach in *Momcilovic* is to be preferred, and the Court's disavowal of Justice Penfold's approach in *Islam*, there remains some uncertainty as to the appropriate methodology.

9.2 Queensland

Section 48(1) of the *Human Rights Act* (Qld) provides:

> All statutory provisions, must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

'Statutory provision' is defined to mean 'an Act or statutory instrument of a provision of an Act or statutory instrument'.[279] 'Act' is defined by the *Acts Interpretation Act 1954* (Qld) to mean an 'Act of the Queensland Parliament'.[280] The interpretative obligation therefore does not extend to Commonwealth laws in operation in Queensland. Pursuant to the *Acts Interpretation Act 1954* (Qld), 'statutory instrument' has the meaning provided by s 7 of the *Statutory Instruments Acts 1992* (Qld).[281]

Courts must therefore consider human rights in construing legislation of the Queensland Parliament. In doing so, the emphasis in the provision on giving effect to the legislative purpose of the statute does not authorise courts to depart from Parliament's intention.[282] That is, the reference to legislative purpose in s 48(1) requires courts to start with the ordinary process of statutory construction. Section 48(1) does not operate as a remedial provision where no human rights compatible construction is available that is consistent with the provision's statutory purpose. Where there are human rights compatible interpretations available, the court must adopt the meaning most compatible with human rights 'to the extent possible' consistent with its statutory purpose.

Where a court is unable to interpret a statutory provision compatibly with human rights, the court must, to the extent possible consistent with its purpose, adopt the interpretation that is *most* compatible with human rights (s 48(2)). That is, the most human rights compatible construction must be chosen of those that are incompatible.

Subsections 48(1) and (2) use the term defined by s 8, 'compatible with human rights'. Under section 8, a statutory provision will be compatible with human rights if it either does not limit a

---

[277] *Andrews v Thomson* [2018] ACTCA 53 [53], citing *Momcilovic v The Queen* (2011) 245 CLR 1 (Gummow and Bell JJ, Heydon J).
[278] *Andrews v Thomson* [2018] ACTCA 53 [53].
[279] *Human Rights Act 2019* (Qld) Dictionary (definition of 'statutory provision').
[280] *Acts Interpretation Act 1954* (Qld) s 6(1) ('Act' means an Act of the Queensland Parliament and includes (a) a British or New South Wales Act that is in force in Queensland; and (b) an enactment of an earlier authority empowered to pass laws in Queensland that has received assent.')
[281] *Acts Interpretation Act 1954* (Qld) Dictionary (definition of 'statutory instrument').
[282] Explanatory Notes, *Human Rights Bill 2018*, 30.

human right or if it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.

It is clear therefore that a court must apply s 13 during the ss 48(1) and (2) process of interpretation, if a statutory provision limits a human right. This legislative formulation avoids the uncertainty in the interaction of the interpretative obligation and reasonable limitations provisions in the ACT and Victorian human rights statutes.

Section 48(4) makes it clear that the operation of s 48 will not affect the validity of an Act, statutory provision, statutory instrument or provision of a statutory instrument that is not compatible with human rights. That is, a court is required to give effect to the Parliament's intention. However, in certain circumstances a court may issue a declaration of incompatibility.[283]

9.3 Victoria

Section 32(1) of the *Charter* imposes an obligation to interpret all statutory provisions in a way compatible with the protected rights, *so far as it is possible to do so consistently with their statutory purpose.* This obligation applies both to courts and tribunals, as well as government officers.

For the purpose of statutory interpretation, a court or tribunal is required to explore all possible interpretations of the statutory provision and to adopt that interpretation that least interferes with a *Charter* right. Relevant *Charter* rights must be taken into account as part of this interpretative process.[284]

Where legislation is not capable of being interpreted consistently with both the rights protections in the Victorian *Charter* and its statutory purpose, the court is not empowered to invalidate the legislation. Instead, the Supreme Court of Victoria or the Victorian Court of Appeal may make a section 36 'declaration of inconsistent interpretation'. The judicial declaration does not impact upon the validity, operation or enforcement of the legislation in question, or give rise to any legal right or civil cause of action.

The approach to statutory construction required by s 32(1) was outlined by French CJ in *Momcilovic.*[285] Although there are divergences in the approaches of the other High Court Justices in that case, it would appear to be 'widely accepted that, with respect to s 32(1), it has been held that the ordinary rules of construction apply and, consequently, a remedial interpretation, which involves a departure from the ordinary rules of interpretation in order to find a rights compatible meaning, is not allowed.'[286]

10. International law, foreign, international and domestic jurisprudence

[283] See s 53 *Human Rights Act 2019* (Qld).
[284] *HJ (a pseudonym) v Ibac* [2021] VSCA 200 (Beach, Kyrou and Kaye JJA) [153]
[285] *Momcilovic v The Queen* (2011) 245 CLR 1 [37]-[51].
[286] *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623 (Ryan J) [247].

Each of the *Human Rights Act (*ACT*)*, *Human Rights Act* (Qld) and Victorian *Charter* contain a provision allowing, but not mandating, courts to take into account international law and judgments of foreign and international courts and tribunals in interpreting a statutory provision.

Section 31(1) of the ACT *Human Rights Act* states, for example:

> International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

The Queensland (s 48(3)) and Victorian (s 32(2)) provisions are in similar terms, but also provide that 'judgments of domestic…courts and tribunals relevant to a human rights' may be considered. The absence of such provision from the ACT *Human Rights Act* does not mean that relevant domestic jurisprudence cannot be considered in interpreting human rights in the ACT.

As observed by French CJ in *Momcilovic,* use of international comparative materials is not novel in judicial decision-making: courts may already have regard to international law and relevant international, foreign and domestic jurisprudence.[287] For example, the common law principles of interpretation relevant to statutes adopting the terminology of international conventions, as each of the statutes do, still apply.[288]

In using comparative materials to aid in the interpretation of the state and territory legislative human rights, however, some caution is required.[289] In *Momcilovic*, French CJ commented, with reference to s 32(2) of the Victorian *Charter* that:

> international and foreign judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.[290]

In the ACT, but not the Queensland and Victorian statutes, the term 'international law' is defined. Within the meaning of the ACT *Human Rights Act*, 'international law' means: the *ICCPR* and other human rights treaties to which Australia is a party (see research paper 2); general comments and views of UN human rights treaty bodies (see also research paper 2); and declarations and standards adopted by the UN General Assembly relevant to human rights.[291]

While considering the caution with which international and foreign judgments should be approached, in considering international and foreign human rights jurisprudence decisions of the International Court of Justice, the European Court of Human Rights and those jurisdictions that have incorporated human rights statutes into their domestic law (Canada, New Zealand, South Africa and the United Kingdom) will be of most significance.

---

[287] *Momcilovic v The Queen* (2011) 245 CLR 1 [18] (French CJ); see also *R v DU* [2018] ACTSC 281 [35].
[288] Ibid.
[289] *R v DU* [2018] ACTSC 281 [35].
[290] *Momcilovic v The Queen* (2011) 245 CLR 1 [19] (French CJ).
[291] *Human Rights Act 2004* (ACT) Dictionary (definition of 'international law').

In the ACT, s 31(2) of the statute sets out matters that must be considered in determining whether material listed in s 31(1) should be considered, and the weight the material should be given. Those matters are:

(a) the desirability of being able to rely on the ordinary meaning of [the Act], having regard to its purpose and its provisions read in the context of the Act as a whole;
(b) the undesirability of prolonging proceedings without compensating advantage;
(c) the accessibility of the material to the public.[292]

The *Human Rights Act* (Qld) and Victorian *Charter* do not contain similar provisions.

11. The scope and content of protected human rights

In this section we address the judicial interpretation to date of the scope and content of each of the rights protected by the ACT *Human Rights Act*, the *Human Rights Act* (Qld) and the Victorian *Charter*.

The general approach to take in interpreting human rights is not controversial. As noted by Bell J in *Matsoukatidou* with reference to the Victorian *Charter:* 'the scope and application of the human rights…of the *Charter* are to be ascertained by a process of interpretation that takes account of the beneficial purposes of the *Charter*.'[293]

In *Eastman*, Elkaim J adopted a similar approach to the ACT *Human Rights Act*.[294] In accordance with this ordinary principle of construction, human rights are interpreted purposively, in the broadest possible way, and in a non-technical sense.[295] Consideration of whether the relevant statutory provision, act or decision in question in proceedings imposes a limitation on a human right, and whether that limitation is reasonable in accordance with the statutory definition of that concept, should take place after identifying the scope of the right in question.[296]

In *Kracke*[297] Bell J set out at some length the methodology to be used in interpreting and applying the Victorian *Charter*, with extensive reference to jurisprudence from other jurisdictions.

We do not examine foreign jurisprudence relevant to the statutory rights in any detail below. However, as each of the statutes allows for relevant international law and judgments of international and foreign courts and tribunals to be considered in statutory interpretation, looking

[292] *Human Rights Act 2004* (ACT) s 31(2).
[293] *Matsoukatidou v Yarra Ranges Council* 51 VR 624, at [73], citing *PJB v Melbourne Health (Patrick's Case)*
[294] *Eastman v the Australian Capital Territory* [2019] ACTSC 280, at [16]. A significant amount of human rights jurisprudence in the ACT has been generated by proceedings brought by Mr David Eastman against the Australian Capital Territory.
[295] For example, see: *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [39]; *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 503 (10 November 2010) [29] (Hargrave J); *Kracke v Mental Health Review Board* (2009) 29 VR 1, 20.
[296] *Matsoukatidou v Yarra Ranges Council* 51 VR 624, at [73] (Bell J).
[297] *Kracke v Mental Heath Review Board* (2009) 29 VR 1, [19]-[235].

internationally for guidance on meaning of rights will be of use to practitioners where there has been limited consideration of rights in the three Australian jurisdictions to date.

Courts and tribunals have looked to judgments from the European Court of Human Rights and on human rights law in the United Kingdom, Canada and New Zealand, for example.[298] In considering the possible application of international and foreign judgments to the rights in the state and territory human rights statutes, practitioners should – as per French CJ's warning in *Momcilovic* – proceed with discrimination and care, accounting for differences of legal and constitutional settings. [299]

11.1 **Recognition and equality before the law**

11.1.1 The Australian Capital Territory

The ACT *Human Rights Act* recognises:

- the right to recognition as a person before the law (s8(1))
- the right to enjoy human rights without distinction or discrimination of any kind (s8(2)) and
- equality before the law and the entitlement to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground (s8(3)).[300]

The examples of discrimination given in the *Note* to the section in the legislation refers to: 'Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.'

Section 8(1) is modelled on article 16 of the *International Covenant on Civil and Political Rights* (*ICCPR)*. At the essence of the right to recognition as a person before the law is the capacity to enjoy the protection of the law and rights under the law.[301] Section 8(3) is based upon Article 26 of the *ICCPR.*

Cases in which s 8 of the ACT *Human Rights Act* has been invoked include the following.

- In criminal proceedings there was reference to the recognition that everyone is entitled to equal treatment before the law in rejecting the contention that a separate sentencing regime was appropriate for offenders who committed 'family violence' offences.[302]

---

[298] See, as one example, *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127 (in which Refshauge J adopted an interpretation of the right to a fair trial consistent with international jurisprudence to the effect that a minimum guarantee of this right would not require the state to fund a lawyer of choice).
[299] *Momcilovic v The Queen* (2011) 245 CLR 1 [19] (French CJ).
[300] In *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27, the Supreme Court read the second sentence of section 8(3) as conferring a freestanding right ([157]).
[301] Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Collation of Factsheets on each right under the ACT Human Rights Act 2004* (February 2015) 4.
[302] *R v Um (No 2)* [2021] ACTSC 115 [22]; *R v UG* (2020) 281 A Crim R 273 [47].

- Purported reliance on s 8 of the ACT *Human Rights Act* in separate civil proceedings by a solicitor for damages and other relief based on alleged defamation, negligence and pursuant to the *Human Rights Act* in connection with his unsuccessful application for a practising certificate was rejected.[303]
- In medical negligence proceedings a self-represented plaintiff sought to rely upon s8 and s1O of the ACT *Human Rights Act* in an action against a number of doctors and the hospital where the plaintiff underwent surgery. Various interlocutory applications were determined. [304]
- A prisoner invoked provisions of the *Human Rights Act*, including s 8(3) in proceedings arising out of inadequate food provided at a detention centre.[305]
- The question of whether s 8(3) of the ACT *Human Rights Act* gives rise to a right to be provided with state funded counsel in an appeal in criminal proceedings has been considered but rejected.[306]

The term 'discrimination' used in ss8 (2) and (3) is not a defined term in the legislation. Article 26 of the *ICCPR* provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Mossop AsJ commented in *Islam*[307]that the drafting of s 8 differs from Article 6 in two obvious respects:

> First, the second sentence of article 26 says "the law shall prohibit", whereas the second sentence of s 8(3) simply gives the right, rather than referring to what the effect of the law should otherwise be. Second, the grounds of discrimination are set out in the text of article 26, whereas they are merely identified as examples in s 8(3).

However, the second of these distinctions is problematic as Article 6 prefaces reference to the specified grounds of discrimination with the words 'on *any* ground *such as'* [the enumerated grounds] although Mossop AsJ comments that this is open to interpretation as confining the grounds of prohibited discrimination.

The use of the words 'discrimination of any kind' (ss(2)) and 'discrimination on any ground' (ss(3)) may give rise to uncertainty as to what is encompassed. According to Mossop AsJ:

---

[303] *Ezekiel-Hart v Reis* [2018] ACTSC 264; *Ezekiel-Hart v Reis (No 2)* [2019] ACTSC 192; *Ezekiel-Hart v Reis* [2019] ACTCA 31. See also: *Emmanuel TAM. Ezekiel-Hart v The Law Society of the Australian Capital Territory* [2010] ACTCA 6.
[304] *Hassan v Calvary Private Hospital Health Care Canberra Ltd t/a Calvary John James Hospital* [2018] ACTSC 53.
[305] *Islam v Director General of the Justice and Community Safety Directorate* [2018] ACTSC 323.
[306] *Achanfuo-Yeboah v The Queen* [2016] ACTCA 71[59].
[307] *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 [154].

> '…the drafting of s 8(3) is such that the grounds of discrimination are not limited to those identified in the example. Nor are they limited to grounds which might be considered to be socially inappropriate forms of discrimination. A prohibition on "discrimination on any ground" would, prima facie, prevent discrimination on grounds such as lack of intelligence, laziness, propensity to violence, unpleasantness of personality, lack of personal hygiene or poor grooming, unless such discrimination involved a "limit set by laws" which were justified under s 28 of the HR Act. While such a result might appear to be an unusual one, it is not obvious how, by orthodox means of interpretation, the terms of s 8(3) could be read down to give them a more confined operation.'[308]

As Mossop AsJ proceeds to note in Victoria this difficulty has been avoided by limiting the prohibited grounds of discrimination under the *Charter* to those specified in the *Equal Opportunity Act 2010* (Vic).[309]

However, in *Islam* the Court found it unnecessary to explore the ambit of prohibited discrimination given that the claim in that case alleged discrimination on religious grounds.[310] In an earlier proceeding brought by the same inmate, various alleged breaches of human rights were alleged arising out of the seizure of property, unsupervised contact with another inmate and discrimination against practising Muslims.[311]

The ACT Administrative Appeals Tribunal has commented that the s 8(3) concept of equality 'before the law implies that the application of laws as well as administrative decisions by government officials should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment.'[312]

The section 8(3) right to equality has been relied upon successfully. *R v Watson* concerned a bail application by a female accused to allow her to take up a residential drug rehabilitation place outside of the detention centre in which she was held.[313] The ACT Supreme Court addressed the relevance of s 8(3) to the bail application, which was subject to section 9D(2) of the *Bail Act 1992* (ACT) which provides that a court must not grant bail unless satisfied that 'special or exceptional circumstances exist favouring the grant of bail.'[314] The Court accepted that typically there is nothing special or exceptional in an un-sentenced prisoner being offered a place in a residential rehabilitation program so as to warrant a grant of bail.[315] However, a residential rehabilitation program was only available within the detention centre to male prisoners. The Court held those

---

[308] Ibid. [156].
[309] Section 3(1) defines 'discrimination' to mean discrimination on the basis of an attribute set out in s 6(1) of the *Equal Opportunity Act 2010* (Vic).
[310] *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 [156].
[311] *Islam v Director General of the Justice and Community Safety Directorate (No 2)* [2015] ACTSC 314.). See also the earlier case brought by the same person: *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20.
[312] *Bragon Traders Pty Ltd and ACT Gambling & Racing Commission* [2006] ACTAAT 3 [34].
[313] *R v Watson* [2017] ACTSC 311.
[314] *R v Watson* [2017] ACTSC 311 [14].
[315] *R v Watson* [2017] ACTSC 311 [30].

circumstances in concert with s9D(2) disadvantaged female prisoners seeking drug rehabilitation options, and breached the 's 8(3) guarantee of the equal protection of the law without discrimination based on sex'.[316] The Court determined that, pursuant to s 30 of the ACT *Human Rights Act*, the words 'special and exceptional circumstances' in s 9D(2) should be interpreted differently in relation to female and male prisoners, to the extent that the rehabilitation facilities for female prisoners in the detention centre were not relevantly equivalent to those for male prisoners.[317] The Court determined the availability of community-based residential rehabilitation to a female un-sentenced prisoner could be considered 'special and exceptional circumstances' for the purpose of s 9D(2).[318]

In 2006, in *Peters v ACT Housing*, a tenant sought to rely upon the section 8 right, among other submissions, to argue that public housing tenants in receipt of a rent reduction for their landlord's failure to carry out essential property repairs should be compensated equally to a private tenant, notwithstanding their receipt of a rent rebate subsidy.[319] The tenant submitted that there was no intention evident in the *Residential Tenancies Act 1997* (ACT) to distinguish in compensation outcomes between the two classes of tenants, and to construe the legislation in that way would be contrary to the rules of statutory interpretation under s 30 of the ACT *Human Rights Act* and s 8(3).[320] The ACT Residential Tenancies Tribunal accepted the tenant's argument that there should be no different treatment between private and public tenants in the relevant measure of the rent reduction, although the Tribunal did not refer to s 8 in its reasons.

Other cases in which s 8 has been relied upon include an alleged violation of common law native title rights[321]; a criminal case in which an issue arose as to whether the rights of a complainant or victim were to be considered in conjunction with the rights of the accused[322] and an appeal by a solicitor against disciplinary findings arising out of professional conduct.[323]

11.1.2 Victoria

Section 8 of the *Charter* provides that every person:

- Has the right to recognition as a person before the law (s8(1))
- Has the right to enjoy his or her human rights without discrimination (s 8(2))
- Is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination (s 8(3))

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination (s 8(4)).

---

[316] *R v Watson* [2017] ACTSC 311 [35]-[36], [40].
[317] Ibid [42].
[318] Ibid [44].
[319] *Peters v ACT Housing* [2006] ACTRTT 6 [13], [66]-[67].
[320] Ibid [16]-[26].
[321] *Mortimer v Land Development Agency* [2012] ACTSC 158.
[322] *R v Forsyth* [2013] ACTSC 179; 281 FLR 62.
[323] *Lander v Council of the Law Society of the Australian Capital Territory* [2009] ACTSC 117.

As at September 2021 this provision was cited 512 times in 103 cases. In many instances provisions other than section 8 were also relied upon. Those cases in which section 8 was relied upon or cited include the following cases, categorised according to the type of proceeding.

Criminal proceedings and appeals

Those cases involving or arising out of criminal proceedings and appeals include the following:

- Proceedings arising out of a claim for damages of battery and false imprisonment brought against police officers[324]
- Refusal of application for an adjournment[325]
- Proceedings for incest and attempted incest brought against a person with advanced vascular dementia[326]
- Application for judicial review following conviction for incitement to murder[327]
- Application to exclude evidence obtained by way of admissions obtained from an elderly Italian migrant for whom English is only a partial language, when an interpreter was not present [328]
- Application for orders re-instating appeals from sentences of Magistrates' Court[329]
- Application for bail by a 17-year-old Aboriginal person with intellectual disability[330]
- Rights of a child defendant charged with serious criminal offences in a superior court and procedures for detention and sentencing[331]
- Right to effective and independent investigation by police integrity body of complaints of human rights abuse by police[332]
- Right to a fair hearing and whether a Magistrate was required to consider whether there were special circumstances before determining whether to make an imprisonment order for failure to pay fines[333]
- Judicial review proceedings arising out of the decision of the Magistrates Court to refuse to transfer a criminal proceeding to the Koori Court[334]

[324] *Gebrehiwot v State of Victoria* [2020] VSCA 315; 287 A Crim R 226.
[325] *Russell v Eaton* [2020] VSCA 249.
[326] *Carson (a Pseudonym) v The Queen* [2020] VSCA 202; 284 A Crim R 289.
[327] *Zhong v Attorney-General* [2020] VSC 302.
[328] *Director of Public Prosecutions v Natale (Ruling)* [2018] VSC 339 (Bell J): 'The equality right in s 8(3) protects the inherent dignity of all persons whatever language they speak and whatever their race or national origin. A full discussion of the various elements of the right is to be found in *Re Lifestyle Communities Ltd (No 3)* 31 VAR 286 and *Matsoukatidou v Yarra Ranges Council* 55 VR 624.' [85].
[329] *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624.
[330] *DPP v SE* [2017] VSC 13.
[331] *DPP v SL* (2016) 263 A Crim R 193.
[332] *Bare v Small* [2013] VSC 129.
[333] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; 49 VR 1; *Taha v Broadmeadows Magistrates' Court; Brookes v Magistrates' Court of Victoria* [2011] VSC 642.
[334] *Cemino v Cannan* (2018) 56 VR 480.

In *Cemino*[335] Ginnane J considered s 8(3) of the *Charter* and the need for protection from discrimination by the adoption of special measures for people suffering special disadvantage so as to ensure that they are equal before the law:

> [130] The right to equality recognised in s 8(3) has also been held to apply to the procedures of courts. In that respect, I have previously referred to passages in *DPP v SL* and *DPP v SE*. In the latter case, Bell J stated that:
>
> > ...the right to age-appropriate and rehabilitation-focussed procedures in bail applications by children also arises as an aspect of the right to equality in s 8(3) because failing to follow such procedures can lead to discriminatory exclusion [89].
>
> [131] In *Matsoukatidou v Yarra Ranges Council*,[90] Bell J set aside orders made by a County Court Judge for failing to apply the *Charter* rights contained in s 8(3) and s 24(1) in circumstances where one appellant had a learning disability, and both appellants were unrepresented. His Honour concluded that courts were bound to apply the s 8(3) right, because 'in procedural respects, the elements of the equality right that it enshrines relate to court and tribunal proceedings, including the conduct of hearings'.[91] His Honour stated that:
>
> > [The plaintiff] is a person with a disability and a disability pensioner. Under s 8(3) of the *Charter*, the judge was obliged to ensure that she was equally and effectively protected against discrimination by reason of this disability. This required the judge to make certain adjustments and accommodations to the procedures that were adopted, which his Honour did not make. [The plaintiff's] inability effectively to participate in the hearing was substantially due to the judge's failure to do so. Therefore the judge did not apply her right to equality under s 8(3) [92].
>
> [132]Bell J considered that the first limb of s 8(3) obliged courts to treat people equally and not arbitrarily, but did not require procedural adjustments to accommodate disadvantaged parties.[93] The second limb was deemed not relevant to the conduct of court hearings as it concerns the substantive law, it may require that substantive law include positive adjustments to ensure the equal protection of the law.[94] However, his Honour stated in respect of the third limb:
>
> > This goes beyond requiring that the law (in content) be equal in substance to requiring that, in the operation and administration of the law, people have equal and effective protection against discrimination. This element of the right may require that, in the conduct of hearings and procedures followed by courts and tribunals, positive adjustments and accommodations are made so that some parties are treated differently to other parties in order to ensure that they have equal and effective protection of the law. It is this relevant of the right that is most relevant in the present case [95].

[335] Ibid.

> [142] Section 8(3) protects equality before the law. Within this context, the third limb states that every person has the right to equal and effective protection against discrimination. Discrimination can be direct or indirect. Courts have long sought to prevent indirect discrimination in their procedures. An example includes assisting self-represented litigants to the extent permissible, who would otherwise be disadvantaged by not understanding a court's procedures. Another example is making courts physically accessible for disabled people, who would otherwise not be able to enter a court and seek justice. These are special measures and accommodations aimed at preventing indirect discrimination by promoting and protecting people's right to equal and effective protection against discrimination. This is a key feature of a fair legal system. Special measures and accommodations relate to courts, as courts are an essential component of the law which people are entitled to access without discrimination. The third limb of s 8(3) directly apples to a court's procedures to ensure that every person is equally able to access a court and justice. Courts have, and have always had, a function in ensuring that people have equal access to the law. These functions, however, does not extend to the substance of the law. Court are not required to ensure that the substantive outcomes of cases guarantee equality.

The nature of 'disadvantage' was further elaborated by Bell J:

> A person is so disadvantaged when their normal participation in society and in social and political institutions is impaired. The disadvantage could come from limitations on access to goods or services of all kinds, including accommodation, transport, health and education, or to work on equal terms. It could be due to restrictions on spiritual, cultural or sexual expression and on accessing leisure and sporting facilities. Obviously this is not an exclusive list, and there could not be such a list. Anything which stands in the way of someone living as a dignified human being, as envisaged by the Charter, whether individually or in family and society, could place them in a position or condition of disadvantage.[336]

Proceedings brought by prisoners

In a number of cases proceedings have been brought by prisoners in connection with aspects of treatment in prisons[337]

Mental health cases

A number of cases arose out of decisions under mental health legislation.[338]

---

[336] *Lifestyles Communities Ltd (No 3) 31 VAR 286,*[16].

[337] See e.g., *Minogue v Falkingham* [2021] VSC 185 (arising out of applications for access to computer equipment); *Rowson v Department of Justice and Community Safety* [2020] VSC 236; 60 VR 410 (arising out of risk of contracting COVID-19).

[338] *XJY v Mental Health Tribunal (Human Rights)* [2021] VCAT 83; *MLQ v Mental Health Tribunal (Human Rights)* [2020] VCAT 587; *XFL v Mental Health Tribunal (Human Rights)* [2020] VCAT 377; *YLY v Mental Health Tribunal (Human Rights)* [2019] VCAT 1383; *HKN v Mental Health Tribunal (Human Rights) (Corrected)* [[2019]] VCAT 825; *PBU & NJE v Mental Health Tribunal* [2018] VSC 564; 56 VR

Guardianship cases

Decisions in respect of guardianship also gave rise to a number of cases.[339]

Discrimination

Perhaps not surprisingly, numerous cases arose out of allegations of various forms of discrimination.[340]

Special measures that do not constitute discrimination

141; *PJB v Melbourne Health* (*Patrick's case*) [2011] VSC 327; 39 VR 373 (appeal from decision of VCAT to appoint administrator in respect of a person with a mental illness); *MH10 v Mental Health Review Board and Anor (General)* [2009] VCAT 1919; *MH9 v Mental Health Review Board and Anor (General)* [2009] VCAT 1199.

[339] *EHV (Guardianship)* [2020] VCAT 501; *TBV (Guardianship)* [2020] VCAT 595; *MJG (Guardianship)* [2020] VCAT 250; *KSJ (Guardianship)* [2019] VCAT 891; *G93966 - HYY (Guardianship)* [2022] VCAT 97. See the matters referred to in the following VEOHRC link: https://www.humanrights.vic.gov.au/legal-interventions/intervention-in-g93966-hyy-guardianship-vcat-97-jan-2022/.

[340] *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770 (discrimination on the grounds of disability); *Djime v Kearnes* [2019] VSC 117; *Yianni v Moonee Valley CC (Human Rights)* [2018] VCAT 1990; *Djime v Kearnes* [2015] VCAT 941 (claims of discrimination on the basis of race and physical features and claims of sexual harassment and victimisation by police officers); *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327 (discrimination in employment); *RW v State of Victoria (Human Rights)* [2015] VCAT 266; *Rossbourne School (Human Rights)* [2014] VCAT 1617 (discrimination in education); *Paul Slattery v Manningham City Council* [2008] VCAT 1273 (discrimination on the grounds of disability in relation to the provision of services); Richardson v City of Casey Council (Human Rights) [2014] VCAT 1294 (discrimination in the provision of services by a Council on the grounds of political belief or activity); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256; 308 ALR 615; *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 (discrimination in the provision of accommodation on the grounds of sexual orientation; religious freedom); *Goode v Common Equity Housing Limited (Human Rights)* [2013] VCAT 2188 (discrimination in the areas of employment, accommodation and the provision of goods and services, on the basis of disability/impairment and age); *Kuyken v Lay* [2013] VCAT 1972 (discrimination in the area of employment on the grounds of physical features); *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure (Human Rights)* [2013] VCAT 1839 (discrimination in the provision of services: eligibility of overseas students for concession cards used on public transport). See also in relation to an application for a protective costs order: *Muhammad Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* [2014] VSCA 115; *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869 (discrimination in the area of goods and services on the grounds of disability); *Aitken & Ors v State of Victoria - Department of Education & Early Childhood Development* [2012] VCAT 1547 (proceedings by parents on behalf of children at State primary schools contending that the provision of special religious instruction involved discrimination against the children); *McAdam v Victoria University and Ors (Anti-Discrimination)* [2010] VCAT 1429(discrimination in the provision of goods and services on the grounds of philosophical belief; victimisation; religious freedom); *Castles v Secretary to the Department of Justice* [2010] VSC 310; 28 VR 141; 33 VAR 280 (discrimination on the grounds of 'infertility impairment' arising out of refusal to permit access to IVF treatment); *Victoria v Turner* (2009) 23 VR 110; 30 VAR 416 (discrimination on the grounds of impairment in relation to access to education).

As noted above, the legislation (s 12(1)) provides that special measures designed to promote or realise substantive equality for members of a group with a particular attribute do not constitute discrimination.[341]

Proceedings arising out of employment or work

In a number of instances, proceedings arose out of employment or work.[342]

Proceedings arising out of protective orders made in respect of children

Proceedings also arose out of protective orders made in respect of children.[343]

Civil proceedings

A range of issues also arose in civil proceedings which gave rise to *Charter* claims generally and claims in respect of s 8 in particular. These included:

- Proceedings arising out of a refusal to grant an application for renewal of a private security operators license[344]
- Consideration of the relevance of the *Charter* in the exercise of discretion in relation to awarding summary judgment[345]
- Applications for leave to appeal from earlier decisions dismissing claim(s) for alleged discrimination arising out of eviction from premises[346]
- An application for the appointment of a litigation guardian[347]
- Proceedings arising out of an unfair settlement of a civil family law property dispute said to have occurred when a party lacked the capacity to instruct lawyers and was coerced[348]
- A claim in respect of superannuation entitlements[349]
- Proceedings arising out of suspension of spousal pension on re-marriage[350]
- An application to set aside or revoke orders declaring a person to be a vexatious litigant[351]

Miscellaneous cases

In a diverse range of other types of cases *Charter* issues and in particular s 8 were raised. These include:

---

[341] See e.g., *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237.
[342] See e.g., *She v RMIT University* [2021] VSC 2 (Incerti J); *Draper v Building Practitioners Board* [2020] VSC 866.
[343] *See: INP v The Secretary, Department of Health and Human Services (Review and Regulation) (Corrected)*[2020] VCAT 1293.
[344] *WUT v Victoria Police* [2020] VSC 586.
[345] *Angeleska v State of Victoria* [2013] VSC 598.
[346] *Le Tuan Pham v Ex Parte* [2013] VSCA 43.
[347] *Pistorino v Connell* [2012] VSC 438.
[348] *Goddard Elliott v Fritsch* [2012] VSC 87.
[349]*Markerink v Emergency Services Superannuation Board (General)* [2011] VCAT 1125.
[350] *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130.
[351] *Attorney-General for the State of Victoria v Kay* [2009] VSC 337.

- Judicial review proceedings arising out of the making of personal safety intervention orders[352]
- A dispute over land tax[353]
- A claim against a University arising out of rejection of special consideration application[354]
- A claim by a woman seeking IVF treatment in relation to whether the consent of her estranged husband was required[355]
- A claim for damages for unlawful imprisonment relating to immigration detention[356]
- An application for an extension of time within which to commence proceedings seeking review of a refusal to revoke enforcement orders arising out of the non-payment of infringement penalties[357]
- Judicial review proceedings by a union seeking to prevent the Equal Opportunity and Human Rights Commission from continuing to conduct a review of discrimination, sexual harassment and victimisation in the Fire Brigade and Country Fire Authority[358]
- A challenge to the adoption of a smoke free policy in a hospital[359]
- Review of a refusal to permit assisted reproductive treatment[360]
- An appeal in relation to the refusal of a police integrity body to investigate a claim of inhuman or degrading treatment[361]
- An appeal in relation to refusal to allow a lay person to represent another person in legal proceedings where the person was illiterate, did not understand legal language and was incapable of representing himself[362]
- An application to quash a decision of the Children's Court that two juveniles lacked maturity to provide instructions to legal representatives and denying them leave to be legally represented in child protection proceedings[363]
- An application for review of decision refusing childcare expenses to enable the applicant to attend physiotherapy, hydro-therapy and Pilates[364]
- A consideration of questions that may be referred to the Supreme Court under s 33(1) of the *Charter*[365]
- An application for crimes compensation.[366]

Exemptions from discrimination legislation

---

[352] *Austin v Dwyer* [2019] VSC 837.
[353] *Fang v Commissioner of State Revenue (Review and Regulation)* [2019] VCAT 1983.
[354] *Naik v Monash University* [2018] VSC 605.
[355] *EHT18 v Melbourne IVF* (2018) 263 FCR 376.
[356] *DBE17 v Commonwealth of Australia* (2018]) 361 ALR 423.
[357] *Re Greco* [2018] VSC 175.
[358] *United Firefighters' Union v VEOHRC & Anor* [2017] VSC 773.
[359] *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647.
[360] *TRV v Department of Health and Human Services (Human Rights)* [2015] VCAT 1188.
[361] *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129; 326 ALR 198 .
[362] *Vella v Wybecca Pty Ltd* [2014] VSC 443.
[363] *A & B v Children's Court of Victoria* [2012] VSC 589.
[364] *Dawson v Transport Accident Commission (General)* [2010] VCAT 644; 33 VAR 243.
[365] *De Simone v Bevnol Constructions & Developments Pty Ltd* [2010] VSCA 231; 30 VR 200; 33 VAR 194.
[366] *Kortel v Mirik and Mirik* [2008] VSC 103.

The *Equal Opportunity Act 2010* (Vic) makes provision for applications for exemption from the operation of certain provisions of the legislation to permit conduct that might otherwise be discriminatory.

Numerous applications have been made, usually successfully, by various organisations, including employers, local councils and educational institutions.[367]

11.1.3 Queensland

'Discrimination' is a term used in a number of the rights below. 'Discrimination' is defined by the *Human Rights Act* (Qld), in relation to a person, to include direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute listed in section 7 of that Act. [368]

The right to recognition and equality before the law in s 15 of the Queensland *Human Rights Act* has been considered in a number of cases. These include the following:

Applications for exemption

As with the human rights and equal opportunity legislation in the other two jurisdictions, a number of applications have been made for exemption from the operation of anti-discrimination provisions.[369]

---

[367] See e.g., *Waite Group (Human Rights)* [2016] VCAT 1258; *Castlemaine Steiner School Ltd - Exemption (Human Rights)* [2015] VCAT 742; *Linfox Australia Pty Ltd - Exemption (Human Rights)* [2015] VCAT 528; *BAE Systems Australia Defence Pty Ltd - Exemption (Human Rights)* [2015] VCAT 230; *Thales Australia Limited and ADI Munitions Pty Ltd exemption (Human Rights)* [2014] VCAT 1441; *Raytheon Australia Limited (Human Rights)* [2014] VCAT 1370; *Caulfield Grammar School (Human Rights)* [2013] VCAT 178; *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384; *Cornish College (Anti-Discrimination Exemption)* [2012] VCAT 889; *BAE Systems Australia Limited (Anti-Discrimination Exemption)* [2012] VCAT 349; *Stawell Regional Health (Anti-Discrimination Exemption)* [2011] VCAT 2423; *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238; *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236; *Thales Australia Limited and ADI Munitions Pty Ltd (Anti-Discrimination)* [2011] VCAT 729; *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796; *The City of Whittlesea – Thomastown Recreation and Aquatic Centre (Anti-Discrimination Exemption)* [2011] VCAT 250; *The City of Monash (Anti-Discrimination Exemption)* [2011] VCAT 111; *Kensington Community Recreation Centre (Anti-Discrimination)* [2010] VCAT 2058; *Peel Hotel Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005; *Be in Shape Studio Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 1681; *Middle Park Bowling Club Inc and Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500; *Department of Human Services and Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116; *Wesley College (Anti-Discrimination Exemption)* [2010] VCAT 247; *Carey Baptist Grammar School Ltd (Anti-Discrimination Exemption)* [2009] VCAT 2221; *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869; 31 VAR 286; Hobsons Bay City Council and Anor (Anti-Discrimination Exemption) [2009] VCAT 1198.

[368] *Human Rights Act 2019* (Qld) Dictionary (definition of 'discrimination').

[369] See e.g., *Re: Leidos Australia Pty Ltd* [2021] QIRC 229; *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164.

In *Ipswich City Council* consideration was given to whether the Queensland Industrial Relations Commission is acting in an administrative capacity, within the meaning of the *Human Rights Act 2019*,(Qld) when deciding to grant exemption in respect to the advertising and recruitment of waste truck drivers.[370]

Matters arising out of employment

Two cases arose out of applications, in respect of persons absent from employment, for the purpose of requiring them to submit to a medical examination.[371]

Guardianship

Issues in respect of s 15 have been invoked in guardianship proceedings.[372]

Civil proceedings

Civil proceedings in which s 15 rights were invoked include:

- An objection to the grant of a mining lease on the grounds that it would limit human rights including in respect of s 15.[373]
- Administrative review proceeding arising out of rejection of an application for home education by a victim of domestic violence living in unidentified accommodation where the refusal arose out of the failure to specify an address.[374]
- A claim by public housing tenant arising out of termination of tenancy for objectionable behaviour.[375]
- Proceedings for termination of a residential tenancy lease arising out of failure to pay rent.[376]

Miscellaneous

Other proceedings in which the right to recognition and equality before the law were considered include:

- Proceedings by an unsuccessful candidate in a local government election seeking to have the Court of Disputed Returns quash the result and order a new election.[377]
- Administrative review proceedings arising out of refusal to grant the required certification to permit a person alleged to have been involved in sexual offences to work with children.[378]

---

[370] *Re: Ipswich City Council* (2020) 305 IR 289.
[371] *Dean-Braieoux v State of Queensland (Queensland Police Service)* [2021] QIRC 209; *Mancini v State of Queensland (Queensland Fire and Emergency Services)* [2021] QIRC 192.
[372] *DLD* [2020] QCAT 237.
[373] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4.
[374] *SF v Department of Education* [2021] QCAT 10.
[375] *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144 .
[376] *Horizon Housing Company v Ross* [2020] QCAT 41.
[377] *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623.
[378] *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152.

- The administrative review of a Departmental decision to remove children from the care of foster carers.[379]

In a number of cases relief was refused as the human rights provisions relied upon came into force after the events in question arose.[380]

11.2 The right to life

11.2.1 The Australian Capital Territory

To date, only two cases in the ACT have addressed the section 9(1) right to life, which expressly encompasses the right not to be arbitrarily deprived of life. Those cases tentatively indicate that while s 9 imposes a negative obligation to refrain from the arbitrary deprivation of life. It also requires public authorities to take positive steps to protect life. However, in light of the limited judicial consideration of the scope and content of the right, interpretation of s 9 would be more fully informed by reference to international law and interpretation of the equivalent provision section 9 (right to life) in the Victorian *Charter*.[381]

Veness[382] concerned an application that the presiding member of the ACT Civil & Administrative Tribunal be disqualified for apprehended bias from considering whether a stay of an immediate suspension of a doctor's registration to practise should be lifted, under s 53 of the *ACT Civil and Administrative Tribunal Act* (2008).

In the course of addressing the interpretation of s 53, in *obiter*, the Tribunal considered the impact of the ACT *Human Rights Act* as requiring it to balance detriment to the medical practitioner with public safety and health considerations. Citing a decision by the European Court of Human Rights[383], the Tribunal proposed that s 9(1) required it to interpret legislation compatibly with public authorities taking appropriate steps to safeguard the right to life of those in its jurisdiction, including requiring an agent of the state to do all that could be reasonably expected to avoid a real and immediate risk to life of which they have knowledge.[384]

The Tribunal also referred to international human rights jurisprudence that has found the right to life places a positive obligation on public authorities to establish an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter.[385] The Tribunal stated its view that the right to life under section 9 would require ACT legislation to be interpreted compatibly with that

[379] *Re and RL* [2020] QCAT 151.
[380] *Isles v State of Queensland* [2021] QCAT 135; *BB v State of Queensland* [2020] QCAT 496; ; *BB v State of Queensland & Ors* [2021] QCAT 496; *Wildin v State of Queensland* [2020] QCAT 514 .
[381] Section 9 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides: 'Every person has the right to life and has the right not to be arbitrarily deprived of life.'
[382] *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55.
[383] *Osman v the United Kingdom,* European Court of Human Rights, No 87/ 199/ 871/ 1083.
[384] *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 [35].
[385] *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 [36].

obligation.[386] That reasoning would also likely apply beyond the context of health professionals, to coronial inquiries including in relation to deaths in police custody in the ACT, for example.

The ACT Supreme Court has also considered the right to life in the context of the delivery of medical treatment. In *Australian Capital Territory v JT*, the Court briefly noted the relevance of section 9(1), as well as section 10(2), in considering the lawfulness of withdrawal of life-sustaining medical treatment. In that case, without express reference to s 9, the Court applied reasoning operating on the strong presumption that life should be maintained through not withdrawing treatment, except in circumstances where a competent adult exercises their right to freely decide to refuse treatment.[387] Both rights under sections 9 and 10 may be relevant in the context of issues of medical treatment.

ACT courts have not considered the meaning of 'arbitrary' in s 9(1) of the ACT *Human Rights Act*. The meaning in s 18 of 'arbitrary' has been considered. In the context of s 18, 'arbitrariness' encompasses unlawfulness.[388] Applied to s 9(1), unlawful deprivation of life may be considered to infringe s 9(1), but deprivations of life that are recognised as lawful may not. On that analysis, for example, conduct falling within the exceptions for criminal responsibility for the offence of murder under the *Criminal Code 2002* (ACT) – such as duress and self-defence - would be unlikely to meet the standard of 'arbitrary' for s 9(1).[389]

The application of s 9(1) is limited by s 9(2) to 'a person from the time of birth'. This inclusion operates to the effect that nothing in section 9 will impact upon the laws on abortion in the ACT.

11.2.2 Victoria

The right to life provision in the Victorian *Charter* (s 9) has been invoked in a number of cases. These encompass:

- An unsuccessful application by a prisoner, with underlying health problems, for orders releasing him from prison due to the risk that he would die if he contracted COVID-19.[390]
- An unsuccessful challenge by an involuntary patient to a smoking ban introduced by a hospital.[391]
- Applications for summary dismissal of an application for extension of time within which to bring proceedings against the State of Victoria, Victoria Police and individual police officers.[392]

11.2.3 Queensland

---

[386] *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 [36].
[387] *Australian Capital Territory v JT* [2009] ACTSC 105 [33], [37], [49], [51].
[388] See, eg, *Lewis v Australian Capital Territory* [2018] ACTSC 19 [432]-[433]; *Monaghan v ACT (No 2)* [2016] ACTSC 352 [233].
[389] *Criminal Code 2002* (ACT) ss 40 and 42. See Judicial College of Victoria, *Charter of Human Rights Bench Book*, 6.3 Right to life (s 9).
[390] *Rowson v Department of Justice and Community Safety* [2020] VSC 236; 60 VR 410.
[391] *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] 48 VR 647.
[392] *Angeleska v State of Victoria* [2013] VSC 598.

The Queensland *Human Rights Act* provision in respect of the right to life (s 16) has to date been referred to in passing in three cases.[393] The provision did not arise directly in any of these cases.

11.3 Protection from torture and cruel, inhuman or degrading treatment

11.3.1 The Australian Capital Territory

Section 10 is a negative obligation prohibiting three types of conduct: torture (s10(1)(a)); treatment or punishment in a cruel, inhuman or degrading way (s10(1)(b)); and medical or scientific experimentation or treatment without free consent (s10(2)).

While the obligation under s 10 is framed as a negative one, it may nevertheless require public authorities to take steps to prevent acts that would contravene section 10. For example, the ACT Government has referred to its s 10 obligations, as well as s 11 of the ACT *Human Rights Act*, to maintain effective legislative measures against domestic and family violence in introducing legislation in those areas.[394]

'Torture' is not defined in the ACT *Human Rights Act*, but under the definition of torture under article 1 of the *CAT*[395], to constitute torture an act must be intentional, inflict severe physical or mental pain or suffering, be for a prohibited purpose, and have been inflicted by or with the consent or acquiescence of a public official of person acting in an official capacity. A 'prohibited purpose' within the meaning of international law is, for example, for the purpose of obtaining information or a confession, or for coercive purposes. Who is a 'public official' or 'acting in an official capacity' should be considered in the context of the definition of 'public authority' in section 40.

Conduct that does not meet the standard of 'torture' may nevertheless contravene the lesser standard in section 10(1)(b). It might include, for example, abuse or humiliation. While 'cruel, inhuman or degrading' treatment or punishment is a broader concept and less severe standard than 'torture', the ACT Supreme Court has interpreted those concepts as needing to reach a minimum level of severity to contravene section 10.[396] This is assessed by an inquiry into all the factual circumstances, including the circumstances of the victim.[397]

Under article 16(1) of the *CAT*, which is relevant to the interpretation of the section 10(1)(b) right pursuant to 31(1) as 'international law', state parties are required to prevent acts of cruel, inhuman or degrading treatment or punishment not amounting to torture, when they are committed by or with the acquiescence of a public official or other person acting in an official

[393] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4; *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33; *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623.
[394] *Si bhnf Cc v Ks bhnf Is* [2005] ACTSC 125 [79].
[395] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted 10 December 1984, United Nations General Assembly resolution 39/46.
[396] *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 [158].
[397] Ibid.

capacity. While it is likely official involvement is a necessary element for conduct to contravene s 10(1)(b), ACT courts have not directly considered this.

In relation to the reference to punishment in section 10(1)(b), in 2008, the Supreme Court in *R v Porritt* proposed that the provision applies to ACT courts in undertaking criminal sentencing.[398] In that case, the Court referred to s 10(1)(b) as inherently recognising the requirement of a court to punish an offender commensurate with the offender's criminal responsibility, after taking into account their personal circumstances and the community interest in the rehabilitation and humane treatment of offenders.[399] The Court's decision in *R v Porritt* was made prior to the introduction of section 40B(2) to the legislation. That provides that a court exercising its judicial functions is not a 'public authority' within the meaning of the legislation and thereby not subject to the obligations of public authorities under s 40B. The position is now likely to be that section 10(1)(b) does not apply to ACT courts in sentencing.

In the context of the Victorian *Charter*, under s 6(2)(b) the *Charter* applies to courts and tribunals 'to the extent that they have functions under Part 2 and Division 3 of Part 3'. This has been held to mean that the *Charter* equivalent to s 10(1)(b) (s10(b)) applies to courts in sentencing, notwithstanding that courts are not public authorities within the *Charter* definition, except when acting in an administrative capacity.[400] There is no equivalent provision in the ACT *Human Rights Act.*

Section 10(2) prohibits medical or scientific experimentation or treatment without a person's free consent, which is directly modelled on article 7 of the *ICCPR*. The exact scope of the meaning of 'medical treatment' has not been considered, except in *obiter dicta* in *P v Registrar of Firearms (Administrative Review)*.[401] In that proceeding, the ACT Civil & Administrative Tribunal preferred a broad view of 'medical treatment' as including 'the assessment and diagnosis of patients' even where 'the purpose of the assessment is not for curative reasons, but, for example, for regulatory or forensic reasons.'[402] Applying that definition, the Tribunal was satisfied that a mental health assessment for licensing purposes would be medical treatment and that the operation of ss10 (2) and 30 of the ACT *Human Rights Act* supported its preferred interpretation that s 56 of the *Firearms Act 1996* (ACT) did not enable the Registrar of Firearms to require an applicant for a licence to provide a mental health assessment report without their consent.[403]

Capacity is inherent in the notion of 'consent' to medical treatment under s 10.[404] The ACT Civil & Administrative Tribunal has applied the relevant common law tests in assessing issues of capacity under s 10(2).[405] The relationship between consent and capacity under s 10 was considered in

[398] *R v Porritt* [2008] ACTSC 71 [41].
[399] Ibid.
[400] See *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [253].
[401] *P v Registrar of Firearms (Administrative Review)* [2018] ACAT 20 [47].
[402] Ibid.
[403] Ibid [48].
[404] *Australian Capital Territory v JT* [2009] ACTSC 105.
[405] *In the Matter of ER (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73 [21], [40].

Australian Capital Territory v JT, concerning treatment of a severely mentally ill, chronically psychotic schizophrenic man detained in the care of the ACT pursuant to mental health provisions. As a result of delusional assumptions connected with his mental illness, JT had fasted to a critical state and was being provided with life sustaining artificial feeding, forcibly administered by his medical practitioners against his wishes. The ACT applied to the Supreme Court for a declaration of the lawfulness of ceasing to administer nutrition and hydration to JT for anything other than palliative care.[406] The cessation of that treatment accorded with JT's expressed wishes. The Court found that JT lacked the capacity to understand the proposed medical conduct and the capacity to give informed consent to it.[407] In those circumstances, the Court treated JT's apparent consent to the withdrawal of medical treatment as vitiated by his lack of competence, and proceeded to determine the case on the basis that he could not be regarded as having given valid consent.[408] The Court observed that although medical treatment without consent is unlawful, that does not authorise the withholding of medical treatment from a person lacking the capacity to give consent.[409] The Court found it was unlawful for the ACT to withdraw life-sustaining treatment from JT.[410]

In *Australian Capital Territory v JT*, the Court did not directly consider the issue of whether the forced feeding of JT against his wishes would amount to inhumane treatment infringing his section 10(1)(b) right, although that concern was raised in evidence of his medical treating staff.[411] However, in circumstances of medical necessity it may be that this would not be found to infringe that prohibition. The Court in *obiter* observed that the enforced medication of a mentally ill patient would not infringe the ACT *Human Rights Act*.[412]

There has been limited consideration of the specific requirement of 'free' consent in s 10(2). The case of *Medical Board of Australia v Speldewinde (Occupational Discipline)* concerned the discipline of a male medical practitioner for inappropriate conversation and unwanted touching of two female patients. The ACT Administrative & Civil Tribunal observed in *obiter* that 'too familiar' and 'unwelcome' conversation and 'insufficiently careful' touching of a patient could undermine the 'free consent' prerequisite to the provision of medical treatment in the ACT under s 10(2).[413]

Other cases in which s 10 of the ACT *Human Rights Act* has been considered include:

- an application for removal of a guardian.[414]

[406] *Australian Capital Territory v JT* [2009] ACTSC 105 [22].
[407] Ibid [18].
[408] Ibid [61]-[62].
[409] Ibid [45].
[410] Ibid [66].
[411] Ibid [63].
[412] Ibid [39], citing *Re S* [1992] 1 NZLR 363.
[413] *Medical Board of Australia v Speldewinde (Occupational Discipline)* [2014] ACAT 27 [19].
[414] *In the matter of Dylan (Guardianship)* [2021] ACAT 91.

- a case which considered the procedural requirements in human rights claims against public authorities.[415]
- a claim that prison disciplinary procedures were in breach of the prohibition on cruel, inhuman or degrading treatment.[416]
- a matter in which various issues in respect of cruel and unusual treatment, including matters said to arise out of the COVID-19 pandemic raised in various applications, including an application to reopen a hearing, in respect of extradition to the United States.[417]
- applications for psychiatric treatment orders.[418]
- applications for leave to appeal and an extension of time in which to appeal from decisions, including summary judgment in favour of the respondents on a claim for defamation and breach of the *Human Rights Act*.[419]
- an appeal from a decision of the Magistrates' Court dismissing applications for personal protection orders. [420]
- applications to strike out, or for summary judgment, in medical negligence proceedings against a hospital and medical practitioners.[421]
- a matter involving consideration of the relationship between provisions of the *Evidence Act* and the *Human Rights Act* arising out of allegedly oppressive police conduct.[422]
- cases dealing with whether forcible or involuntary treatment and medication is in breach of human rights.[423]
- proceedings arising out of the death of an elderly patient who had emergency surgery, initially on the wrong leg. [424]
- an application to have a person declared a vexatious litigant.[425]

---

[415] *Millard v Collins* [2020] ACTSC 138.
[416] *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33. See also: *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27; *Islam v Director General of the Justice and Community Safety Directorate (No 2)* [2015] ACTSC 314.
[417] *Matson v Attorney-General* (Cth) [2021] FCA 161 (White J); *Matson v Attorney-General* [2020] FCA 1558.
[418] *In the Matter of Adam (Mental Health)* [2020] ACAT 91 (Acting Presidential Member R Orr QC); *C v Chief Psychiatrist* [2011] ACTSC 195.
[419] *Ezekiel-Hart v Reis* [2019] ACTCA 31. See also *Ezekiel-Hart v Reis* (No 2) [2019] ACTSC 192; *Ezekiel-Hart v Reis* [2018] ACTSC 264.
[420] *Polleycutt v Aldcroft* [2019] ACTSC 174.
[421] *Hassan v Calvary Private Hospital Health Care Canberra Ltd t/a Calvary John James Hospital* [2018] ACTSC 53.
[422] *R v Eastman* (No 28) [2018] ACTSC 2. See also: *David Harold Eastman v The Australian Capital Territory* [2013] 279 FLR 249; *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4; 4 ACTLR 161.
[423] *In the Matter of PW (Guardianship and Management of Property)* [2017] ACAT 8; *Australian Capital Territory v JT* [2009] 4 ACTLR 68; 232 FLR 322.
[424] *Chaloner v The Australian Capital Territory* [2014] ACTSC 329; *Holly Jane Chaloner and Kate Ann Chaloner v The Australian Capital Territory* [2013] 281 FLR 449.
[425] *Attorney General in and for the State of New South Wales v Beverly Viavattene* [2012] NSWSC 902.

- an appeal against orders made by the Children's Court in connection with a child declared to be in need of care and protection.[426]

11.3.2 Victoria

Section 10 of the Victorian *Charter* has been invoked in numerous cases, including:

- a review of a decisions of the Mental Health Tribunal: to grant an application to carry out electro-convulsive treatment[427]; to require compulsory treatment in the community[428]; to make an inpatient treatment order[429]; the making of an involuntary treatment order[430]
- the making of guardianship orders[431]
- an application by a father for further reasons in relation to child protection decisions made in respect of his children[432]
- proceedings seeking damages, including exemplary damages, for personal injuries caused by the abuse of power and the use of excessive force by police officers in carrying out an arrest[433]
- a claim arising out of an alleged assault by police during an arrest[434]
- judicial review proceedings brought by a prisoner arising out of a refusal to refuse access to Tarot cards[435]
- an appeal from a decision of the Children's Court in respect of a condition to vaccinate children pursuant to an interim accommodation order[436]
- a challenge to the use of a maximum-security adult gaol for use as a juvenile justice centre and youth remand centre[437]
- a challenge to the strip searching of prisoners based on initial scanning results[438]

---

[426] *TM v Office of Children, Youth and Family Support* [2007] ACTSC 5.
[427] *XJY v Mental Health Tribunal (Human Rights)* [2021] VCAT 83; *YLY v Mental Health Tribunal (Human Rights)* [2019] VCAT 1383; *HKN v Mental Health Tribunal (Human Rights) (Corrected)* [2019]] VCAT 825*; PBU & NJE v Mental Health Tribunal* [2018] 56 VR 141.
[428] *MLQ v Mental Health Tribunal (Human Rights)* [2020] VCAT 587; *MH10 v Mental Health Review Board and Anor (General)* [2009] VCAT 1919; *Kracke v Mental Health Review Board and Anor (No 2) (General)* [2009] VCAT 1548; *MH9 v Mental Health Review Board and Anor (General)* 2009] VCAT 1199.
[429] *XFL v Mental Health Tribunal (Human Rights)* [2020] VCAT 377.
[430] *XX v WW and Middle South Area Mental Health Service* [2014] VSC 564; *MH6 v Mental Health Review Board (General)*[2008] VCAT 846
[431] *MJG (Guardianship)* [2020] VCAT 250.
[432] *INP v The Secretary, Department of Health and Human Services (Review and Regulation) (Corrected)*[2020] VCAT 1293.
[433] *Cruse v State of Victoria* [2019] VSC 574; 59 VR 241.
[434] *Gebrehiwot (who sues by his litigation guardian Tamar Hopkins) v State of Victoria (Ruling No 2)* [2019] VCC 1229.
[435]*Haigh v Ryan* [2018] VSC 474.
[436] *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806.
[437] *Certain Children v Minister for Families and Children (No 2) [*2017] 52 VR 441; *Minister for Families and Children v Certain Children* [2016] VSCA 343; 51 VR 597. *Certain Children v Minister for Families and Children* [2016] 51 VR 473.
[438] *Knight v General Manager, HM Prison Barwon* [2017] VSC 135.

- a challenge to the refusal to grant bail and the detention of a juvenile in a remand centre[439]
- a challenge to the adoption of a smoke free policy in connection with an involuntary patient[440]
- a challenge to the decision of the Director of Police Integrity, including the question of whether there is an implied procedural right to the effective and independent investigation of alleged human rights abuses by police[441]
- the alleged breach of *Charter* rights in connection with the treatment of persons with disabilities by educational authorities, including in respect of the use of physical force, restraint, isolation and seclusion[442]
- an application by a prisoner for permission to attend a clinic for IVF treatment[443]
- proceedings arising out of the refusal of prison authorities to permit access to certain documents arising out of the investigation of an incident.[444]

In *Minogue,*[445] the validity of legislation directed specifically at the parole eligibility of a prisoner convicted of the murder of a police officer (which specifically exempted the provisions from the operation of the Victorian *Charter*) was challenged on the ground, amongst others, that it gave rise to cruel, inhuman or degrading treatment or punishment contrary to Article 10 of the *Bill of Rights 1688*.[446]The challenge was unsuccessful.

11.3.3 Queensland

Section 17 of the Queensland legislation has now been invoked in a number of cases.

In two parallel cases judicial review proceedings arose out of a direction requiring police officers, a nurse and ambulance officers to receive COVID vaccinations, with exemptions in the event of medical grounds or exceptional circumstances. Dalton J of the Supreme Court determined that the underlying disputes were industrial matters within the jurisdiction of the Industrial Relations

[439] *Application for Bail By HL (No 2)* [2017] VSC 1.
[440] *De Bruyn v Victorian Institute of Forensic Mental Health*[2016] 48 VR 647.
[441] *Bare v Independent Broad-based Anti-Corruption Commission* [2015] VSCA 197; 48 VR 129; *Bare v Small* [2013] VSC 129. See also the decision in respect of an application for a protective costs order: *Nassir Bare v Rai Small and Independent Broad-based Anti-corruption Commission and Paul Jevtovic and Victorian Equal Opportunity and Human Rights Commission and Attorney-General for the State of Victoria and 2nd* [2013] VSCA 204; 47 VR 255.
[442] *RW v State of Victoria (Human Rights)* [2015] VCAT 266.
[443] *Castles v Secretary to the Department of Justice* [2010] 28 VR 141.
[444] *Rogers v Chief Commissioner of Police (General)* [2009] VCAT 2526.
[445] *Minogue v Victoria* [2019] 268 CLR 1. See also the earlier decision: *Minogue v Victoria* [2018] 264 CLR 252 in which the challenge to legislation affecting parole included a claim that the legislation was incompatible with human rights under the *Charter*.
[446] Said to be in force by virtue of the *Imperial Acts Application Act 1980* (Vic), ss 3 and 8.

Commission and not within the jurisdiction of the Supreme Court.[447] This decision was overturned on appeal.[448]

In *Owen-D'Arcy*[449] a prisoner brought proceedings alleging a breach of human rights[450] coupled with a judicial review application [451] challenging a maximum-security order (MSO) and a prohibition on contact with other prisoners in the maximum-security unit. After a detailed analysis of relevant Australian and international jurisprudence, Martin J of the Supreme Court held that the decision to issue the MSO was not compatible with human rights and was thus invalid. The challenge to the 'no association decision' was also upheld given the failure to have sufficient regard to the human rights relevant to that decision. Thus, that decision was also held to be unlawful. That aspect of the decision was held not to satisfy the first, second and fourth parts of the test proposed in *Bare*.[452]

In *Bare*, Tate J outlined the test, under the Victorian *Charter*, for determining whether a public authority has acted in a way that is incompatible with human rights or, in making a decision, failed to give proper consideration to the relevant human right(s):

> for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.[453]

Although the outcome in *Owen-D'Arcy* was in large measure determined by factual findings the decision reflects the important interconnection between *statutory human rights* protections and general principles applicable to *judicial review* of decisions.

---

[447] *Johnston v Commissioner of Police; Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health* [2021] QSC 275.
[448] See *Witthahn & Ors v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone & Ors v Commissioner of Police & Ors* [2021] QCA 282.
[449] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.
[450] Alleging breaches of: the right to humane treatment when deprived of liberty (s 30(1)); the right to liberty and security of the person (s 29) and the right to protection from torture and cruel, inhuman or degrading treatment (s 17(b)).
[451] On the grounds of natural justice; unreasonable and illogical conduct; relevant and irrelevant considerations and incorrect findings of fact.
[452] *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129.
[453] (2015) 48 VR 129 at 223 [288]. See also the decision of Richard J in *Minogue* [2021] VSC 56.

Important principles in respect of unreasonable and illogical conduct[454]; the failure to take into account relevant considerations and the taking into account of irrelevant considerations[455] and errors of law arising out of incorrect fundings of fact[456] were examined. The applicant succeeded on one of the grounds of judicial review in respect of the 'no association' decision.

As discussed above, the legislation only permits challenges to decisions or conduct on human rights grounds by way of a 'piggy-back' to other grounds for contending that the act or decision is unlawful. However, the challenge on human rights grounds may succeed, and invalidate the decision or act, even if the challenge on the other (non-human rights) grounds fails.

11.4 Protection of the family and children

11.4.1 The Australian Capital Territory

Section 11(1) of the ACT human rights legislation recognises that the family is the 'natural and basic unit of society' and that the family is entitled to be protected by society. Section 11(2) provides that every child has the right to the protection needed by virtue of being a child, without distinction or discrimination of any kind. Section 11(1) is modelled on article 23 of the *ICCPR* (protection of the family and its members) and section 11(2) on article 24 (protection of the rights of the child).

An explanatory note to section 11 refers to the definition of 'family' as having a 'broad meaning'. It also refers to *ICCPR General Comment 19* in which the UN Human Rights Committee recognised that under international law, 'the concept of the family may differ' from State to State and from region to region within a State, so that it is 'not possible to give the concept a standard definition.'[457] The *General Comment 19* continues that 'when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23' which is to suggest that the definition of 'family' is to be drawn from recognition of family units in ACT law.[458] The Comment recognises that 'diverse concepts of the family' can exist under States laws, including 'nuclear' families, 'extended' families, unmarried couples and children, and single parents and their children.[459] While it is not cited in the ACT *Human Rights*

---

[454] See: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 and *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1. As Martin J noted, those principles have been helpfully distilled in *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1. In that decision a Full Court of the Federal Court summarised the relevant principles at [38]. See also the High Court decision in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.

[455] See: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; *Minister for Aboriginal-Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J.

[456] See: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 418 [91] per Hayne, Heydon, Crennan and Kiefel JJ.

[457] UN Human Rights Committee, CCPR General Comment No. 19: *Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para 2.

[458] UN Human Rights Committee, CCPR General Comment No. 19: *Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para 2.

[459] UN Human Rights Committee, CCPR General Comment No. 19: *Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para 2.

Act 2004, the UN Human Rights Committee's *General Comment No 17* also discusses the definition of 'family' within the context of article 17 of the *ICCPR*.

A further note to s 11 provides examples of 'distinction or discrimination' as on the basis 'of race, colour, sex, sexual orientation language, religion, political or other opinion, national or social origin, property, birth, disability or other status.' As with the use of 'discrimination' under s 8, the examples are not intended to be exhaustive or to limit the meaning of the terms.

Both provisions impose positive obligations. However, in the absence of thorough judicial interpretation of the operation of s 11 in the ACT, the exact scope of those obligations is unclear. What circumstances might give rise to an infringement of s 11 by a public authority have been addressed only in an ad hoc manner in ACT cases to date.

Most proceedings in which s11 has been considered have arisen in the context of proposed separation or removal of children from their parents, for example in matters relating to adoption and care and protection orders for children. These cases have generally confirmed that the right to the protection of the family under s 11(1) must be balanced against the right to children of protection under s11(2), which the ACT Supreme Court has described as 'often of fundamental importance', particularly in cases related to the protection of children from family violence.[460]

While recognising that s 11 is not inconsistent with adoption, the ACT Supreme Court has observed that s 11 reinforces the seriousness of making an order for an adoption already recognised in the common law and that such an order be supported by sufficient and weighty considerations with reference to the interests of the child.[461]

Section 11 was also raised in the case of *A v Chief Executive of Department of Disability, Housing & Community Services* in which, among other issues, the ACT Supreme Court considered a Magistrate's interim order authorising the defendant to supervise the care and protection of seven children, under which the Chief Executive had placed them in foster care.[462] The Court found that the Magistrate's reasons did not suggest he had taken into account the desirability of keeping the family together and held that it was an error of law to make orders authorising the removal of children from their parents or substantially excluding a parent from the family without giving due regard to the importance and entitlement of protection to the family provided by section 11(1).[463]

---

[460] *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 [51]. See also: *Tm v Office of Children, Youth and Family Support* [2007] ACTSC 5 [13] (describing the best interests of the child as the paramount consideration in relation to care and protection orders as not inconsistent with consideration of s 11 of the ACT *Human Rights Act*).

[461] *In the matter of an adoption of D* [2008] ACTSC 44 [7]-[8]. See also *In the matter of the adoptions of A and B* [2012] ACTSC 53 [11] (on the relevance of s 11 to adoption proceedings).

[462] *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43.

[463] *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 [48] (in those proceedings, the Court was satisfied that there had been a miscarriage of justice in that the care and protection orders made were inimical to the protection of the family unit and unjustified on the evidence).

In *Aldridge v R*, the Supreme Court considered section 11(2) to be a relevant matter to be taken into account in criminal sentencing of a parent where that would leave their children without proper arrangements for their care. This was reiterated by the Court in *Scheele v Watson*, as an issue of the right to proper protection of the child under s11(2).[464]

Section 11 has also been invoked in proceedings concerning the public housing entitlements of families. The ACT Supreme Court has stated that s 11 requires the 'rights of a family, and of children in particular, to secure and appropriate housing be recognised and that Territory laws be so interpreted so as to preserve and advance those rights where possible.'[465]

In *Anyar v Commissioner for Social Housing*, the ACT Civil & Administrative Tribunal determined that the Commissioner had erred in decision-making on the applicant's request for a transfer of accommodation by failing to consider that her daughter's medical condition was being exacerbated by the family's public housing accommodation, contravening section 11.[466]

Section 11 was also invoked in *Canberra Fathers & Childrens' Services Inc & Michael Watson (Residential Tenancies)*, relating to the proposed eviction of a single father with three children from crisis accommodation that would render them homeless, although the case was decided on the basis of s 12 of the ACT *Human Rights Act*.[467]

In *Merritt and Commissioner for Housing* [2004] ACATAAT 37, a public housing tenant, a single mother with two children, unsuccessfully invoked s 11 in proceedings related to the ACT providing her family with accommodation in a public housing complex with a physically insecure environment and social problems that she claimed was unsuitable to raise her two small children in.[468] While observing that the housing environment was less than ideal for her two children, the Tribunal did not accept that the tenant's family or children were not being protected in accordance with s 11 as they were provided with accommodation at concessional rent and the ACT Government was taking measures to improve the environment of the complex.[469] The Tribunal also considered that provision of other accommodation to the tenant and her family members would likely be to the detriment of another family, thereby violating their rights under s 11.[470]

Courts have also referred to the right of children to protection under s 11(2) in the context of the involvement of children in court proceedings, including in criminal proceedings against them. In *R v JA*, for example, s 11(2) was invoked along with ss 20(2) and 21(1) of the ACT *Human Rights Act* as supporting the presumption against the criminal responsibility of a child unless

[464] *Aldridge v R* [2011] ACTCA [34] (in that case, concerning the sentencing of a father, the mother of the children as serving a periodic detention sentence and the parents had no close family to assist with the care of their children). See also: *Scheele v Watson* [2012] ACTSC [86] (asserting the relevance of s 11 in criminal sentencing of a parent).
[465] *The Commissioner for Housing in the ACT v Y* [2007] ACTSC 84 [48].
[466] *Anyar v Commissioner for Social Housing (Administrative Review)* ACAT [2017] 33 [72]-[81].
[467] *Canberra Fathers and Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74.
[468] *Merritt and Commissioner for Housing* [2004] ACATAAT 37 [53].
[469] *Merritt and Commissioner for Housing* [2004] ACATAAT 37 [53].
[470] *Merritt and Commissioner for Housing* [2004] ACATAAT 37 [54].

responsibility is proved beyond reasonable doubt.[471] In *Si bhnf v Ks bhnf Is*, the Supreme Court referred to the ACT *Human Rights Act* right of a child to be properly and adequately represented by an adult guardian in relation to the making of a protection order against them.[472]In *R v YI*[473] the Court cited section 11(2) in refusing to exercise its powers to compel a seven-year old child to give evidence in court against his will in order to protect the child from psychological harm in relation to the experience of giving evidence, to which his position as a child made him vulnerable.[474]

11.4.2 Victoria

Section 17 of the *Charter* provides for the protection of families and the rights of children, without discrimination, to such protection as is in his or her best interests and is needed by reason of being a child.

Cases in which this provision has been invoked or referred to include:

- proceedings arising out of decisions in respect of child protection [475] including guardianship applications[476]
- claims of discrimination on the basis of disability[477]
- an application by a media organisation to obtain and broadcast recordings made in connection with a criminal investigation into child abuse[478]
- applications for bail [479] including by a young Aboriginal person with intellectual disability[480]
- a claim of discrimination arising out of a State-run primary school permitting primary school girls to wear religious dress[481]
- an appeal from a Children's Court decision in respect of vaccination of children as a condition of an interim accommodation order[482]

---

[471] *R v JA* [2007] ACTSC 51 [33].
[472] *Si bhnf v Ks bhnf Is* [2005] ACTSC 125 [104],
[473] [2004] ACTSC 115.
[474] *R v YI* [2004] ACTSC 115 [31].
[475] *INP v The Secretary, Department of Health and Human Services (Review and Regulation) (Corrected)* [2020] VCAT 1293; *BJR v Secretary to the Department of Justice and Community Safety (Review and Regulation)* [2020] VCAT 310; *AXP v Secretary to the Department of Justice and Community Safety (Review and Regulation)* [2019] VCAT 710; *Secretary to the Department of Justice & Regulation v McIntyre* [2019] VSC 105 (Second Revision 2 July 2019); *LRB v Secretary to the Department of Justice and Regulation (Review and Regulation)* [2018] VCAT 1351; *EYP v Secretary to the Department of Justice and Regulation (Review and Regulation)* [2018] VCAT 625; *ZZ v Secretary, Department of Justice* [2013] VSC 267.
[476] *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 146.
[477] *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770; *RW v State of Victoria (Human Rights)* [2015] VCAT 266.
[478] *Australian Broadcasting Corporation v Victoria Police & Kehoe* [2020] VSC 410.
[479] *Re LD* [2019] VSC 457; *Application for Bail by HL (No 2)* [2017] VSC 1; *Application for Bail BY HL* [2016] VSC 750.
[480] *DPP v SE* [2017] VSC 13.
[481] *Secular Party of Australia Inc. v the Department of Education and Training (Human Rights)* [2018] VCAT 132.
[482] *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806.

- proceedings arising out of decisions in respect of public housing,[483] including applications for an order requiring the landlord of public housing to enter into a residential tenancy agreement[484]
- proceedings by children challenging their detention at a remand and youth justice centre contained within a maximum-security prison[485]
- an application for leave to appeal from a refusal to grant a stay of criminal proceedings where the person was a child at the time of the offence but an adult at the time of being charged, including a claim of lost opportunity to have the matter dealt with in a Children's Court[486]
- proceedings arising out of the criminal prosecution of a child aged 15 for serious offences in the Supreme Court of Victoria, including as to appropriate arrangements for detention and the conduct of the trial[487]
- an appeal by a mother of children from the refusal of an application for an order to revoke orders for the return of four Aboriginal children to the care of their maternal grandmother[488]
- applications to VCAT for review of a decision of Medical Panels refusing applications seeking assisted reproductive treatment to have a child [489]
- proceedings by a prisoner seeking orders to enable her to resume IVF treatment commenced before her imprisonment[490]
- challenges by tenants to orders for possession of residential premises[491]
- applications for orders to obtain residential tenancy agreements[492] including an application by the partner of a deceased tenant for an order requiring the Director of Housing to enter into a residential tenancy agreement with him[493]
- an application for an extension of time within which to bring proceedings and opposition to an application for summary dismissal of various claims for damages[494]

---

[483] *Maiga v Port Phillip Housing* [2017] VSC 441.
[484] *Alsindi v Director of Housing (Residential Tenancies)* [2017] VCAT 1882; *Giotopoulos v Director of Housing* [2011] VSC 20.
[485] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; *Minister for Families and Children v Certain Children* (2016) 51 VR 597*; Certain Children v Minister for Families and Children* (2016) 51 VR 473.
[486] *Earl Baker (a pseudonym) v Director of Public Prosecutions, Attorney-General for the State of Victoria and Victorian Equal Opportunity and Human Rights Commission* (2017) 270 A Crim R 318.
[487] *DPP v SL* [2016] VSC 714.
[488] *Secretary, Department of Human Services v Sandin* [2011] VSC 42.
[489] *CPA v Patient Review Panel (Human Rights)* [2016] VCAT 1555; *TRV v Department of Health and Human Services (Human Rights)* [2015] VCAT 1188; *PQ v Patient Review Panel (Health and Privacy)* [2012] VCAT 29.
[490] *Castles v Secretary to the Department of Justice* [2010] VSC 310.
[491] *Burgess & Anor v Director of Housing & The Victorian Civil and Administrative Tribunal (No 2)* [2015] VSC 70; *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648; *Burgess v Director of Housing* [2013[VSC 626; *Women's Housing Ltd v Thomas (Residential Tenancies)* [2014] VCAT 95; *Director of Housing v Ronan (Residential Tenancies)* [2013] VCAT 2050.
[492] *DS v Aboriginal Housing Victoria (Residential Tenancies)* [2013] VCAT 1548.
[493] *DJ v Director of Housing (Residential Tenancies)* [2014] VCAT 406.
[494] *Angeleska v State of Victoria & Ors* [2013] VSC 598.

- a challenge to orders of the Children's Court preventing them from providing instructions to and being represented by a legal practitioner in child protection proceedings[495]
- proceedings arising out of orders for placement of a child in a restricted accommodation facility for her care and protection[496]
- an application for a non-publication order in respect of court proceedings[497]
- an application for review of a decision of a local authority to refuse planning permission for construction of a mixed use development[498]
- a challenge to the right of the State to confiscate the family home under proceeds of crime legislation[499]
- proceedings arising out of a custodial order following failure of a wife to satisfy surety requirements entered into in connection with release of her husband on bail and his subsequent absconding[500]
- an application for review of a determination refusing childcare expenses to enable a person with disabilities arising out of an accident to attend for various forms of physical therapy[501]
- proceedings by an employee alleging discrimination in respect of a work allocation policy that allegedly failed to accommodate an employee's parental responsibilities[502]
- an application for review of a refusal to provide certain documents sought under freedom of information legislation.[503]

11.4.3 Queensland

The protection of families and children encompassed by section 26 of the Queensland human rights legislation has been considered in numerous cases, including:

- proceedings arising out of decisions under legislation designed to provide safeguards in respect of persons working with children[504]

---

[495] *A & B v Children's Court of Victoria* [2012] VSC 589.
[496] *Re Beth* [2013] VSC 189.
[497] *Lew v Priester (No. 2)* [2012] VSC 153.
[498] *Dipvis Properties Pty Ltd v Glen Eira CC* [2010] VCAT 1874.
[499] *DPP v Ali (No. 2)* [2010] VSC 503.
[500] *JR Mokbel Pty Ltd v Director of Public Prosecutions* [2007] VSC 119.
[501] *Dawson v Transport Accident Commission (General)* [2010] VCAT 644.
[502] *Richold v State of Victoria, Department of Justice (Anti-Discrimination)* [2010] VCAT 433.
[503] *Morgan v Department of Human Services (General)* [2008] VCAT 2420.
[504] Recent (2021) decisions are: *CTC v Director-General, Department of Justice and Attorney-General* [2021] QCAT 406; *ST v Director-General, Department of Justice and Attorney-General* [2021] QCAT 337; *NK v Director-General, Department of Justice and Attorney-General* [2021] QCAT 270; *RD v Director-General, Department of Justice and Attorney-General* [2021] QCAT 253; *SFV v Director-General, Department of Justice and Attorney-General* [2021] QCAT 223; *LB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 140; *HK v Director-General, Department of Justice and Attorney-General* [2021] QCAT 130; *TD v Director-General, Department of Justice and Attorney-General* [2021] QCAT 138; *BW v Director-General, Department of Justice and Attorney-General* [2021] QCAT 158; *ZB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 8; *MK v Director-General, Department of Justice and Attorney General* [2021] QCAT 62; *ABD v Director-General,*

- an appeal from a decision requiring an employee absent from work to submit to a medical examination[505]
- a case involving objections to a mining lease contending that the approval would be incompatible with human rights[506]
- proceedings arising out of s refusal to approve an application for home education in respect of a child diagnosed with various disorders[507]
- proceedings arising out of the suspension of a teacher's registration following the commencement of criminal proceedings for a serious offence.[508]

11.5 Privacy and reputation

11.5.1 The Australian Capital Territory

Section 12 provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with *unlawfully* or *arbitrarily* and not to have his or her reputation *unlawfully* attacked.

A 'home' under s 12 is interpreted as a place where a person and / or their family live, the notion being disconnected from any legal or equitable title.[509] For example, under this reasoning the right has been applied to the place of residence of public housing tenants.

In *Canberra Fathers and Children Services Inc v Michael Watson*[510] the Tribunal clarified that action by a public authority will be 'unlawful' within the meaning of the provision, notwithstanding that it is authorised by a contract, if done inconsistently with a human right or with failure to consider human rights in decision-making. The Tribunal also held that an inquiry into whether interference is arbitrary or not in breach of the right is a matter of 'substance' rather than 'form' and that interference will not be arbitrary if governed by clear pre-existing rules and predictable and foreseeable procedures to those to which they apply. In that case, the Tribunal found that the eviction of a family from social housing that would result in their homelessness would constitute unlawful or arbitrary interference with the home, in breach of the right, as here was no policy applying to the particular circumstances and the decision-making process was not transparent, predictable or foreseeable.

The rights conferred by section 12 have been invoked in numerous cases[511] including:

Department of Justice and Attorney-General [2021] QCAT 57; *DL v Director-General, Department of Justice and Attorney General* [2021] QCAT 61; *HM v Director-General, Department of Justice and Attorney General* [2021] QCAT 13; *WW v Director-General, Department of Justice and Attorney-General* [2021] QCAT 7; *DP v Director-General, Department of Justice and Attorney-General* [2021] QCAT 106

[505] *Dean-Braieoux v State of Queensland (Queensland Police Service)* [2021] QIRC 209.

[506] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4.

[507] *SF v Department of Education* [2021] QCAT 10.

[508] *Queensland College of Teachers v Teacher TNE* [2020] QCAT 484.

[509] *Canberra Fathers and Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74 [34].

[510] [2010] ACAT 74.

[511] The cases referred to were decided in the five-year period 2017 to 2021.

- a criminal prosecution where an issue arose as to whether the issuing of a warrant provides a lawful basis for the invasion of privacy[512]
- challenges to the termination of a residential tenancies[513]
- proceedings arising out of an alleged failure to permit access to a person in intensive care on life support following an accident[514]
- proceedings against a Law Society alleging an unlawful attack on the plaintiff's reputation[515]
- a dispute between a property owner and the Owners Corporation concerning the right to inspect property to ensure compliance with fire regulations[516]
- the seizure of a mobile phone and the retention and examination of a laptop computer[517]
- a planning appeal including an alleged violation of the right to privacy through approval of a multi-story housing development[518]
- an appeal from the dismissal of applications for personal protection orders[519]
- proceedings arising out of police entry on premises without a warrant and the making of an arrest for breach of conditions of bail[520]
- applications to exclude evidence obtained in a police searches[521]
- challenges to the admissibility of covert audio and video recordings[522]
- an application for suppression orders in respect of information including a litigant's identity and residence[523]
- proceedings concerning whether an applicant for a firearms license can be required to undergo a mental health assessment without their consent[524]
- an appeal arising out of the appointment of a guardian and manager of a protected person[525]
- an appeal from a determination of a magistrate that the taking of photographs amounted to an invasion of privacy and was indecent[526]

---

[512] *Zeltner v Deputy Registrar of the Supreme Court of the Act* [2021] ACTSC 276. See also: *Smethurst v Commissioner of the Australian Federal Police [2020]* 94 ALJR 502.
[513] *Pye v Argyle Community Housing Ltd ACN 002 761 855 (Appeal)* [2021] ACAT 84; *Commissioner for Social Housing v Cook (Residential Tenancies)*[2020] ACAT 36
[514] *Millard v Collins* [2020] ACTSC 138.
[515] *Ezekiel-Hart v Council of the Law Society of the Act* [2021] ACTSC 133. See also: *Ezekiel-Hart v Reis* [2019] ACTCA 31; *Ezekiel-Hart v Reis (No 2)* [2019] ACTSC 192; *Ezekiel-Hart v Reis* [2018] ACTSC 264.
[516] *The Owners - Units Plan No 14 v Wright (Appeal)* [2021] ACAT 55.
[517] *Madders v Tiffen and Tiffen (No 1)* [2021] ACTMC 4.
[518] *Hobbs v ACT Planning and Land Authority and Anor (Administrative Review)* [2020] ACAT 58.
[519] *Polleycutt v Aldcroft* [2019] ACTSC 174.
[520] *Andrews v Thomson* [2018] 275 A Crim R 386.
[521] *R v Peter* [2018] ACTSC 312; *R v Johnson* [2018] 336 FLR 320. See also *R v Song (No 1)* [2017] ACTSC 147.
[522] *R v EP* [2019] ACTSC 89; *Dong v Song* [2018] 331 FLR 326; *R v Eastman (No 28)* [2018] ACTSC 2.
[523] *GP v McKenzie and Ors* [2018] ACAT 96.
[524] *P v Registrar of Firearms (Administrative Review)* [2018] ACAT 20.
[525] *In the Matter of AB* [2018] ACAT 18; *In the Matter of AB* [2017] ACAT 67.
[526] *Stroop v Harris* [2017] 12 ACTLR 231.

- proceedings for personal injuries arising out of an attack by a dog on a child whilst visiting residential premises[527]
- disciplinary proceedings against a psychologist[528]
- a challenge by a tenant to orders for the termination of a lease and possession of residential premises[529]
- challenges to decisions not to backdate rent rebates.[530]

11.5.2 Victoria

The right to privacy and reputation contained in section 13 of the Victorian *Charter*, like the equivalent ACT provision, has been invoked in a considerable number of cases. There are over 130 reported cases in the period to the end of 2023.

Recent cases in which the provision has been considered include: a judicial review application in respect of an order made by the Children's Court for the retention of a DNA sample taken from a child; [531]guardianship proceedings,[532]a challenge to registration requirements imposed by a local authority;[533]an application for review of a decision made by the Mental Health Review Tribunal that a person be subject to a treatment order;[534]a challenge to an order requiring taking a DNA sample from a mentally impaired person.[535]The provision was considered by the Court of Appeal in December 2021 in an appeal by a prisoner arising out a challenge to strip searches and random drug tests.[536] Amongst findings in relation to various grounds of judicial review the Court of Appeal found that the directions regarding random urine tests did not constitute an arbitrary interference with the prisoner's privacy but that the directions regarding strip searches did constitute such an interference.[537] The strip searches were also held to be incompatible with the right in s 22(1) of persons deprived of liberty to be treated with respect for their inherent 'dignity'.

The Court noted that the term 'arbitrary' is wider than the term 'unlawful' although the precise scope of the term 'arbitrary' has not been settled. [538] However, the Court was of the view that the clear preponderance of authority supports the proposition that the term 'arbitrary' in s 13(a) of the *Charter* has the human rights meaning described by Warren CJ in *WBM*. [539] The Court concluded that:

---

[527] *Hartigan v Commissioner for Social Housing in the Act* [2017] 319 FLR 158.
[528] *Kaye v Psychology Board of Australia (Occupational Discipline)* [2017] ACAT 27.
[529] *Commissioner for Social Housing v CC (Residential Tenancies)* [2017] ACAT 17
[530] *Little v Commissioner for Social Housing* [2017] ACAT 11; *Miller v Commissioner for Social Housing* [2017] ACAT 10.
[531] *MB v Children's Court of Victoria* [2023] VSC 666.
[532] *MJG (Guardianship)* [2023] VCAT 1234.
[533] *Dickson v Yarra Ranges Council* [2023] VSC 491.
[534] *EYE (Human Rights)* [2023] VCAT 1281.
[535] *Yarran v Magistrates' Court of Victoria* [2022] VSC 531.
[536] *Thompson v Minogue* [2021] VSCA 358. See also *Minogue v Thompson (No 2)* [2021] VSC 209; *Minogue v Thompson* [2021] VSC 56.
[537] At [317].
[538] At [50].
[539] At [55], referring to *WBM v Chief Commissioner of Police* (2012) 43 VR 446.

(a) an 'arbitrary' interference with privacy is one which is capricious or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought;

(b) the phrase 'not being proportionate to the legitimate aim sought' does not incorporate the proportionality analysis in s 7(2); and

(c) the onus of establishing that an interference with privacy is unlawful or arbitrary is on the person alleging limitation of his or her privacy right.[540]

The onus of establishing that a limitation on a human right is demonstrably justified for the purposes of s 7(2) of the *Charter* is on the public authority that has imposed the limitation.[541]

In *Vlahos* an unsuccessful application was made for the exclusion from evidence of a court ordered pre-sentence psychological report of a prisoner, on the ground that it had been obtained in breach of various provisions of the *Charter* including s 13(a). [542] The Court did not accept that there had been any 'arbitrary interference' with the prisoner's privacy.[543] Trapnell J noted,[544] with approval, the observations of Bell J that the right in s 13(a) of the *Charter*:

> extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful.[545]

The Court of Appeal has considered, amongst other issues, whether a provision of the *Independent Broad-Based Anti-Corruption Commission Act 2011* was incompatible with the right to privacy in s 13(a) of the *Charter.* This followed the execution of search warrants that led to the seizure of computer and electronic equipment and data and the foreshadowed inspection of seized documents. The primary judge concluded that the relevant provision of the *IBAC Act* struck the relevant balance between the rights to privacy and the need for effective investigation and that in any event the limitations on the privacy rights were justified having regard to the matters contained in s 7(2) of the *Charter*. The various challenges to the decision of the primary judge were rejected.[546]

In the five-year period 2017 to 2021 the right to privacy has been invoked in a wide variety of cases including:

---

[540] At [221].
[541] At [222].
[542] *Vlahos v Director of Public Prosecutions (Vic) (Ruling No 1)* [2021] VCC 1520. See also *Director of Public Prosecutions v Vlahos (Ruling No 2)* [2021] VCC 1519.
[543] At [120].
[544] At [111].
[545] *PJB v Melbourne Health* (2011) 39 VR 373 [85]. See also *Director of Public Prosecutions v Kaba* (2014) 44 VR 526 where Bell J re-stated the relevant principles.
[546] *HJ (a pseudonym) v Ibac* [2021] VSCA 200.

- reviews of decisions by the Mental health Review Tribunal to grant applications to perform electro-convulsive therapy[547]
- proceedings for termination of residential tenancies and possession of premises [548]
- a challenge to the decision of VCAT affirming a decision refusing to grant a private security license[549]
- proceedings in respect of guardianship and an enduring power of attorney[550]
- claims in respect of direct and indirect discrimination on the grounds of disability[551]
- defamation proceedings arising out of internet search results[552]
- an application to sell the property of a person subject to guardianship orders[553]
- an application for review of a decision to redact information in a report arising out of an investigation into a workplace injury[554]
- judicial review of a decision to stop a letter from a prisoner[555]
- an application for reassessment of orders for guardianship and administration[556]
- an appeal from a decision of a magistrate convicting a person for contravention of a prohibition on communication in relation to abortion within a safe access zone[557]
- proceedings arising out of the service of a bankruptcy notice[558]
- an application for judicial review seeking to prevent the suspension of a racehorse training license based on information obtained by police after execution of a search warrant[559]
- a contention that the right to privacy extends to a right of access to own's own health information[560]
- a case involving an argument that the interference with privacy may include the loss of daylight from windows in apartments[561]

---

[547] *XJY v Mental Health Tribunal (Human Rights)*[2021] VCAT 83; *YLY v Mental Health Tribunal (Human Rights)* [2019] VCAT 1383; *HKN v Mental Health Tribunal (Human Rights) (Corrected)* [[2019]] VCAT 825; *PBU & NJE v Mental Health Tribunal* (2018) 56 VR 141 (Bell J).

[548] *Salvation Army Housing Victoria v LVM (Residential Tenancies)* [2020] VCAT 1209*; Director of Housing v Follari (Residential Tenancies)* [2018] VCAT 657; *Alsindi v Director of Housing (Residential Tenancies)* [2017] VCAT 1882; *AVW v Nadrasca Ltd (Residential Tenancies)* [2017] VCAT 1462; *Maiga v Port Phillip Housing* [2017] VSC 441.

[549] *Wut v Victoria Police* [2020] VSC 586.

[550] *WQN (Guardianship)* [2020] VCAT 814.

[551] *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770.

[552] *Defteros v Google LLC* [2020] VSC 219.

[553] *EHV (Guardianship)* [2020] VCAT 501.

[554] *Pitman v Victorian Workcover Authority - WorkSafe Victoria (Review and Regulation)* [2020] VCAT 487.

[555] *Haigh v Ryan (in his capacity as Governor of Barwon Prison)* [2020] VSC 102.

[556] *MJG (Guardianship)* [2020] VCAT 250.

[557] *Clubb v Edwards* [2020] 281 A Crim R 252.

[558] *Zeqaj v Victoria Police (Human Rights)* [2019] VCAT 1641.

[559] *McLean v Racing Victoria* [2019] VSC 690; 59 VR 384.

[560] *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSC 131; Michos v Eastbrooke Medical Centre Pty Ltd [2018] VSC 517.

[561] *Goh v Port Phillip CC* [2018] VCAT 1515.

- proceedings arising out of a complaint to Police that they had interfered with his privacy by disclosing information about him to the Australian Tax Office[562]
- an application for approval for IVF treatment without the necessity for the consent of an estranged husband[563]
- judicial review of a decision by the Office of the Information Commissioner not to investigate a complaint that a school had interfered with a student's privacy[564]
- a case involving a contention that interference with the rights in respect of privacy and family arose in respect of the power of a Children's Magistrates Court to authorise vaccination of young children as an incident of making an interim accommodation order[565]
- judicial review of a decision of a prison officer to refuse to deliver to a prisoner a letter and book sent by mail[566]
- proceedings in which it was contended that unreasonable road traffic noise, and the failure to provide measures to mitigate such noise, contravened the right to privacy.[567]

11.5.3 Queensland

The right to privacy and reputation in s 25 of the *Human Rights Act 2019* (Qld) was invoked or referred to in over 100 cases decided in the period to the end of 2023. These included:

- administrative review of a decision of the Queensland Racing integrity Commission arising out of misconduct due to physical altercations in which an issue arose as to the right to freedom of expression and the right not to have reputation unlawfully attacked[568]
- proceedings arising out of objections to mining leases encompassing human rights grounds[569]
- guardianship proceedings [570]
- proceedings in respect of a clearances for working with children[571]

---

[562] *Zeqaj v Victoria Police (Human Rights)* [2018] VCAT 1733.
[563] *EHT18 v Melbourne IVF* (2018)263 FCR 376.
[564] The decision concerning an application for a suppression order and transfer of the proceedings to the Federal Circuit Court is: *BJP19 (as Litigation Guardian for BJQ19) v Office of the Australian Information Commissioner* [2019] FCA 618.
[565] *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806.
[566] *Minogue v Dougherty* [2017] VSC 724.
[567] *Humphris v ConnectEast (No 4)* [2017] VSC 104.
[568] *Vale v Queensland Racing Integrity Commission* [2021] QCAT 438.
[569] *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc. (No 2)* [2021] QLC 44; *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 2)* [2021] QLC 4; *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33.
[570] *EB* [2021] QCAT 434; *NHF* [2021] QCAT 412; *IHC* [2021] QCAT 141; *DAMA v Public Guardian* [2020] QCATA 161; *DKM* [2020] QCAT 443; *DKM* [2020] QCAT 441; *CC* [2020] QCAT 367.
[571] *CTC v Director-General, Department of Justice and Attorney-General* [2021] QCAT 406; *BW v Director-General, Department of Justice and Attorney-General* [2021] QCAT 158; *MK v Director-General, Department of Justice and Attorney General* [2021] QCAT 62; *DL v Director-General, Department of Justice and Attorney General* [2021] QCAT 61; *HM v Director-General, Department of Justice and Attorney General* [2021] QCAT 13; *Jamie Luke Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152.

- proceedings seeking orders for access to 'protected counselling communications' by persons facing criminal charges[572]
- an application by a prisoner to review a Maximum Security Order and a direction limiting contact with other prisoners[573]
- an application for an order prohibiting the disclosure of a person's identity[574]
- an application for exemption from the operation of anti-discrimination legislation[575]
- an appeal from a decision requiring an employee to submit to a medical examination[576]
- review of a decision not to approve the home schooling of children[577]
- proceedings for the termination of residential tenancy[578]
- proceedings arising out of the removal of children from foster carers.[579]

At the time of writing the most recent consideration of s 25 by the Supreme Court was by Crowley J in a judicial review application arising out of findings of sexual assault of a child.[580]

11.6 Freedom of movement

11.6.1 The Australian Capital Territory

The right to freedom of movement encompasses the right to move freely within the ACT and to enter and leave it and the freedom to choose his or her residence in the ACT (s 13).

This provision has been invoked in cases including:

- guardianship proceedings and the use of restrictive practices to restrain persons with dementia who reside in a residential aged care facility[581]
- an appeal in criminal proceedings arising out of a conviction following roadside drug screening where the relevant legislation permitted a person to be required to remain at a designated place whilst a drug screening device was obtained[582]
- an application for a psychiatric treatment order[583]
- an appeal from the decision of a Magistrates Court dismissing applications for personal protection orders[584]

---

[572] *TRKJ v Director of Public Prosecutions (Qld); Kay v Director of Public Prosecutions (Qld)* [2021] QSC 297.
[573] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.
[574] *Ryle v State of Queensland (Department of Justice and Attorney-General) and Pitt* [2021] QIRC 307
[575] *Re: Leidos Australia Pty Ltd* [2021] QIRC 229.
[576] *Dean-Braieoux v State of Queensland (Queensland Police Service)* [2021] QIRC 209.
[577] *SF v Department of Education* [2021] QCAT 10.
[578] *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144; *Horizon Housing Company v Ross* [2020] QCAT 41.
[579] *Re and RL* [2020] QCAT 151.
[580] *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266.
[581] *In the mater of Evelyn (Guardianship)* [2021] ACAT 126.
[582] *Tran v Stapleton* (2021) 287 A Crim R 434.
[583] *In the Matter of Adam (Mental Health)* [2020] ACAT 91.
[584] *Polleycutt v Aldcroft* [2019] ACTSC 174.

- proceedings arising out of the making of assessment order and a removal order under mental health legislation[585]
- criminal proceedings arising out of non-compliance with an exclusion direction[586]
- guardianship proceedings and the question of whether a person can give lawful consent to psychiatric treatment[587]
- an appeal in criminal proceedings including in respect of the making of a sex offender registration order[588]
- judicial review proceedings arising out of the cancellation of a periodic detention order which resulted in full time imprisonment[589]
- proceedings arising out of the cancellation of parole[590]
- proceedings challenging the reasonableness or legality of move on directions[591]
- an appeal from the making of a personal protection order under domestic violence legislation.[592]

11.6.2 Victoria

Section 12 of the Victorian *Charter* provides that every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live. Obviously, this does not apply to persons lawfully deprived of liberty.[593] Similarly, such rights are curtailed where a person is subject to a supervised treatment order under mental health legislation.[594]

The Charter's Explanatory Memorandum provides examples of reasonable limits on the right of freedom of movement, which relate to situations where restriction is justified by some other important purpose - for example, restrictions on persons lawfully detained, parole orders, guardianship orders, and family violence intervention orders.[595]

The right to freedom of movement has been invoked in various cases, including:

- civil proceedings for alleged battery and false imprisonment by police[596]
- a challenge to the legality of a curfew imposed during the COVID-19 pandemic[597]

---

[585] *In the matter of TM (Metal Health)* [2015] ACAT 81.
[586] *Brooke v Turnbull* [2018] ACTMC 15.
[587] *In the matter of ER (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73.
[588] *Znotins v Harvey* [2015] ACTSC 241.
[589] *Jamie Griggs v The Sentence Administration Board of the ACT and Ors* (2010) 5 ACTLR 185.
[590] *Paul Anthony Blundell v Sentence Administration Board of the Australian Capital Territory, the Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* (2010) 5 ACTLR 88.
[591] *P v Joshua William McMillan* [2010] NSWLC 9; *Spatolisano v Hyde* [2009] ACTSC 161; *Tahi Temoannui v Brett Jason Eric Ford* (2009) 196 A Crim R 442.
[592] *Si bhnf CC v KS bhnf Is* [2005] ACTSC 125.
[593] See e.g., *Thompson v Minogue* [2021] VSCA 358 [60].
[594] See e.g., *MOT* (Human Rights) [2021] VCAT 895.
[595] *Hobsons Bay City Council and Anor (Anti-Discrimination Exemption)* [2009] VCAT 1198.
[596] *Gebrehiwot v State of Victoria* (2020) 287 A Crim R 226.
[597] *Loielo v Giles* (2020) 63 VR 1.

- guardianship proceedings and the residential options for persons with a disability[598] as well as orders imposing treatment, attendance at a mental health service, authorizing restraint, limiting movement, or specifying where a patient is to live[599]
- proceedings against Police officers alleging harassment, discrimination and vilification, etc[600] or when an individual subjected to coercive questioning is made to feel they cannot reasonably choose to cease cooperating or leave[601]
- a challenge to a decision of a local Council to prohibit a person from attendance at Council meetings, forums and events[602]
- judicial review of a conviction for loitering without reasonable excuse[603]
- a challenge to an injunction preventing a person from leaving Victoria and attending any point of international departure[604]
- applications for bail and consideration of bail applicants raising human rights issues including Aboriginal cultural rights, the right of children to protection of their best interests, the right of applicants with disability to equality and applicants with multiple attributes raising vulnerability to intersectional discrimination[605]
- proceedings in respect of alleged discrimination, , for example of providers of education subjecting a student with disability to restraint and seclusion[606]
- judicial review of an involuntary treatment order[607]
- an application for review of orders enabling a child to be placed in a locked down facility[608]
- an appeal in respect of supervision orders under sex offender legislation, [609] imposition of conditions limiting movement within supervision orders.[610]
- an appeal against the appointment of an administrator who may sell the home of an involuntary [patient with a mental illness[611]
- an application for a writ of habeas corpus in respect of an adult mentally ill person instructed to live in a treatment unit rather than at home with the mother[612]

---

[598] *EHV (Guardianship)* [2020] VCAT 501; *MJG (Guardianship)* [2020] VCAT 250.
[599] *HYY (Guardianship)* [2022] VCAT 97 [63];
[600] *Djime v Kearnes* [2019] VSC 117; *Djime v Kearnes* [2015] VCAT 941.
[601] *DPP v Kaba* [2014] VSC 52 [458] [459]; *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 [738].
[602] *Yianni v Moonee Valley CC (Human Rights)* [2018] VCAT 1990.
[603] *Director of Public Prosecutions v Rayment* (2018)57 VR 622.
[604] *Chen v Tang* [2017] VCC 1538.
[605] *Application for Bail BY HL* [2016] VSC 750; *Woods v DPP* (2014) 238 A Crim R 84; *Re Application for Bail by Foster* [2020] VSC 62; *DPP v S E* [2017] VSC 13.
[606] *RW v State of Victoria (Human Rights)* [2015] VCAT 266.
[607] *XX v WW and Middle South Area Mental Health Service* [2014] VSC 564.
[608] *Re Beth (No 3)* [2014] VSC 121; Re Beth (2013) 42 VR 124.
[609] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.
[610] *AC (Guardianship)* [2009] VCAT 1186; *Secretary, Department of Justice v AB* [2009] VCC 1132
[611] *PJB v Melbourne Health* (2011) 39 VR 373.
[612] *Antunovic v Dawson* (2010) 30 VR 355.

- an application for exemption from the operation of discrimination law in respect of age restrictions on occupants of home units[613]
- an appeal in respect of a restraint of a person in respect of whom a bankruptcy notice had been issued from leaving the jurisdiction[614]
- stay at home restrictions imposed by a Direction to combat the COVID-19 pandemic[615]
- reviews of decisions of the Mental Health Review Board in respect of continued treatment of involuntary patients.[616]

11.6.3 Queensland

Section 19 of the *Human Rights Act 2019* (Qld) provides for freedom of movement.

This has been considered in a number of cases includng:

- applications for appointment of a guardian[617]
- proceedings in respect of alleged discrimination against a student by a school[618]
- an application for an injunction to restrain persons from attending a planned sit-in protest on a bridge[619]
- an application to terminate the tenancy of a public housing tenant for objectionable behavior[620]

11.7 Freedom of thought, conscience, religion and belief

In late 2021 the Commonwealth Government introduced into Federal Parliament the *Religious Discrimination Bill 2021*.[621] This followed the report in 2018 of the Expert Panel into Religious Freedom. The Bill prohibits discrimination on the basis of a person's religious belief or activity in a wide range of areas including employment, education, access to premises and the provision of goods, services and accommodation.

There are a number of general and specific exemptions. It is provided that certain statements of belief do not constitute discrimination under discrimination laws. The Bill provides for offences in relation to victimisation and discriminatory advertisements; establishes the Office of Religious

---

[613] *Members of Owners Corporation On Plan of Subdivision No. 441923W (Anti-Discrimination Exemption)* [2010] VCAT 1111.
[614] *Talacko v Talacko* [2010] FCAFC 54.
[615] *Loielo v Giles* [2020] VSC 722
[616] *MH10 v Mental Health Review Board and Anor (General)* [2009] VCAT 1919; *MH9 v Mental Health Review Board and Anor (General)* [2009] VCAT 1199; *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646.
[617] *EB* [2021] QCAT 434; *NHF* [2021] QCAT 412; *IHC* [2021] QCAT 141; *CC* [2020] QCAT 36; *DLD* [2020] QCAT 237.
[618] *BB v State of Queensland* [2021] QCAT 496; *BB v State of Queensland* [2020] QCAT 496.
[619] *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246.
[620] *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144.
[621] This was introduced with the *Religious Discrimination (Consequential Amendments) Bill 2021* and the *Human Rights Legislation Amendment Bill 2021.*

Discrimination Commissioner and confers certain functions on the Australian Human Rights Commission.

The proposed legislation was referred to the Parliamentary Joint Committee on Human Rights and the Senate Legal and Constitutional Affairs Legislation Committee. The proposed legislation is controversial and various parties, including the Law Council of Australia[622], have raised concerns in submissions to the Parliamentary Joint Committee on Human Rights.

Although the legislation passed the House of Representatives in early 2022, with one amendment- the removal of s 38(3) of the Sex Discrimination Act, which gave religious schools the power to discriminate based on sexual orientation, gender identity, marital status or pregnancy. The legislation lapsed at the end of the term of the Parliament.

11.7.1 The Australian Capital Territory

Section 14(1) protects the right to freedom of thought, conscience and belief. This recognises that the right encompasses the freedom to have or adopt a religion or belief of one's choice and to demonstrate that religion or belief, either individually or in community, in public or private. The right to demonstrate religion or belief under section 14(1)(b) includes worship, observance, practice or teaching. Section 14(2) protects individuals from coercion limiting those freedoms.

The right which encompasses both religious and secular beliefs, does not protect all religious or conscientious beliefs. The ACT Supreme Court in *R v AM* cited and applied the decision of Burton J of the UK Employment Appeals Tribunal in *Grainger PLC v Nicholson*[623] summarising the test for a belief to be one subject to the protection of s 14.[624] That is:

(i) The belief must be genuinely held.
(ii) It must be a belief and not…an opinion or viewpoint based on the present state of information available.
(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others.[625]

Once that standard has been met, the section 14 right recognises a diversity of religious beliefs.

---

[622] Law Council of Australia, Submission to Parliamentary Joint Committee on Human Rights Senate Legal and Constitutional Affairs Committee (Submission, 17 December 2021) < https://www.lawcouncil.asn.au/publicassets/392b2295-9e71-ec11-9446-005056be13b5/4149%20-%20Religious%20Discrimination%20Bill%202021%20and%20Related%20Bills.pdf>
[623] [2009] UKEAT 0219/09/ZT [24].
[624] *R v AM* [2010] ACTSC 149 [44], [49].
[625] *R v AM* [2010] ACTSC 149 [44], [49].

As the Supreme Court observed in *Islam v Director-General of the Department of Justice and Community Safety Directorate* : 'Religious belief is intensely personal and can easily vary from one individual to the other.'[626]

In *R v AM*, the Supreme Court considered the particular meaning of 'conscience' in section 14. 'Conscience' is distinguished in the provision from religion or belief and is not co-extensive with those concepts, although related.[627] The Court referred to Barwick CJ's description of some characteristics of conscientious belief in the High Court of Australia case *R v District Court of the Northern District of the State of Queensland; Ex parte Thompson*.[628] 'Conscientious belief' was said by Barwick CJ to be characterised by a 'compulsive quality' that is 'durable though not unchangeable' and exhibiting a nature and depth of conviction that is distinguishable from 'mere intellectual persuasion that by its very nature may be transient.'[629]

The Court in *R v AM* suggested that freedom of conscience under section 14, 'unlike freedom of religion' may be 'limited to the beliefs and mental processes of an individual and that it does not necessarily protect any action motivated by the conscience of the person.'[630] The Court drew support for this interpretation from section 16 of the ACT *Human Rights Act*, which distinguishes between holding opinions and their freedom of expression, but observed that this interpretation would require further consideration of the different uses of 'conscience' and 'belief' in section 14(1).[631] However, the Court found it unnecessary to come to a conclusion on the issue in the proceedings before it.[632]

The question of whether a public authority has fulfilled or contravened its obligation under s 14 of the ACT *Human Rights Act* 'is a question of fact and degree, to be assessed in all the circumstances' that 'will depend on the evidence that is before the Court.'[633] Conduct that is an isolated occurrence in the context of a reasonably effective policy designed to respect adherence to religious beliefs and practices may not reach the degree of inadequacy required to find that an individual's right under section 14 has been breached.[634]

---

[626] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [46]. See also *Islam v Director General of the Department of Justice and Community Safety Directorate* [2017] ACTSC 293; *Islam v Director General of the Justice and Community Safety Directorate (No 2)* [2015] ACTSC 314.
[627] *R v AM* [2010] ACTSC 149 [35].
[628] *R v AM* [2010] ACTSC 149 [33], citing *R v District Court of the Northern District of the State of Queensland; Ex parte Thompson* (1968) 118 CLR 488, 492.
[629] *R v AM* [2010] ACTSC 149 [33], citing *R v District Court of the Northern District of the State of Queensland; Ex parte Thompson* (1968) 118 CLR 488, 492.
[630] *R v AM* [2010] ACTSC 149 [46].
[631] *R v AM* [2010] ACTSC 149 [47].
[632] *R v AM* [2010] ACTSC 149 [47].
[633] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [48]; see also *Islam v Director General of the Justice and Community Safety Directorate* [2018] ACTSC 323 [24].
[634] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [110]-[131].

In *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)*, the ACT Supreme Court rejected an argument by the plaintiffs that a development approval for a mosque to be used for Islamic religious and funeral services without an approval condition to the effect of s 14(2) on the use of the land was inconsistent with that provision.[635] The Court was satisfied that by 'merely approving the construction of a building in which religious worship can occur the Territory does not authorise coercion of person in a way that would limit their religious freedom.'[636]

In another case the right to freedom of religion was adverted to in an application by persons to be joined to proceedings seeking a review of the decision of the Heritage Council to list a church and surrounds on the Heritage Register.[637]

Some reasonable and justified limitations on the section 14 right have been considered. In *Islam v Director-General Justice and Community Safety Directorate (No 3)*, the Supreme Court was satisfied that section 14 was not infringed in circumstances where constraints on the plaintiff's capacity to practise his religion in the community arose only from his imprisonment, which in itself was not alleged to infringe his rights, but he was otherwise free to hold or adopt a religion or belief of his choice and to demonstrate his religion in worship, observance, practice or teaching.[638]

ACT courts have considered the relationship between the section 14 protection and other areas of law with which it may overlap. That the substance of a claim under section 14 concerns matters related to religious discrimination that may be dealt with under the *Discrimination Act 1991* (ACT) will not operate as a bar to s 14 proceedings.[639]

The ACT Supreme Court has also affirmed that the right to freedom of conscientious belief under section 14 does provide lawful authority for acts otherwise criminal.[640]

11.7.2 Victoria

Section 14 of the *Charter* provides for freedom of thought, conscience, religion and belief.

---

[635] *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165 [296]-[297].

[636] *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165 [296]-[297].

[637] *Trustees Of the Roman Catholic Church for the Archdiocese Of Canberra And Goulburn and Act Heritage Council (Administrative Review)* [2012] ACAT 81.

[638] *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 [159].

[639] *Islam v Director General of the Justice and Community Safety Directorate (No 2)* [2015] ACTSC 314 [53] (per Refshauge J: 'That is a contention which is not possible to accept having regard to the terms of s 14 of the HR Act which protects freedom of religion including freedom to demonstrate a person's religion and prohibits coercion in a way that would limit freedom of religious observance and practice. It is perfectly possible for conduct to amount to a contravention of both the *Discrimination Act* and the HR Act and there is nothing in either Act which prevents a person relying upon the HR Act in proceedings in the Supreme Court in those circumstances.')

[640] *R v AM* (2010) 245 FLR 410 [55], [83].

Judicial review proceedings arising out of a decision to stop a letter from a prisoner, including on s 14 grounds, were dismissed when the decision was later reversed.[641]

In *Cottrell* Chief Judge Kidd noted that:

> It is true that s 14 also embraces beliefs of any kind. In my view, conduct involving serious religious vilification could not be considered a demonstration of a belief that would be protected by s 14. For a belief to come within the scope of s 14 it must, 'be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others'. This includes the freedom of religion, centrally protected by s 14 itself, as well as other cultural and religious rights protected by s 19 of the Charter. The concept of "conscience" under s 14 should be understood in the same way. [footnotes omitted][642]

In proceedings seeking to challenge a decision to refuse to grant a private security operator license the VCAT member commented that, after considering his public statements and the evidence the applicant

> either did not understand or would not accept that, when he participated in the mock beheading, he was acting outside his rights to freedom of thought, to express himself and to take part in public life.[643]

Other cases in which the s 14 right has been invoked include:

- proceedings arising out of a claim of discrimination following a decision by a local Council to ban the applicant from meetings, forums and events[644]
- an application by a hospital for authority to administer blood products to a seriously ill Jehovah's Witness child in opposition to the wishes of the child and the mother[645]
- discrimination proceedings arising out of a State-run primary school permitting young girls to wear religious dress[646] or a student's family challenging a uniform policy preventing the child wearing a religious head covering to cover his hair[647]
- proceedings by a prisoner arising out of the refusal of prison authorities top permit access to Tarot cards for purposes of religious practice[648]
- a case in which a question arose as to whether it was a breach of the right of religious freedom to refuse to allow the wife of a person being tried to wear a nikab in court[649]
- planning proceedings in respect of the proposed construction and use of a mosque[650]

---

[641] *Haigh v Ryan (in his capacity as Governor of Barwon Prison)* [2020] VSC 102.
[642] *Cottrell v Ross* [2019] VCC 2142.
[643] *Shortis v Chief Commissioner of Police (Review and Regulation)* [2019] VCAT 1379 [9].
[644] *Yianni v Moonee Valley CC (Human Rights)* [2018] VCAT 1990.
[645] *Mercy Hospitals Victoria v D1* (2018) 56 VR 394.
[646] *Secular Party of Australia Inc. v the Department of Education and Training (Human Rights)* [2018] VCAT 1321.
[647] *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507 [181]
[648] *Haigh v Ryan* [2018] VSC 474.
[649] *R v Chaarani (Ruling 1)* (2018) A Crim R 456.
[650] *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715; *Hoskin v Greater Bendigo CC and Anor* [2015] VCAT 1124. See also *Rutherford & Ors v Hume CC* (2014) 202 LGERA 361.

- discrimination proceedings arising out of a refusal to provide accommodation on the basis of the sexual orientation of those seeking to book a camping resort[651]
- discrimination proceedings in respect of religious instruction in Government schools[652]
- applications for exemption from the operation of discrimination legislation[653]
- proceedings including a claim of discrimination on the basis of philosophical belief[654]
- proceedings in respect of spousal pension entitlements under superannuation arrangements[655]
- a decision to grant an exemption to allow women-only swimming sessions at a leisure centre[656]

11.7.3 Queensland

Section 21 of the *Human Rights Act 2019* (Qld) confers a right to freedom of thought, conscience religion and belief.

In the case of *Johnston* judicial review proceedings were instituted challenging directions requiring police officers to receive COVID-19 vaccinations. At first instance, as the claims were found to be industrial matters within the jurisdiction of the Industrial Relations Commission it was held that the Supreme Court lacked jurisdiction to determine the matters.[657]However, as noted above, this decision was overturned on appeal.[658]

Section 21 also arose in proceedings for an injunction to restrain persons from attending a planned sit-in demonstration on a bridge.[659]

11.8 Peaceful assembly and freedom of association

11.8.1 The Australian Capital Territory

The *Human Rights Act 2004* (ACT) recognises the right of everyone to peaceful assembly (s 15(1)) and to freedom of association (s 15(2)). Section 15 is modelled on the rights at articles 21 and 22 of the *ICCPR*.

---

[651] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256.
[652] *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547.
[653] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796
[654] *McAdam v Victoria University and Ors (Anti-Discrimination)* [2010] VCAT 1429.
[655] *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130.
[656] *Hobsons Bay City Council Anor (Anti-Discrimination Exemption)* [2009] VCAT 1198
[657] *Johnston v Commissioner of Police; Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health* [2021] QSC 275.
[658] *Witthahn & Ors v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone & Ors v Commissioner of Police & Ors* [2021] QCA 282.
[659] *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246.

In two appeals against the making of a 'non association' order by a Magistrate, it was contended that the orders infringed the right to association. The appeals were allowed, in one case in part, but on other grounds.[660]

The ACT Human Rights Commission has issued guidance that, 'the right to peaceful assembly is the right of individuals to gather for a common purpose or to pursue common goals, such as protesting or meeting.'[661] There are no internal qualifications on the concept of 'assembly' in section 15(1) as to the place - public or private - or purpose of the gathering.

To the extent that section 15(1) protects assembly for the purpose of protesting, it is likely to overlap with the implied freedom of political communication under the Commonwealth *Constitution*. Nevertheless, while the primary purpose of the right may be to protect peaceful demonstration and political assembly, the right is likely to extend to assembly for social, cultural, religious, charitable or professional purposes.[662]

The right to freedom of association has been interpreted in international law to be the right to associate with others for the purpose of common interests – economic, professional, political, cultural or recreational - in formal groups.[663] Those include, for example, political parties, trade unions or professional associations.

In *Omari* the ACT Supreme Court observed that notwithstanding that it may be justified as a reasonable limitation on human rights, the making of a guardianship order is a serious interference with the rights of the protected person, including their rights under s 15(2) to freedom of association, and that should be considered in the making of an order.[664]

The Court has also observed that the section 15 right, among others, is potentially impacted by the making of domestic violence protection order and that a human rights consistent approach to the making of the order would be one in which the least rights restrictive approach possible is taken that still achieves the protective purpose of the order.[665]

The extent to which the right protects freedom of association for private, for example, familial or social purposes does not appear to have been the subject of any significant consideration in the ACT.

11.8.2 Victoria

[660] *Turner v Raiser* [2021] ACTSC 21; *Robb v Uren* (2019) 348 FLR 335.
[661] Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Collation of Factsheets on each right under the ACT Human Rights Act 2004* (February 2015) 23.
[662] Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Collation of Factsheets on each right under the ACT Human Rights Act 2004* (February 2015) 23.
[663] Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Collation of Factsheets on each right under the ACT Human Rights Act 2004* (February 2015) 23.
[664] *Omari v Omari, Omari and the Guardianship and Management of Property Tribunal* [2009] ACTSC 28 [58].
[665] *Si bhnf Cc vs Ks bhnf Is* [2005] ACTSC 125 [23]-[24].

Section 16 of the Victorian *Charter* provides for the right to peaceful assembly and freedom of association.

These rights, along with the implied freedoms of political communication and association under the Commonwealth *Constitution*, were considered by the Full Federal Court in an unsuccessful challenge to actions of the City of Melbourne Council against members of the Occupy Melbourne protest group.[666]

11.8.3 Queensland

The right to freedom of assembly and freedom of association is protected by s 22 of the *Human Rights Act 2009* (Qld).

In *Sr*i urgent injunction proceedings were instituted to prevent various protesters from attending or encouraging others to attend a planned sit-in protest in the middle of a road of a major traffic route on a bridge. The injunction was granted notwithstanding the rights conferred by s 22.[667]

11.9 Freedom of expression

11.9.1 The Australian Capital Territory

Section 16 of the ACT *Human Rights Act* is modelled on article 9 of the *ICCPR*, protecting freedom of opinion and expression. It protects the right to hold opinions without interference. Unlike the equivalent provision in the Victorian *Charter*, section 16 contains no internal limitations restricting the operation of the right.

The UN Human Rights Committee has stated that the right to freedom of opinion prohibits 'any form of effort to coerce the holding or not holding of any opinion', including the criminalization of holding an opinion or the 'harassment, intimidation or stigmatization of a person' on the basis of their opinion.[668]

Section 16(2) protects the right to freedom of expression, defined to include 'the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or print, by way of art, or in another way chosen by him or her.'

ACAT has observed that section 16(2), citing the United Kingdom decision of *London Regional Transport v Mayor of London* on the equivalent article 10 of the *European Convention on Human Rights*, is 'the lifeblood of democracy.'[669]

The content of s 16(2) right has been the subject of limited consideration. In *Medical Board of Australia v Tausif (Occupational Discipline)*, the Tribunal observed that a provision of the *ACT Civil*

---

[666] *Kerrison v Melbourne City Council* (2014) 228 FCR 87. See also *Muldoon v Melbourne City Council* (2013) 217 FCR 450.
[667] *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246.
[668] General Comment No. 34: Article 9 Freedoms of opinion and expression [9][10].
[669] *Medical Board of Australia v Tausif (Occupational Discipline)* [2015] ACAT 4 [31].

*& Administrative Tribunal Act 2008 (*ACT) in respect of non-publication orders should be read in light of s 16(2).[670]

In *Allatt & ACT Government Health Directorate (Administrative Review)*, ACAT accepted that the section 16(2) right includes a right to seek and receive information from a public authority and is engaged by freedom of information processes which might necessarily restrain an individual's right under section 16(2) of the ACT *Human Rights Act*.[671]

The section 16(2) right is not absolute and may be subject to necessary limitations for the purpose of protecting other rights, in particular the section 12 right to privacy and reputation.[672] Conversely, s 16(2) may impose limitations on the s 12 right. The interaction between the two provisions, in particular the right not to have one's reputation unlawfully attacked under s 12(2), has also been considered on a number of occasions in the context of defamation proceedings.[673] In *Szuty v Smyth*, for example, the Court referred to s 16 as support for the defence of fair comment, but observed that the 'relevant facts upon which the opinions are expressed must be, substantially, accurately stated' as a 'reasonable protection for reputation' pursuant to section 12(b).[674]

In *Clinch* social media posts were alleged to give rise to unlawful vilification on the basis of gender identity and this gave rise to several proceedings including an appeal.[675] In the appeal proceeding ACAT considered the s 16 right to freedom of expression in conjunction with the countervailing rights to equality and freedom from discrimination.[676]

The ACT Discrimination Tribunal also considered the interaction between section 16(2) and sections 8 and 12 of the ACT *Human Rights Act* in *Emlyn-Jones* in the context of alleged discrimination and vilification on the basis of sexuality in comments in an online community forum published by the Canberra Times on the issue of civil unions.[677] The Tribunal observed of the respective limits of sections 8 and 16 that, 'the right to freedom of expression should not amount to abuse resulting in discrimination or vilification of a person, and the right not to discriminate should not stifle the freedom of expression.'[678] Ultimately the Tribunal found that the publication of the comments by the respondent was not discriminatory and had not vilified the applicant. However, the Tribunal was satisfied that anti-vilification provisions limited to a strict test of

[670] *Medical Board of Australia v Tausif (Occupational Discipline)* [2015] ACAT 4 [31].
[671] *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 167 [62], [70]. The right to receive information may be subject to limitations subject to s 28 reasonable limits: [67].
[672] *Szuty v Smyth* [2004] ACTSC 77 [129]; see also *Cristian v Bottrill (Appeal)* [2016] ACAT 104 [14].
[673] *Szuty v Smyth* [2004] ACTSC 77 [129]; see also *Cristian v Bottrill (Appeal)* [2016] ACAT 104.
[674] *Szuty v Smyth* [2004] ACTSC 77 [131].
[675] *Rep v Clinch (Appeal)* [2021] ACAT 106.
[676] *Rep v Clinch (Appeal)* [2021] ACAT 106 [141]. See also *Bottrill v Sunol and Anor (Discrimination)* [2017] ACAT 81.
[677] *Daniel Emlyn-Jones and Federal Capital Press [Intervener: Human Rights Commissioner]* [2009] ACTDT 2 [2]-[7].
[678] Ibid [114].

incitement of hatred, serious contempt or severe ridicule satisfy the proportionality test in s 28 in respect of limitations on the right of freedom to expression.[679]

The Tribunal has also referred on occasion to the need to balance s 16 considerations with the right to a fair trial under s 21, in particular in respect of considerations of open justice.[680]

The ACT Supreme Court and ACAT have both considered reasonable limitations on freedom of expression under section 28 of the ACT *Human Rights Act* in the context of statements by members of professions with particular ethical obligations. As a general rule, in *Pocock* the Tribunal accepted that 'professional associations may be able to impose restrictions on public statements by members without breaching human rights such as freedom of expression.'[681] The Tribunal stated that while restrictions on freedom of expression must comply with the s 28 reasonable limits test:

> it is accepted that in assessing whether such restrictions are reasonable, a balance must be struck between the right (and on occasion, the responsibility in conscience) of a person to communicate information and opinions to the public on the one hand, and the legitimate aim of a professional association to maintain standards among its members, on the other.[682]

The Tribunal accepted that in the context of psychologists, a 'dominant consideration in assessing reasonableness should be the extent to which such standards serve to protect vulnerable patients served by the profession.'[683]

In *Lander v Council of the Law Society of the Australian Capital Territory*, the Full Court considered a finding that a solicitor had engaged in unsatisfactory professional conduct by sending discourteous professional correspondence to an ACT government department.[684] In doing so, the Court observed that, if s 16 was engaged, it super imposed itself on the relevant legal professional rules and that its role was to allow 'lawful criticism by a solicitor of the performance of public officials.'[685] In the view of the Court, the issue was then analysed as one of whether the solicitor's comments were false or without foundation, to his knowledge, rather than discourteous.[686] In respect of the right to freedom of expression, the Court accepted as correct that 'it is not inconsistent with [that] right ... to place limits on professional behaviour, provided, such limits are

[679] Ibid [165]-[166].
[680] For example, *Lazarus v Azize & Ors* [2015] ACTSC 344 [21]; *Medical Board of Australia v Tausif (Occupational Discipline)* [2015] ACAT 4.
[681] *Pocock v Psychology Board of Australia (Occupational Discipline)* [2014] ACAT 54 [13].
[682] Ibid [14].
[683] Ibid [14].
[684] *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32.
[685] Ibid [57].
[686] Ibid [58].

compatible with a solicitor's duty to his or her client, to the courts and the public and can be justified in a free and democratic society'.[687]

11.9.2 Victoria

Section 15(1) of the *Charter* provides that every person has the right to hold an opinion without interference. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether (a) orally; or (b) in writing; or (c) in print; or (d) by way of art; or (e) in another medium chosen by him or her (s 15(2)).[688]

However, *special duties and responsibilities* are attached to the right of freedom of expression and the right may be subject to *lawful restrictions reasonably necessary* (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality (s 15(3)).

In *McDonald*[689] Bell J examined, among other things, the legislative framework:

> The fact that the Victorian Charter includes both the general limitation provision in s 7(2) and the specific limitation provision in (for example) s 15(3) gives rise to an issue about how the two relate. In relation to s 15(3), it has been argued that different approaches have been adopted. In my view, ss 7(2) and 15(3) must be read and applied harmoniously as part of the one coherent scheme; and they must be read and applied so as not to result in the substantive scope of the right in s 15(2) being reduced. These propositions are opposite sides of the same coin.[32] (footnote omitted)
>
> … legality (lawfulness) and justification (proportionality) are central components of both the general limitation standard in s 7(2) and the specific limitation standard in s 15(3) (among others). The two standards perform the same function, one generally and the other specifically, of determining when and how much the substantive right in s 15(2) may justifiably be limited. As the central components of the standards are common, applying both when called for is achievable, and desirable in the interests of consistency, coherence and certainty. They complement each other and do not compete. [33] (footnote omitted)

As members of the High Court have noted, the term 'reasonably necessary' used in s 15 of the *Charter*:

> supplies a criterion for judicial evaluation and decision-making in many fields. Examples from the common law, statute law and Australian constitutional law were collected and discussed by Gleeson CJ in *Thomas v Mowbray*. In an earlier decision, his Honour had

[687] Ibid [38]. See also *Victorian Legal Services Commissioner v McDonald* (2019) 57 VR 186*; McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 where a complaint of unsatisfactory misconduct arose out of a letter between solicitors where one was alleged to be dishonest and telling lies.
[688] The *Justice Legislation Amendment Act 2022* (Vic) amended section 15(2)(e) of the *Charter* by substituting 'that person' for 'him or her'.
[689] *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89.

pointed out that "necessary" does not always mean "essential" or "unavoidable". He also observed that, particularly in the field of human rights legislation, the term "proportionality" might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms.[690]

Section 15 has given rise to a considerable body of jurisprudence. Relevant cases determined in recent years include:

- Proceedings by a police officer alleging bullying, victimisation and discrimination in the workplace in which VCAT determined that the claim under s 15 of the *Charter* did not assist the Applicant regarding the criteria which must otherwise be proved for the purposes of the claim under equal opportunity legislation[691]
- An application by a prisoner for judicial review of administrative decisions regarding access to a laptop computer in which the Applicant unsuccessfully sought to rely upon various *Charter* rights, including s 15[692]
- A number of cases in relation to applications for suppression orders[693]
- An appeal in which it was contended that VCAT had erred in failing to consider or apply provisions of the *Charter*, including s 15, when considering actions of Victoria Police in requiring a person to provide personal information and medical evidence to it and an applicant seeking VCAT review of a decision to refuse to grant a private security license which had been refused in part due to a criminal conviction for inciting serious religious vilification.[694]
- Proceedings for defamation arising out of the publication of material on the internet[695]
- An application for review of a decision to refuse access to documents under freedom of information legislation[696]
- Judicial review proceedings brought by a prisoner arising out of a decision to refuse access to Tarot cards[697]
- An application for judicial review of a decision to stop a letter from a prisoner[698]
- Proceedings seeking orders to remedy an alleged nuisance caused by protesters blocking women's access to a Fertility Control clinic.[699]

---

[690] *Hogan v Hinch* 243 CLR 506 [72](footnotes omitted) (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.)
[691] *Gilmore v Victoria Police (Human Rights)* [2021] VCAT 1250 [39].
[692] *Minogue v Falkingham* [2021] VSC 185.
[693] Noted by Bell J in *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 [38].
[694] *Wut v Victoria Police* [2020] VSC 586. See also *Shortis v Chief Commissioner of Police (Review and Regulation)* [2019] VCAT 1379.
[695] *Defteros v Google LLC* [2020] VSC 219.
[696] *Pitman v Victorian Workcover Authority - WorkSafe Victoria (Review and Regulation)* [2020] VCAT 487. See also *Willner v City of Melbourne (Review and Regulation)* [2015] VCAT 1594; *XYZ v Victoria Police* (2010) 33 VAR 1.
[697] *Haigh v Ryan* [2018] VSC 474.
[698] *Haigh v Ryan (in his capacity as Governor of Barwon Prison)* [2020] VSC 102
[699] *Fertility Control Clinic v Melbourne City Council* [2015] VSC 424.

- An appeal from a decision of the Magistrates' Court in respect of a conviction for contravention of a prohibition of communication in relation to abortion within a safe access zone[700]
- An application by an investigative reporter for access to video recordings of interviews arising out of an investigation of sexual assault[701]
- An appeal from a conviction of a charge of serious religious vilification arising out of a video of a mock-beheading occurring outside Council offices and published on social media to promote a protest against the building of a mosque[702]
- An appeal in professional misconduct proceedings against a solicitor arising out of a letter accusing another solicitor of being fundamentally dishonest and telling lies[703]
- Proceedings for discrimination following a decision of a Council to ban the Applicant from meetings, forums and events, , or from Council premises[704]
- Judicial review proceedings by a prisoner following the seizure of a pen pal letter, the refusal to photocopy a document[705]
- An application by a self-represented party to audio-record proceedings[706]
- An application for a suppression order to protect the anonymity of the Applicant and family members[707]
- Judicial review proceedings by a prisoner in respect of taking part in educational programmes in prisons and the right to communicate by way of letters[708]
- Judicial review proceedings by a prisoner following a decision not to permit him to enrol in an educational course[709]
- Claims against police for discrimination on the basis of race and physical features and human rights breaches due to imposition of grooming standards prohibiting goatees and beards [710]
- Proceedings in respect of discrimination in employment[711]
- An appeal from a conviction for disturbing a meeting of persons assembled for religious worship.[712]

---

[700] *Clubb v Edwards* (2020) 281 A Crim R 252.
[701] *Australian Broadcasting Corporation v Victoria Police and Kehoe* [2020] VSC 410.
[702] *Cottrell v Ross* [2019] VCC 2142.
[703] *Victorian Legal Services Commissioner v McDonald* (2019) 57 VR 186. See also *Victorian Legal Services Commissioner v Low (Legal Practice)* [2016] VCAT 1584.
[704] *Yianni v Moonee Valley CC (Human Rights)* [2018] VCAT 1990; See also *Slattery v Manningham CC* (Human Rights) [2013] VCAT 1869.
[705] *Minogue v Dougherty* [2017] VSC 724.
[706] *Kyriazis v County Court of Victoria (No 1)* [2017] VSC 636 (Bell J)
[707] *PQR v Secretary, Department of Justice and Regulation (No 1)* (2017) 53 VR 45.
[708] *Craig Minogue v Jan Shuard (in her capacity as the Correctional Services Commissioner)* [2017] VSCA 267
[709] *Minogue v Shuard* [2016] VSC 797.
[710] *Djime v Kearnes* [2015] VCAT 941.
[711] *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327.
[712] *Erikson v Pollock* [2022] VCC 1388.

11.9.3 Queensland

Section 21 of the *Human Rights Act 2019* (Qld) provides for freedom of expression in terms of the right to hold an opinion without interference.

The provision has been invoked or referred to in:

- An appeal against a promotion decision in which a question arose as to whether the recruitment and selection process breached human rights provisions[713]
- Applications for review of decisions to issue a negative notice under working with children legislation[714]
- Administrative review proceedings arising out of allegations of misconduct in connection with racing[715]
- Judicial review proceedings arising out of a direction requiring police officers to receive COVID-19 vaccinations[716]
- Urgent injunction proceedings to restrain protesters from attending or encouraging others to attend a planned sit in on a major road over a bridge[717]
- Proceedings arising out of the termination of a residential tenancy[718]

11.10 Right to participate in public life

11.10.1 The Australian Capital Territory

Section 17(a) protects the right of 'every citizen' to have the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives.[719] Every citizen is to have the opportunity to vote and be elected at periodic elections that guarantee the free expression of the will of electors and to have access on general terms of equality for appointment to the public service and public office (s 17 (b) and (c)).[720]

The ACT Supreme Court has observed of article 25 of the *ICCPR*, on which s 17 is modelled, that:

---

[713] *Dale v State of Queensland (Office of Industrial Relations)* [2022] QIRC 8.
[714] *AMD v Director General, Department of Justice and Attorney-General* [2022] QCAT 4; *ZB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 82.
[715] *Vale v Queensland Racing Integrity Commission* [2021] QCAT 438
[716] *Johnston v Commissioner of Police; Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health* [2021] QSC 275. The decision about jurisdiction was overturned: *Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone v Commissioner of Police* [2021] QCA 282, 9 QR 642. See *also Johnston v Commissioner of Police (Qld); Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Sutton v Commissioner of Police (Qld); Baxter v Chief Health Officer* [2022] QSC 96 (Dalton J) and the further decision at [2022] QSC 95.
[717] *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246.
[718] *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144.
[719] *Human Rights Act 2004* (ACT), s 17(a).
[720] *Human Rights Act 2004* (ACT), s 17(b)-(c).

> It is clear that the right is designed to ensure that the exercise of state authority must be based on the principle of sovereignty of the people and make it clear that governments based on absolute monarchical legitimacy, a "Fuhrerprinzip" or similar autocratic structure violate the fundamental right to political participation guaranteed to citizens under article 25(a) [*ICCPR*].[721]

To date, section 17 has been given limited consideration by ACT courts or the ACT Civil & Administrative Tribunal. The term 'citizen' and scope of the concept of 'conduct of public affairs' are not defined in the legislation and have not been examined in any detail within the context of the provision. The UN Human Rights Committee describes the 'conduct of public affairs' as a 'broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative power' and as covering 'all aspects of public administration, and the formulation and implementation of policy'.[722]

In *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)*, the Court rejected the plaintiff's submission that s 17(a) comprises of a right to take part in 'public affairs to the fullest extent.'[723] The plaintiff had submitted unsuccessfully that this right was infringed when the public notification period for a government planning development approval process in relation to a mosque closed before all the relevant planning and entity information was publicly available.[724]

In those proceedings, the Supreme Court also rejected a submission that s 17(a) of the ACT *Human Rights Act* is associated with a right to receive information.[725]

Similarly, the ACT Civil & Administrative Tribunal held that the right to participate in public life 'does not necessarily contemplate a right to access information or documents'.[726] In that case, s 43 of the *Freedom of Information Act 1989* (ACT), which operates to exempt documents from disclosure because of the effect on business organisations, was considered by the Tribunal as falling short of engaging the s 17 right notwithstanding that the provision did not facilitate access to documents.[727]

In another case, arising out of disputation between a solicitor and the Law Society, the purported reliance on s 17 was said to be misconceived.[728]

---

[721] *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165 [303].
[722] UN Human Rights Committee General Comment No 25 *Article 25 (Participation in Public Affairs and the Right to Vote)* [5].
[723] *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165 [303].
[724] Ibid [303].
[725] Ibid [304].
[726] *Law Society of the ACT & Treasury Directorate and NRMA (Appeal)* [2013] ACAT 36 (The Tribunal did not decide whether or not the appellant had standing to raise an s30 interpretative argument under the ACT Human Rights Act as an association, rather than an individual: [107]).
[727] *Law Society of the ACT & Treasury Directorate and NRMA (Appeal)* [2013] ACAT 36 [114].
[728] *Ezekiel-Hart v Reis* [2019] ACTCA 31.

While s 17(b) expresses the right to vote and be elected to apply to 'every citizen', ACT electoral laws that limit the right to vote and stand for election to individuals of at least 18 years of age are likely to be read as a reasonable limitation within the meaning of section 28 of the ACT *Human Rights Act*.[729] The UN Human Rights Committee also refers to the right to vote under article 25 of the *ICCPR* being available to every 'adult' citizen.[730]

11.10.2 Victoria

Section 18 of the *Charter* provides for the right to take part in public life.

Purported reliance on this provision has in a number of instances been found to be misconceived.[731]

In *Chaarani* a question arose as to whether the wife of an accused should be permitted to wear a nikab in court during the trial and whether a requirement that persons in court have their faces uncovered constituted a reasonable limitation on the principle of open justice and rights of religious freedom and participation in public life.[732]

In *Slattery* the Respondent was found to have breached various human rights, including s 18, by prohibiting the Applicant from attending any building owned, occupied or managed by the Respondent Council.[733]

In *Richardson* a limitation imposed by the Council on further questions in Public Question Time by the Applicant was due to the Applicant's unmanageable behaviour and the time and energy that it was taking from work of the Council.[734]The rights under ss 15 and 18(1) were held to be justifiably limited by the question time ban.[735]

An unsuccessful attempt was made to rely upon s 18 (and other provisions) in a proposed challenge to the seizure of mail by prison authorities in an application by a vexatious litigant for leave to commence a proceeding.[736]

11.10.3 Queensland

Section 23 of the Queensland *Human Rights Act 2009* provides for a right to take part in public life.

---

[729] *Electoral Act 1992* (ACT) ss 103 and 128.
[730] General Comment No 2525 *Article 25 (Participation in Public Affairs and the Right to Vote)* [4].
[731] See e.g., *Wut v Victoria Police* [2020] VSC 586 [261]; *Cottrell v Ross* [2019] VCC 2142; *Fidge v Municipal Electoral Tribunal* [2019] VSC 639.
[732] *R v Chaarani (Ruling 1)* (2018) 275 A Crim R 456.
[733] *Paul Slattery v Manningham City Council* [2008] VCAT 1273. See also Slattery v Manningham City Council (Human Rights) [2013] VCAT 1869; In *Yianni v Moonee Valley CC* (Human Rights) [2018] VCAT 1990, VCAT found that a notice banning the applicant from attendance at public meetings, forums and events conducted by the Respondent for 12 months breached the *Charter*.
[734] *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294 [122].
[735] *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294 [225].
[736] *Knight v Shuard* [2014] VSC 475.

In a public service appeal against a promotion decision, it was unsuccessfully contended that the recruitment and selection process breached the Applicant's human rights under s 23.[737]

The right to take part in public life was invoked unsuccessfully in a number of challenges to negative decisions under working with children legislation.[738]

In proceedings before the Supreme Court, sitting as the Court of Disputed Returns, an unsuccessful candidate for Mayor at a Council election sought to quash the result and obtain orders for a new election due to alleged voting irregularities and breach of the human rights arising under s 23. The application was dismissed.[739]

Purported reliance on s 23 by persons seeking to oppose an application for an injunction to prevent them from attending or encouraging others to attend a proposed sit-in on a road on a public bridge was unsuccessful. [740]

11.11 Right to liberty and security of the person

11.11.1 The Australian Capital Territory

Section 18(1) provides for an overarching right to liberty and security of person, including the right not to be arbitrarily arrested or detained. The right applies to all forms of detention including imprisonment but also, for example, protective detention under mental health treatment orders and guardianship orders.[741]

While the human right to liberty is now statutorily protected, the right 'is accepted as very important in a liberal civilized society' and 'was always strongly protected at common law' including by the tort of false imprisonment which responds to a 'failure of the processes leading to the deprivation of liberty.'[742] On this construction, aspects of the right to liberty under section 18 are simply a public law expression of the common law right.[743] This view has influenced the ACT Supreme Court's interpretation of the section 18(7) right to compensation for unlawful arrest or detention, which is discussed below.

---

[737] *Dale v State of Queensland (Office of Industrial Relations)* [2022] QIRC 8.
[738] *JB v Director-General Department of Justice and Attorney-General* [2021] QCAT 433; *CTC v Director-General, Department of Justice and Attorney-General* [2021] QCAT 406; *ST v Director-General, Department of Justice and Attorney-General* [2021] QCAT 337; *BW v Director-General, Department of Justice and Attorney-General* [2021] QCAT 158*; ZB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 82; *MK v Director-General, Department of Justice and Attorney General* [2021] QCAT 62; *DL v Director-General, Department of Justice and Attorney General* [2021] QCAT 61; HM *v Director-General, Department of Justice and Attorney General* [2021] QCAT 13.
[739] *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623.
[740] *Attorney-General for the State of Queensland v Sri &* Ors [2020] QSC 246.
[741] See e.g., *In the Matter of Evelyn (Guardianship)* [2021] ACAT 126.
[742] *Lewis v Australian Capital Territory* [2018] ACTSC 19 [75].
[743] See *Lewis v Australian Capital Territory* [2018] ACTSC 19 [457]-[459] (per Refshauge J); *Morro v Australian Capital Territory* [42]-[43].

Sub-sections 18(2) to 18(6) set out more specific guarantees and limitations upon the right to liberty and security.

Section 18(2) is a specific internal limitation on the right to liberty and security. It provides that a person may be deprived of liberty 'on the grounds and in accordance with the procedures established by law.' The reference in section 18(2) to grounds and procedures established by law prohibits unlawful deprivations of liberty only, rather than unlawful treatment while detained which is the subject of section 19 (the right to humane treatment when deprived of liberty) discussed below.[744]

Together with the section 18(1) requirement that arrest and detention of a person not be arbitrary, section 18(2) requires that the arrest and detention of an individual must be both lawful and not arbitrary, as the right is protected under article 9(1) of the *ICCPR*. The concepts of 'arbitrariness' and 'unlawfulness' are related but have distinct content, as apparent from the discrete uses of the terms within section 18.

Consistent with international human rights law, ACT courts have treated 'arbitrariness' as a broader concept than unlawfulness.[745] In *Monaghan*, the ACT Supreme Court cited international jurisprudence in which arbitrariness is interpreted to include elements of inappropriateness, injustice, as well as lack of predictability and proportionality.[746] In *Blundell*, the ACT Supreme Court referred to arbitrariness as turning on 'the nature and extent of any departure from the substantive and procedural standards involved' and as arbitrary if it is 'capricious, unreasoned, without reasonable cause…without reference to an adequate determining principle or without following procedures.'[747] ACT courts have also accepted that while not every arbitrary detention will be unlawful, the unlawfulness of a detention will be sufficient to make it arbitrary.[748]

Sub-sections 18(3) to (6) are specific guarantees in respect of the operation of criminal justice procedures such as arrest and in a person's treatment after their arrest and detention.

Anyone who is arrested must be told, at the time of the arrest, of the reasons for it and must be promptly told about any charges against him or her pursuant to section 18(3).

In *Vogel* a defendant convicted by the Magistrates Court appealed on the ground, amongst others, that the Magistrate had failed to consider whether his arrest was unlawful given that he was not told of the reasons for his arrest as required by both criminal legislation and s 18(3) of the *Human*

[744] *Eastman v Chief Executive of the Department of Justice and Community Safety* [2011] ACTSC 33 [22].
[745] See, e.g., *Lewis v Australian Capital Territory* [2018] ACTSC 19 [432]-[433]; *Monaghan v ACT (No 2)* [2016] ACTSC 352 [228].
[746] *Monaghan v ACT (No 2)* [2016] ACTSC 352 [227]-[234].
[747] *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Community Justice and Safety* [2010] ACTSC 151 [166], citing *Neilson v Attorney-General* [2001] NZLR 433 [34].
[748] See, e.g., *Lewis v Australian Capital Territory* [2018] ACTSC 19 [432]-[433]; *Monaghan v ACT (No 2)* [2016] ACTSC 352 [233].

Rights Act. Along with other grounds of appeal this was dismissed because the unlawfulness of arrest had not been raised at the initial trial.[749]

Section 18(4) requires that: (a) a person charged with an offence is brought promptly before a judge or magistrate and (b) to trial without unreasonable delay. In determining whether the subsection (4)(a) requirement to bring an arrested person promptly before a court has been met, any statutory entitlement of the arresting officer to hold the person for the purposes of investigation will be relevant.[750] The section 18(4)(b) guarantee is additional to, but overlaps with, the section 22(2)(c) right to be tried for a criminal offence without unreasonable delay.

A person awaiting trial must not be detained in custody 'as a general rule' but release may be subject to guarantees to appear for trial, at any other stage of judicial proceedings and, if appropriate, for execution of judgment (s 18(5)). Thus s 18(5) clearly does not prevent pre-trial custodial detention and will not mandate the provision of bail in every case.[751]

The right in s 8(5) is relevant to consideration of the way courts approach bail applications and to the legislation governing bail in the ACT, the *Bail Act 1992* (ACT). An approach to a bail application in which the applicant is required to rebut the assumption that they would commit further offences was held to be inconsistent with the presumption of liberty under section 18(5).[752]

The ACT Supreme Court has held that the requirement in s 9C of the *Bail Act 1992* (ACT) that a person accused of murder and serious drug offences show 'special or exceptional circumstances' to have the usual considerations applied in assessing their eligibility for bail is incompatible with s 18(5).[753]

Section 18(6) states that anyone deprived of their liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order their release if the detention is not lawful.

Section 18(7) provides that anyone 'who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.' In *Lewis*, the Supreme Court addressed the question of whether section 18(7) gives an entitlement to compensation independent of and in addition to the common law right to damages for the tort of false imprisonment.[754] The Court interpreted section 18(7) as merely expressing 'that a person should have a right to compensation for unlawful detention', which the Court was satisfied is adequately provided for in ACT law by remedies for the common law tort for false imprisonment rather than in an additional public law head of compensation under s 18(7).[755] Prior to the Court's decision in *Lewis* the status of s 18(7) had only

[749] *Vogel v Broomhall* [2019] ACTSC 194.
[750] *Martin v R; R v Martin* [2015] ACTCA 38 [62].
[751] *Re an Application for Bail by Rodriguez* [2008] ACTSC 50 [20]; see also *In the matter of an application of bail by Paul Blundell* [2008] ACTSC 138 [2].
[752] *R v Rubino* [2012] ATCSC 157 [41]. In addition, there is a presumption in favour of bail in s 9C of the *Bail Act 1992* (ACT).
[753] *In the matter of an application for Bail by Isa Islam* (2010) 4 ACTLR 235.
[754] *Lewis v Australian Capital Territory* (2018) 329 FLR 267 [391].
[755] *Lewis v Australian Capital Territory* (2018) 329 FLR 267 [474].

been considered in *obiter dicta* by the Court or in cases prior to the introduction of s 40C to the ACT *Human Rights Act*.[756]

In *Lewis* there was an appeal from the finding that he was only entitled to nominal damages for having spent 82 days in prison. It was contended that he was entitled to $100,000 as either damages for false imprisonment or for infringement of s 18(7) of the *Human Rights Act*. The appeal to the Court of Appeal was dismissed with the Court holding that the inevitability of his imprisonment was determinative of the appeal. The Court held that it was unnecessary to determine whether the *Human Rights Act* gave rise to a separate entitlement to damages.[757] The appeal to the High Court was dismissed.[758] As Gageler J observed:

> Mr Lewis has no entitlement to compensatory damages for loss of liberty or dignity given the likelihood that he would have been lawfully imprisoned for the same period under the same conditions had the conduct which constituted his wrongful imprisonment not occurred. Lacking an entitlement to compensatory damages and having no arguable entitlement to aggravated or exemplary damages, his right to liberty is vindicated by the nominal damages he has been awarded.[759]

The claim for substantial 'vindicatory' damages was rejected by all members of the Court.

In *Deng* a claim for damages was brought for, amongst other things, false imprisonment, together with a claim for compensation pursuant to s 18(7) of the *Human Rights Act*. Following the joinder of Magistrates as defendants the proceedings were initially stayed.[760]

In *Brown* proceedings for damages for false imprisonment and compensation pursuant to s 18(7) were unsuccessful and the plaintiff was ordered to pay the defendants' costs. The Court found that the plaintiff had been lawfully arrested and detained.[761]

In *Eastman* compensation was sought for unlawful detention (s 18(7)) and wrongful conviction (s 23). The Court found in favour of the plaintiff in respect of the wrongful conviction and that it was therefore unnecessary to determine the claim under s 18(7).[762] The Court declined to decide as between the differing views in earlier cases[763] as to whether s 18(7) created a statutory cause of

---

[756] See, for example, *Strano v Australian Capital Territory* [2016] ACTSC 4; *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118. See also *Monaghan v Australian Capital Territory (No 2)* (2016) 315 FLR 305.
[757] *Lewis v Australian Capital Territory* [2019] ACTCA 16.
[758] *Lewis v Australian Capital Territory* (2020) 94 ALJR 740.
[759] Ibid [21]. Although all members of the Court were all of the view that the appeal should be rejected there are differences in the reasoning adopted in the four judgments. (Kiefel CJ and Keane J; Gageler J; Gordon J and Edelman J).
[760] *Deng v Australian Capital Territory (No 2)* [2021] ACTSC 135.
[761] *Brown v Australian Capital Territory* (2020) 350 FLR 417; *Brown v Australian Capital Territory (No 2)* [2020] ACTSC 109.
[762] *Eastman v The Australian Capital Territory* (2019) 14 ACTLR 195; 348 FLR 251.
[763] *Strano v Australian Capital Territory* (2016) 11 ACTLR 134; *Morro and Ors v Australian Capital Territory* (2009) 234 FLR 71.

action separate from the tort of false imprisonment because the threshold for the possible application of s 18(7) had not been met in the present case.

Section 18(8) is a guarantee against imprisonment for the failure to carry out a contractual obligation.

The section 18 protection of the right to liberty has been invoked generally by ACT courts in undertaking statutory construction, including in the context of the operation of the legislative bail regime. For example:

- In *Massey* Penfold J noted that although the *Human Rights Act* may result in interpretations of the *Bail Act* that differ for pre- *Human Rights Act* interpretations, there was no basis for assuming that the human rights legislation would necessarily require a new or different interpretation of any or all of its provisions.[764]
- In *Stott*, the ACT Supreme Court rejected an application to issue a warrant for the arrest of a potential witness who had not been subpoenaed or bound over to appear at trial. While the Court did not find that such an inherent and relatively unconfined power did not exist in the Court, the Court expressed the view that this would unlikely be incompatible with ss 18(1) and (2), in particular the reference in s 18(2) to 'procedures' for the deprivation of liberty that are 'established by law'.[765]
- In *Charles*, in considering section 56A of the *Bail Act 1992* (ACT) on the arrest without warrant of a person on bail, the ACT Supreme Court confirmed that the automatic revocation of bail should not be implied, in the absence of express terms, unless it is the only construction that can reasonably be given to legislation; to do otherwise would be inconsistent with section 18.[766]
- In *XH*, the ACT Supreme Court observed that an interpretation of legislation in respect of an intensive correction order that would deprive an offender from spending part of their prison term in the community that, on the face of the legislation seems to have been intended to be available by the legislature, would be inconsistent with the liberty of the individual, supported by s 18.[767]
- In *Breen*, the ACT Supreme Court was satisfied that section 18 is a 'relevant matter' within the meaning of section 22(3) to be taken into account in applying section 22 of the *Bail Act 1992* (ACT) on the criteria for granting bail to adults.[768]

[764] *In the matter of an application for bail by Rebecca Massey [No. 2]* [2009] ACTSC 70[26] ; further referred to in *R v Watson*(2017) 326 FLR 110 [39].
[765] *R v Stott* (2017) 320 FLR 406 [40]-[42].
[766] *R v Charles* [2016] ACTSC 177 [82] (concerning whether the bail of a person arrested under section 56A of the *Bail Act 1992* (ACT) on the belief on reasonable grounds that they have failed to comply, or will fail to comply, with their bail conditions was automatically revoked without terms to that effect).
[767] *R v XH* [2017] ACTSC 236 [12]-[14].
[768] *In the matter of the application for Bail by Breen* [2009] ACTSC 172 [55].

In *Davis*, the ACT Supreme Court observed that section 40C(4) of the ACT *Human Rights Act* gives the Court the discretion to refuse any evidence obtained in breach of a public authority's obligations under s 40B(1), in particular in contravention of ss 18(1) or (2).[769]

The question of the limitation period and when the causes of action arise was considered in *Strano* which arose out of a claim for damages in respect of a period of unlawful detention. The claimant contended that the cause of action only accrued when he became aware of the unlawfulness required to give rise to the right. The Court of Appeal Court upheld the decision of the trial judge[770] and concluded that nothing in s 18(7) gives rise to any consideration dependent upon the discoverability of the unlawfulness.[771]

11.11.2 Victoria

Section 21 of the *Charter* provides for the right to liberty and security of the person. It is modelled on other international human rights provisions.[772]

Like the analogous ACT provision, it has been considered in a substantial number of cases, including in the context of criminal processes,[773] criminal proceedings,[774] guardianship matters[775] and mental health decisions.[776]

In numerous instances, the challenges to human rights violations have arisen out of decisions that were held to be demonstrably justified.

In other instances, claims of human rights violations have been upheld.

As under the ACT legislation human rights considerations have been invoked in applications for bail, particularly where a long period of time is likely between arrest and trial.[777]

The curfew and stay at home restrictions imposed in light of the Covid 19 pandemic was unsuccessfully challenged on human rights grounds, including s 21.[778]

In a criminal case, the suspension of jury trials during the Covid-19 pandemic led to an application for trial by judge alone, relying on human rights grounds including s 21(5) of the *Charter*. Having accepted that it is in the public interest that people charged with serious criminal offences access

[769] *R v Davis* [2015] ACTSC 101 [58].
[770] *Strano v Australian Capital Territory (No 2)* (2016) 310 FLR 481.
[771] *Strano v Australian Capital Territory* [2017] ACTCA 5.
[772] See Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) included in Schedule 1 to the *Human Rights Act 1998* (UK). See also s 22 *New Zealand Bill of Rights Act 1990* and s 7 *Canadian Charter of Rights and Freedoms* signed in 1982.
[773] See e.g., *Gebrehiwot v State of Victoria* (2020) 287 A Crim R 226; *Cruse v State of Victoria* (2019) 59 VR 24.
[774] See e.g., *Dudley v A Judge of the County Court of Victoria* [2020] VSCA 179.
[775] *HYY (Guardianship)* [2022] VCAT 97.
[776] Particularly in relation to involuntary treatment orders. See e.g., *Antunovic v Dawson* (2010) 30 VR 355; *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646.
[777] See e.g., *Re Shea* [2021] VSC 207; *Re Raffoul* [2020] VSC 848; *Re LD* [2019] VSC 457; *Woods v DPP* (2014) 238 A Crim R 84; *DPP (Cth) v Barbaro* (2009) 20 VR 717; 193 A Crim R 369; *Re Dickson* [2008] VSC 516; *Gray v DPP* [2008] VSC 4.
[778] *Loielo v Giles* (2020) 63 VR 1.

expeditious justice, the Chief Judge Kidd found it unnecessary to deal with the argument under the *Charter*.[779]

In *Kheir* a prisoner sought judicial review of a refusal to allow him time off his sentence for emergency management days, including on the ground of breach of human rights under s 21 due to the delay in decision-making. The application was rejected[780] and the conclusion was said to be consistent with jurisprudence in the United Kingdom.[781]

In relation to communication of the reasons for arrest of an accused person, s 21(4) of the *Charter* supplements the common law. [782] As with many of the provisions of the *Charter* the human rights and freedoms incorporate or enhance rights and freedoms at common law.

The right to liberty and security of the person was considered in the application of the indefinite sentencing regime by the Court of Appeal in *Carolan*[783] and in connection with the making of detention or supervision orders in a number of cases.[784]

Imprisonment for the failure of persons with intellectual disabilities or mental illness to make instalment payments in respect of fines was the subject of human rights challenges, including under s 21, and appeals to the Court of Appeal, in *Taha*.[785]The Court of Appeal dismissed the appeals from judgments given in the Common Law Division quashing the orders for imprisonment made by the Magistrates Court. The Court of Appeal found that a Magistrate is required to make enquiries regarding whether individuals have a disability or other special circumstances before making an imprisonment order.[786]

In a number of cases the Court of Appeal has considered the application o f s 21 in considering decisions made under other legislation including in respect of community corrections orders[787]and requiring persons to accompany a police officer to a place to furnish a sample of breath[788] or blood.[789]

---

[779] *DPP v Truong & Bui* [2020] VCC 806 [44].
[780] *Kheir v Robertson* [2019] VSC 422. See also *Kheir v Secretary to the Department of Justice and Regulation* [2019] VSC 76.
[781] *R (Black) v Secretary of State for Justice* [2009] 1 AC 949.
[782] See *Slaveski v Victoria* [2010] VSC 441 [111-114];[116]-[119] and *Victoria Police v Todero* [2016] VMC 30.
[783] *Carolan v The Queen* (2015) 48 VR 87; 252 A Crim R 214.
[784] See e.g., *Director of Public Prosecutions v JPH (No 2)* (2014) 239 A Crim R 543; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.
[785] *Victoria Police Toll Enforcement v Taha* (2013)49 VR 1.
[786] *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37 [270].
[787] *DPP v Leys* (2012) 44 VR 1.
[788] *DPP v Piscopo* (2011) 33 VR 182 on appeal from *Director of Public Prosecutions v Piscopo* (2010) 201 A Crim R 429.
[789] *Director of Public Prosecutions v Rukandin* (2011) 210 A Crim R 547 on appeal from *Director of Public Prosecutions v Rukandin* (2010) 204 A Crim R 382.

The prohibition on imprisonment for inability to perform a contractual obligation (s 21(8)) was considered in relation to non-compliance with surety obligations entered into by the wife of a person facing serious criminal charges who absconded.[790]

11.11.3 Queensland

Section 29 of the Queensland *Human Rights Act* provides for the right to liberty and security of person.

The nature and extent of the 'residual liberty' of persons convicted and imprisoned was considered by the Supreme Court in *Owen-D'Arcy* in judicial review proceedings arising out of the making of a maximum-security order.[791]

This gave rise to a review of various cases, including from other jurisdictions including Canada, the United Kingdom and New Zealand.

According to Martin J:

> The Canadian decisions support the idea of the existence of a "residual liberty". That is, there is a right inherent in a prisoner not to be subjected to further deprivation or harsher conditions unless the provisions which allow for such action have been fulfilled. The United Kingdom and New Zealand authorities do not accept the existence of a residual liberty. To the contrary, some single judge decisions in this country favour the existence of such a class of liberty.[792]

His Honour concluded that s 29 had not been engaged.[793]

An application for an order for release from detention due to the unreasonable delay in bringing the matter to trial was rejected in *Dunshea.*[794]

The prohibition on imprisonment for debt (s 29(8)) was unsuccessfully invoked by a person convicted of fraud arising out of a failure to comply with loan obligations.[795]

In appeal proceedings arising out of criminal convictions for drug offences, human rights claims under s 29 were held to be of no relevance.[796]

Human rights contentions were also said to be misconceived in an appeal against the refusal of bail.[797]

---

[790] *JR Mokbel Pty Ltd v Director of Public Prosecutions* [2007] VSC 119.
[791] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [202]-[234].
[792] Ibid [225].
[793] Ibid [234].
[794] *Re Dunshea* [2021] QSC 163.
[795] *R v Smith* [2021] QCA 116.
[796] *R v Morrison* [2020] QCA 187.
[797] *Baggaley v Commonwealth Director of Public Prosecutions* [2020] QCA 179.

In *Volkers*, proceedings arising out of alleged indecency with two young persons were permanently stayed due to protracted delay. The delay since 2002 was held to amount to a breach of the appellants rights under the *Human Rights Act* to a trial without unreasonable delay.[798]

11.12 Humane treatment when deprived of liberty

11.12.1 The Australian Capital Territory

Section 19 (1) of the *Human Rights Act 2004* (ACT) provides that persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. It is further provided that accused persons must be segregated from those convicted, except in exceptional circumstances (s 19(2)) and that accused persons must be treated in a way that is appropriate for those not convicted (s 19(3)).[799]

Section 19(1) applies to all persons who are incarcerated or detained in some way, for example in prisons or mental health facilities.[800] This imposes a positive obligation to treat anyone deprived of liberty 'with humanity and with respect for the inherent dignity of the human person.'[801]

The Supreme Court considered the meaning of the obligation to treat detainees with 'humanity' in *Islam* as pertaining to 'treatment as befits a human being, with compassion.'[802] The Court commented that, while accepting that detention will curtail human rights, 'a public authority must ensure that additional hardship or separate impingement on such rights does not arise that is unrelated to the deprivation of liberty.'[803] Similarly, in *Eastman,* citing the decision of the European Court of Human Rights in *Cenbauer*[804], Refshauge J referred to the obligation of the State to:

> ensure that a person is detained in conditions which are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and wellbeing are adequately secured by [footnotes omitted].[805]

---

[798] *Volkers v R* [2020] QDC 25 [113].
[799] Section 20(1) also provides that an accused child must be segregated from accused adults.
[800] *Ezekiel-Hart v Reiss* [2018] ACTSC 264 [59]. In that case, the plaintiff's pleading that he had been deprived of the liberty to work and in doing so was treated inhumanely was found to be a fundamental misconception of section 19 of the Act: [58].
[801] See e.g., *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [56].
[802] Ibid [57].
[803] Ibid [64].
[804] *Cenbauer v Croatia* [2006] ECHR 73786/01
[805] *Eastman v Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 4 [86].

In *Islam* the Court confirmed that the best approach to the question of whether an authority has complied with its obligation under s 19 is to treat the question as directed at the statutory language.[806] That is, whether or not the person bringing the proceedings, in their particular circumstances, as a matter of fact and degree, has been treated with humanity and with respect for the inherent dignity of the human person.[807]

This follows the approach adopted by Mansfield J in *Eastman No 2,*[808] rather than that of Refshauge J in *Eastman No 1*, which suggested that s 19 of the ACT *Human Rights Act* might contain other freestanding guarantees.[809]

In his judgment on an interlocutory application in *Eastman No 1*, Refshauge J had stated that:

> there is an arguable case that s 19 of the *Human Rights Act* does require that a prisoner be given the opportunity of useful work, that there is a requirement for rehabilitative measures to be put in place, and that there is also an obligation to provide access to appropriate and timely medical treatment.[810]

In *Islam*, the plaintiff unsuccessfully sought an order, to give effect to s 19, that he have access to full-time, meaningful employment while detained as a prisoner. The Court considered the issue under s 19 to be whether there had 'been a failure to treat the plaintiff with humanity and respect for the inherent dignity of the human person as a result of the fact' that he had 'not been offered paid employment' for a period while imprisoned.[811] In finding there was no failure to comply with s 19, as a matter of fact and degree, the Court found nothing which would elevate the importance of employment within the prison in the plaintiff's circumstances that would mean failing to offer him employment at that moment would be more significant for the purpose of assessing whether he had been treated in accordance with section 19.[812]

In analysing whether an individual's section 19 right has been infringed, it is important to consider whether restraints imposed upon a person are best characterised as resulting from the circumstances of their deprivation of liberty or instead arise out of a lack of respect for their humanity and inherent dignity.

---

[806] *Islam v Director-General of Justice and Community Safety Directorate* [2015] ACTSC 20 [87].
[807] Ibid [86].
[808] *Eastman v Chief Executive of the Department of Justice and Community Safety (Eastman No 2)* [2011] ACTSC 33.
[809] *Eastman v Chief Executive of the Department of Justice and Community Safety (Eastman No 1)* [2011] ACTSC 33 [71].
[810] *Eastman v Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 4 [99].
[811] *Islam v Director-General of Justice and Community Safety Directorate* [2015] ACTSC 20 [88].
[812] Ibid [95].

In *Islam*, for example, the Court was satisfied that a failure by prison staff to provide Mr Islam, a Muslim, with a meal suitable for his religious dietary requirements on one occasion resulted from his failure to comply with prison procedures for noting his dietary requirements, albeit faultlessly as Mr Islam did not know the procedures existed. The failure was held not to infringe his rights under section 19.[813] Rather, the failure arose from the entitlement of the detention centre kitchen to rely on their procedures due to the practical difficulties and operational requirements of the prison providing food frequently in an ordered manner to a large number of detainees with a variety of dietary requirements.[814]

For section 19(1) to have been infringed, ACT courts have considered that a deprivation must also 'have some severity for it to amount to a violation of a right to be treated with humanity and inherent dignity.'[815]

The assessment of whether ill treatment has attained a minimum level of severity to contravene section 19 was, in *Eastman* said to be a relative assessment, depending on all the circumstances of the case, such as the nature and context, the manner and method of its execution, its duration, physical or mental effects, and potentially the sex, age and state of health of the victim.[816]

In *ZS* the ACT Supreme Court considered the interaction of s 19 with parole processes.[817] The Court observed that the requirement to treat anyone deprived of liberty with respect for the inherent dignity of the human person 'extends to the process of the grant of parole' through section 7(1) of the *Crimes (Sentence Administration) Act 2005* (ACT).[818] That provision requires that functions under that Act be exercised as far as possible to respect and protect offender's human rights and to ensure their 'decent, humane and just treatment.'[819] The Court went on to consider the meaning of 'just treatment' within the meaning of s 7(1), but did not consider s 19 in any detail.[820]

In *Brown*[821] a number of questions arose as to whether the alleged failure to provide certain health care and health services amounted to a breach of s 19(1) and 27(1) and (2) of the ACT *Human Rights Act.* A female prisoner contended that a breach of her human rights arose out of the failure to provide an Aboriginal Health Assessment (AHA) on each occasion on which she was detained. The plaintiff's claim was unsuccessful. The health services provided to the plaintiff were held not to fall below the required standard.

---

[813] Ibid [132]-[133].
[814] Ibid [132]-[133].
[815] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [66], citing *Haigh v Ryan* [2018] VSC 474 [86] (per Ginnane J).
[816] *Eastman v CEO, Department of Justice and Community Safety* [2010] ACTSC 4 [91].
[817] *ZS v Sentence Administration Board* [2018] ACTSC 289.
[818] Ibid [138].
[819] Ibid [138]. Section 7(1) operates in addition to the requirement under section 40B of the ACT *Human Rights Act* on public authorities to act consistently with human rights.
[820] *ZS v Sentence Administration Board* [2018] ACTSC 289 [139].
[821] *Brown v Director-General of the Justice and Community* [2021] ACTSC 32.

In *Johns*[822] a prisoner sought judicial review of a decision of staff to notify police that he had written and emailed a manuscript to his brother and the withdrawal of privileges without following policy. Breach of the s 19 right to human treatment was alleged. The claims were dismissed.

In *Bourne* a prisoner contended that his transfer from the ACT to NSW would result in him being deprived of the protection of s 19 given that there is no equivalent legislation in that state. The claim was rejected given the absence of any evidence that treatment the plaintiff would receive in a NSW prison would be any different to that he would receive in the ACT.[823]

11.12.2 Victoria

Section 22 of the Victorian *Charter* provides for the humane treatment of persons deprived of liberty and the treatment of persons detained without charge. It applies in a range of contexts including apprehension [824] and incarceration by police,[825] prison custody,[826] involuntary detention for mental health treatment[827] and guardianship settings.[828]

In *Minogue* a prisoner required to submit to urine tests and strip searches was partially successful in challenging these practices on human rights grounds. The Court of Appeal noted that:

> The precise content of the dignity right in s 22(1) of the Charter has not been determined. Nor have the courts formulated a test for determining when the dignity right is limited. That is not surprising because the scope of the right, and the circumstances in which it can be limited, will be informed by the nature, extent and purpose of the deprivation of a person's liberty.[829]

[822] *Johns v Director-General of the Act Justice and Community Safety Directorate* [2019] ACTSC 311.
[823] *Bourne v Australian Capital Territory* [2019] ACTSC 127 [24].
[824] *Bare v IBAC* [2015] VSCA 197.
[825] *Day: Finding into Death with Inquest of Day, Tanya Louise* (COR 2017 6424) [2020] VicCorC 26437 [531] – [533]
[826] *Castles v Secretary of Department of Justice* (2010) 28 VR 141
[827] *PBU and NJE v Mental Health Tribunal* [2018] VSC 564.
[828] *HYY (Guardianship)* [2022] VCAT 97
[829] *Thompson v Minogue* [2021] VSCA 358 [61][240]. See also *Minogue v Thompson (No 2)* [2021] VSC 209; *Minogue v Thompson* [2021] VSC 56.

> In considering the content of the dignity right in s 22(1) of the Charter, a relevant factor is that individuals who are deprived of their liberty may be vulnerable in that they may not be able to resist incursions upon their dignity in the same way as members of the general community.[830]

Moreover, as the Court of Appeal noted, given that the provision applies to persons deprived of their liberty, hardship or constraints that are *intrinsic to the loss of liberty* do not engage the dignity right.[831]

Furthermore, the *dignity right* has to be considered having regard to the *justification requirement* in s 7(2).

It was contended in the appeal, inter alia, that the primary judge had misunderstood, misinterpreted or misapplied s 22(1) of the *Charter.*[832]

The Court of Appeal accepted that the procedures used in respect of the urine tests and strip searching were highly intrusive and limited the inherent dignity of the prisoner.[833]However, it was held that the primary judge had properly granted relief in respect of the strip searches but not in respect of the random urine tests.[834]

In *CS* a number of human rights protections, including section 22 were considered in an application for a detention order. The Court declined to make a detention order but made a supervision order.[835]

In *Vlahos* an application was made for the exclusion of evidence, including on the ground that a pre-sentence psychological report was obtained in a manner that was incompatible with *Charter* rights, including s 22(1).[836]The application was unsuccessful.

In *Gebrehiwot* various human rights grounds were relied on, including s 22, in proceedings for damages for battery and false imprisonment following an arrest by police. An application for leave to appeal to the Court of Appeal was made after a jury trial. Leave was granted, the appeal was allowed on several grounds and a re-trial was ordered. The trial judge had not allowed the jury to consider the *Charter* claims in considering damages. The Court of Appeal held that the trial judge was correct to conclude that a breach of s 38 could not found a claim for damages and that the prohibition on damages in the *Charter* is unequivocal and precluded statutory monetary compensation[837]

In relation to the 'dignity' rights in the *Charter* the Court referred to the discussion by Emerton J in *Castles*[838] (discussed below).[839]

In *Rowson*[840] s 22 was invoked, along with other grounds, in proceedings brought by a prisoner seeking release from prison on health grounds given the risk of contracting COVID-19. The application was unsuccessful, including because no diagnosis of an infected person in prison had occurred and Corrections Victoria had taken steps to guard against the entry of the virus into the prison and control it if it did enter.[841]

The establishment of a youth justice centre and a youth remand centre within a section of an adult maximum-security gaol was challenged on a number of human rights grounds, including s

22. This gave rise to proceedings at first instance before Garde J,[842] judicial review proceedings before the Court of Appeal[843] and further proceedings before Dixon J following further orders made by the Governor in Council.[844]

In the proceedings before Dixon J orders were sought by children seeking their removal from the unit established within an adult maximum-security prison to a place of lawful detention on the ground that their place of detention was not lawful for children on remand or who had been sentenced under legislation applicable to children and youths.

Amongst other findings the Dixon J concluded that:

> The relevantly engaged rights that were limited in a way that was unreasonable and not demonstrably justified were the s 22(1) right to humane treatment when deprived of liberty and the s 17(2) right of children to such protection as is in their best interests.[845]

In considering the 'proportionality' of the limits on such rights, Dixon J concluded that certain limits on rights (arising out of the *Weapons Exemption*) were demonstrably justified as reasonable.[846]

The question of whether proper consideration had been given to relevant human rights in the making of certain orders was considered. Dixon J held that the Minister's 'balancing exercise' fell short of the required statutory standard.[847] Consequently, various orders were held to be unlawful, for example, decisions to establish Grevillea Unit as a remand centre and a youth justice centre. The Court ordered that the State of Victoria and Secretary to the DHHS be restrained from detaining children at the Grevillea Unit.[848]

---

[830] *Thompson v Minogue* [2021] VSCA 358 [63].
[831] Ibid [66].
[832] Ibid [104][229].
[833] Ibid [243].
[834] Ibid [13].
[835] *Director of Public Prosecutions v CS* [2021] VSC 686.
[836] *Director of Public Prosecutions v Vlahos (Ruling No 2)* [2021] VCC 1519; *Vlahos v Director of Public Prosecutions (Vic) (Ruling No 1)* [2021] VCC 1520.
[837] *Gebrehiwot v State of Victoria* (2020) 287 A Crim R 226 [132] [133].
[838] *Castles v Secretary, Department of Justice* (2010) 28 VR 141.
[839] *Gebrehiwot v State of Victoria* (2020) 287 A Crim R 226 [140].
[840] *Rowson v Department of Justice and Community Safety* (2020) 60 VR 410.
[841] Ibid [94].
[842] *Certain Children v Minister for Families and Children* (2016) 51 VR 473. Garde J held that the relevant orders made by the Governor in Council were invalid.
[843] Minister for Families and Children v Certain Children (2016) 51 VR 597. The Court of Appeal upheld the decision of Garde J.
[844] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; 266 A Crim R 152.
[845] Ibid [449]. See also [476].
[846] Ibid [488].
[847] Ibid [492].
[848] Ibid [505], [569].

In *Sloan*[849] VCAT dealt with an application for summary dismissal of a proceeding by a prisoner alleging discrimination and vilification on the basis of religious belief or activity. The Tribunal considered the jurisprudence in respect of *Charter* claims that are alleged to be 'colourable' (i.e., made for the improper purpose of fabricating jurisdiction [850]),misconceived or lacking in substance. The application for dismissal of the proceeding was granted.

In *Cruse*[851] substantial damages, including aggravated and exemplary damages were awarded to a plaintiff of Aboriginal descent following misuse of police powers, including assault and battery, which was said to be 'a shocking departure' from the standards expected of police.

In *AXB*[852] a defendant found not guilty of criminal charges on the ground of mental impairment and the Court considered whether a custodial or non-custodial supervision order was appropriate. Issues arose as to the availability of various alternatives for clinical and psychiatric oversight and whether proposer consideration had been given to rights under s 22(1) of the *Charter.*

A decision to refuse a prisoner access to Tarot cards was unsuccessfully challenged on various human rights grounds, including s 22, in *Haigh*.[853]

In *HL*[854] an application for bail by a child gave rise to a number of human rights issues, including under s 22(1). As Elliott J noted:

> While the scope of s 22(1) of the Charter, and its potential limitation, has not been considered in any detail by this court against particular facts of detention, concern has been expressed that certain conditions of detention may fall short of the standard required by s 22(1). For example, in *Dale v Director of Public Prosecutions*, the Court of Appeal noted that the conditions of detention of a dangerous prisoner, which included solitary confinement, strip searches and shackling with leg irons when out of the unit, might raise questions under s 22(1), though it declined to express a view on the matter. (footnotes omitted)[855]

Comparative jurisprudence on the right to humane treatment when deprived of liberty was considered in *De Bruyn*.[856] In that case the Court considered whether a smoking ban engaged an involuntary mental health patients' right under s 22(1) and whether a hospital in adopting a smoke free policy had given proper consideration to relevant human rights and found that the policy had been imposed for health and rehabilitative purposes and that its adoption following extensive consultation was not inhumane[857].

---

[849] *Sloan v State of Victoria (Human Rights)* [2021] VCAT 933.
[850] See e.g., *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219; *Keir v Robertson* [2019] VSC 422 [101].
[851] *Cruse v State of Victoria* (2019) 59 VR 241.
[852] *Director of Public Prosecutions v AXB* [2019] VSC 526.
[853] *Haigh v Ryan* [2018] VSC 474.
[854] *Application for Bail by HL (No 2)* [2017] VSC 1.
[855] Ibid [127].
[856] *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647.
[857] Ibid [131], [182].

In *Bare*[858] the Court of Appeal considered an appeal[859] arising out of the rejection by the Office of Police Integrity of an application by the appellant to investigate a complaint of mistreatment by police officers. This gave rise to consideration of, inter alia: whether the failure to investigate was in breach of the *Charter*; whether the duty of public authorities under the *Charter* was applicable; whether a decision or act of a public authority in breach of the *Charter* was a jurisdictional error ; the application and scope of a privative clause and whether there was an implied procedural right to effective and independent investigation of complaints of breaches of human rights. By majority (Tate and Santamaria JJA), the appeal was allowed, with Warren CJ in dissent. In their judgments, Tate and Santamaria JJA touch on aspects of s 22.In JPH[860] Forrest J determined that the regime for the management of detention order prisoners was not inconsistent with provisions of the *Charter*, including s 22.

In *Castles*[861] the facts and outcome have been summarised as follows: … the plaintiff was a prisoner in a minimum-security prison who, before her conviction, had been receiving in vitro fertilisation ('IVF') treatment for more than one year. For each cycle of IVF, the treatment involved self-administration of a number of drugs and three or four visits to the Melbourne IVF clinic. The treating doctor considered that the plaintiff needed to have the treatment without delay because she would become ineligible for treatment at the clinic at the age of 46 and she was 45 at the time of the litigation. By the time she was due to become eligible for home detention it would be too late for her to undergo a cycle of IVF treatment at the clinic. Due to the nature of the prison and her classification as a low-security prison she was able to go on trips outside of the prison with an accompanying officer and she was entitled to leave the prison on unaccompanied trips. From the time she started serving her term of imprisonment, the plaintiff made numerous requests for the approvals and permits needed to continue her IVF treatment while she was in prison, at her own expense. The Secretary of the Department of Justice decided not to issue the permits required by the plaintiff to leave the prison to obtain the treatment. Emerton J found that the right under s 22 of the *Charter* for persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, which she described as 'the dignity right', encompassed access to health services available to the wider community without discrimination on the ground of their legal situation. This was so because the dignity right entailed that prisoners should not be subjected to hardship or constraint other than the hardship or constraint that resulted from their deprivation of liberty. Although the enjoyment of those rights might necessarily be compromised by the fact of incarceration, s 47(1)(f) of the *Corrections Act 1986* provided that every prisoner had the right to have access to reasonable medical care and treatment necessary for the preservation of health. Emerton J held that, in the circumstances of the case, access to IVF treatment was both reasonable and necessary for the plaintiff's reproductive health, although this might not necessarily involve access to the Melbourne IVF clinic

[858] *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129; 326 ALR 19. See also *Bare v Small* [2013] VSC 129.
[859] In the proceeding below, a judge of the Trial Division had rejected the application for judicial review of the decision: *Bare v Small* [2013] VSC 129.
[860] *Director of Public Prosecutions v JPH (No 2)* (2014) VSC 177; 239 A Crim R 543.
[861] *Castles v Secretary of Department of Justice* (2010) 28 VR 141.

if the IVF treatment could be provided closer to the prison at an alternative location.[862]Emerton J gave detailed consideration to s 22 and various parts of the judgment have been referred to with approval in subsequent cases, including a number of those referred to above.[863]

11.12.3 Queensland

Section 30 of the Queensland *Human Rights Act* provides for rights to humane treatment when deprived of liberty. As has been noted in a number of cases dealing with the Victorian *Charter,*[864] this to some extent overlaps with the provisions providing protection from torture and cruel, inhuman or degrading treatment (s 17 of the Queensland legislation). These have been referred to in the following terms: 'they are not simply different points of seriousness on a continuum, but identify distinct, though overlapping rights'.[865]

In *Owen-Darcy*[866] Martin J agreed with the description of similar provisions in the Victorian *Charter* by Emerton J in *Castles* 'to the effect that s 17(b) prohibits bad conduct towards any person (imprisoned or not) while s 30 mandates good conduct towards people who are incarcerated.'[867]In *Owen-D'Arcy* judicial review proceedings arose out of a decision to issue a maximum-security order and a no association direction. As noted above, one issue that arose was as to the existence of a right to 'residual' liberty whilst incarcerated.

In considering the nature of the human right in s 30 Martin J noted that:

> [t]o be treated humanely requires some level of benevolence or compassion and the infliction of the minimum of pain.
>
> … A necessary consequence of deprivation of liberty is that some rights enjoyed by other citizens will be unavailable or compromised.'[868]

11.13 Children in the criminal process

In each of the three jurisdictions separate rights are provided for in respect of children involved in the criminal process.

11.13.1 The Australian Capital Territory

Section 20 of the ACT *Human Rights Act* provides for the separation of children from accused adults, treatment that is appropriate to the child's age; expedition in bringing the matter to trial and appropriate treatment for those convicted having regard to the child's age.

---

[862] Per Tate JA in *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129 [278].
[863] Particular paragraphs cited with approval include: [31][52][53][54][108][109][113][152][161][165].
[864] See e.g., the decision of Richard J in *Minogue v Thompson* [2021] VSC 56 and the appeal *Thompson v Minogue* [2021] VSCA 358.
[865] Martin J in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 at [179] citing the observation of Elias CJ in the New Zealand case of *Taunoa v Attorney General* [2008] 1 NZLR 429 at [97].
[866] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [180]
[867] *Castles v Secretary to the Department of Justice* 28 VR 141 [180].
[868] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [245].

The requirement to bring cases to trial 'as quickly as possible' has been considered in a number of cases.[869]

11.13.2 Victoria

The rights of children in the criminal process are set out in s 23 of the Victorian *Charter*. This has been invoked in a number of cases including:

- applications for bail, [870] and directions aiming to ensure Courts are cognizant of intersectional discrimination and its impacts when handling bail applications made by young accused persons from the Aboriginal community and people with intellectual disability[871]
- the establishment of a youth justice centre and a youth remand centre and gazettal of a section of a men's prison for this purpose [872]
- in determining suitable arrangements for detention when at court and ensuring effective support and participation of an accused young person in the criminal process [873]
- child protection proceedings, for example involving decisions about whether children should be taken away from parents[874]
- in a challenge to a decision of a Magistrate alleged to have failed to have regard to the requirement to bring proceedings to trial as quickly as possible.[875]

11.13.3 Queensland

Section 33 of the Queensland *Human Rights Act* provides for rights in respect of children the criminal process. At the time of writing it does not appear to have been the subject of any reported decisions.

11.14 Fair trial/hearing[876]

---

[869] See e.g., *LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the Act* [2014] ACTSC 26; *TM v Karapanos* (2011) 250 FLR 366*; Perovic v CW*, ACT Children's Court, unreported (1 June 2006).

[870] *Re IH* [2020] VSC 325; *DPP v SE* [2017] VSC 13; *Application for Bail by HL (No 2)* [2017] VSC 1.

[871] *DPP v SE* [2017] VSC 13 [28] It is necessary for the court to recognise that different forms of discriminatory disadvantage and vulnerability may be experienced by Aboriginal persons, children and persons with intellectual disability and that someone who is disadvantaged and vulnerable in all three discriminatory respects is in a position of exacerbation.

[872] *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; 266 A Crim R 152.

[873] *DPP v SL* (2016) 263 A Crim R 193.

[874] *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 [152]: The rules of natural justice and … right to a fair hearing require the court to adopt a procedure which is appropriate in the circumstances, having regard to those best interests and a balanced consideration of the other interests [211]: what will be required to afford a fair hearing to a child in a protection proceeding will depend on the capacity of the child, the nature of the proceeding, the issues at stake and the circumstances of the case.

[875] *C v Children's Court of Victoria* [2015] VSC 40.

[876] In Queensland 'trial' is defined in the dictionary to mean the hearing of a charge, including a committal proceeding, or a proceeding in which a person is to be sentenced.

11.14.1 **The Australian Capital Territory**

Section 21 of the ACT *Human Rights Act* provides for the right to a fair trial.[877] This is also a fundamental right recognised by common law. The right applies to both civil and criminal proceedings.[878]

This does not encompass a 'right' to trial by judge alone[879] or give rise to an abrogation of the the right of access to a court or a fair trial where there is an absence of legal representation.[880]

It does, however, encompass a right to a trial without unreasonable delay.[881]

The right may be relevant in considering an application for leave to appeal.[882]

The procedural rights in criminal proceedings set out in s 22(2) *Human Rights Act* (discussed below) form a subset of the overarching substantive right contained in s 21. These provisions are related to the right to equality before the law in s 8 (discussed above).

In *Griffin*[883] the ACT Court of Appeal considered an application for a permanent stay of criminal proceedings. At first instance the defendant had achieved a stay by arguing that a crucial piece of evidence (a shirt) had been lost by the police and that he was irretrievably prejudiced. The Court referred to the right to a fair trial in s 21 but then went on to apply the discretion with respect to such stay applications according to well established principle. It held that the trial could proceed as long as certain directions were given to the jury. An application for special leave to the High Court was refused.[884]

In *Upton*[885] Connolly J considered a stay application arising out of delay. His Honour examined overseas authorities including English cases involving the UK *Human Rights Act 1998.* Although a stay was granted the prosecution was permitted to proceed with the case if it paid the costs arising out of the abandonment of two previous trial dates through no fault of the accused.

---

[877] Based on art 14 of the *ICCPR* and reflecting art 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (the *European Convention on Human Rights*).
[878] See *Capital Property Projects (ACT) Pty Ltd v Australian Capital Territory Planning and Land Authority* [2008] ACTCA 9 at [38] and the cases referred to.
[879] See *R v Girvan* [2012] ACTSC 142; *R v Fearnside* (2009) 3 ACTLR 25. See also Jodie O'Leary, 'Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT' (2011) 10(3) *Canberra Law Review* 30.
[880] *Commonwealth of Australia v Davies Samuel Pty Ltd* [2008] ACTSC 76.
[881] See e.g., *Foote v Somes* [2012] ACTSC 63 on a proportionality test for an appropriate remedy to breach of the right to a trial without unreasonable delay.
[882] See *Bloc (ACT) Pty Ltd v Crafted Holdings Pty Ltd* [2021] ACTCA 37; *Arrow International Australia Ltd v Group Konstrukt Pty Ltd* (2012) 7 ACTLR 48 at [58]; *Potts v The Queen* (2019) 343 FLR 296; *Barlow v Law Society of the ACT* [2018] ACTCA 16; *R v DL* [2018] ACTCA 9; *Quach v Butt* [2017] ACTCA 4; *Piscioneri v Reardon* [2016] ACTCA 33; *Macedonian Orthodox Church Incorporated v ACT Planning and Land Authority* (2015) 208 LGERA 434.
[883] *R v Griffin* [2007] ACTCA 6.
[884] *Griffin v The Queen* [2008] HCATrans 72.
[885] *R v Upton* [2005] ACTSC 52.

The application of s 21 to prison disciplinary proceedings was considered in *Islam*.[886]According to the Court:

> What is required is an evaluative assessment of all the circumstances to see whether the conduct amounts to a contravention of the right as described is s 21(1) of the *Human Rights Act*. That results in a flexible standard and the Court's task is to consider all the relevant factors in giving content to that standard.[887]

Given that strike out applications may deprive a party of a full hearing on the merits, it has been held that such applications are to be treated with caution.[888]

In *Cunningham* the right to a fair trial was invoked in an application by an accused for a separate trial from two co-accused.[889]

In other instances, the right has been relied upon in:

- applications for a stay or proceedings[890]
- a challenge to the suspension of the registration of a psychologist[891]
- cases involving questions of access by accused persons to evidence of restricted confidences[892]
- proceedings involving the question of whether sentencing legislation was incompatible with provisions of the *Human Rights Act*[893]
- judicial review proceedings arising out of a revocation of parole[894]
- proceedings arising out of a refusal to stay of proceedings[895]
- an application for a stay of proceedings due to the delay in establishing professional standards panels to inquire into complaints about a medical practitioner.[896]

11.14.2 Victoria

Section 24 of the Victorian *Charter p*rovides for a right to a fair hearing. This has been considered in over 130 cases in the period to the end of 2023. Cases in which this right has been invoked include:

---

[886] *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33.
[887] Ibid [110].
[888] *Applicant 201943 v The School* [2021] ACAT 3 [28]. See also *Cheluvappa v University of Canberra* [2018] ACAT 108 [41]; *Gindy & Chief Minister & ACT Government and* Ors [2011] ACAT 67 [27]; *Mewett v University of Canberra* [2018] ACAT 61.
[889] *R v Cunningham*; *R v Moarefi* [2020] ACTSC 24.
[890] See e.g., *R v Watson (No 2)* (2019) 349 FLR 233.
[891] *Kaye v Psychology Board of Australia (Occupational Discipline)* [2017] ACAT 27.
[892] *R v NS* (2016) 12 ACTLR 64; 315 FLR 26.
[893] *Eastman v Australian Capital Territory* (2014) 9 ACTLR 119; 285 FLR 325.
[894] *Luke Marsh v Australian Capital Territory* (2014) 288 FLR 116.
[895] *LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the Act* [2014] ACTSC 26.
[896] *Dr Andrew Foote v Michael Somes, Warren Johnson, Dr Catherine Sansum Acting as Professional Standards Panel and Medical Board of the Act and Act Human Rights Commission* [2012] ACTSC 63.

- judicial review of a Magistrates' court decision to impose an imprisonment order in the case of a person with intellectual disability who had unpaid fines. A court must consider before making an imprisonment order whether there are special or exceptional circumstances which would justify the making of orders of less severity.[897]
- judicial review of a Children's Court determination that two children were not mature enough to be represented on a direct instructions basis[898]
- proceedings arising out of the failure of the Mental Health Review Board to conduct a review of involuntary and community treatment orders[899]
- an application for a coercive powers order to compel a person to attend before the Chief Examiner to provide evidence.[900]
- an appeal of a ruling to stay a criminal trial posing a substantial risk of improper conviction[901]
- an application to facilitate obtaining overseas documents by a defendant in a criminal case[902]
- judicial review of a decision of VCAT declining to appoint a professional advocate or other person to represent the plaintiff[903]
- an application for leave to appeal against orders dismissing an application for a grant of probate[904]
- judicial review of administrative decisions by prison authorities to refuse an application for permission to purchase a laptop computer and equipment[905]
- judicial review proceedings arising out of the striking out of a statement of claim in the Magistrates' Court[906]
- an unsuccessful attempt to rely upon *Charter* rights in challenging a decision of a Board of Inquiry by a person who was not a party[907]
- proceedings alleging a failure by the Crown to disclose to the accused relevant material[908]
- proceedings arising out of the refusal of an application for an adjournment[909]
- proceedings arising out of a refusal of an application for a private security license[910]

---

[897] *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37 [253]; *Taha v Broadmeadows Magistrates' Court & Ors* [2011] VSC 642 [61]: the right to liberty and the right to a fair hearing require consideration of whether imprisonment is reasonable in all the circumstances.
[898] *A & B v Children's Court of Victoria & Ors* [2012] VSC 589.
[899] *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646
[900] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381.
[901] *The Queen v Chaouk & Ors* [2013] VSCA 99 [22] Citing Mason CJ and McHugh J in *Dietrich*: the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial.
[902] *BA v Attorney-General* (2017) 266 A Crim R 497.
[903] *Tomasevic v All States Legal Co Pty Ltd t/as Nowicki Carbone* [2021] VSC 815.
[904] *Carroll v Goff* [2021] VSCA 267.
[905] *Minogue v Falkingham* [2021] VSC 185.
[906] *She v RMIT University* [2021] VSC 2
[907] *Draper v Building Practitioners Board* [2020] VSC 866
[908] *Roberts v The Queen* [2020] VSCA 277.
[909] *John (Jack) Russell v Simon Eaton and County Court of Victoria* [2020] VSCA 249.
[910] *Wut v Victoria Police* [2020] VSC 586.

- claims by prisoners that the right of access to the courts extends to unfettered access to computer facilities[911]or supervised internet access[912]
- a case in which it was held that the discretion on the part of the Attorney General as to whether to refer a case to the Court of Appeal is neither a civil or criminal proceedings and therefor does not attract the operation of s 24 of the Charter[913]
- proceedings in which questions arose as to whether the court or tribunal gave persons a reasonable opportunity to present their case[914]
- an appeal in a criminal case arising out of the refusal of the trial judge to grant a stay of the proceeding[915]
- claims that self-represented litigants had been denied a fair hearing[916] for example, self-represented litigants with disability or whose first language is not English
- a proceeding in which it was contended that s 24(1) requires strict compliance with the rules of evidence[917]
- a challenge to the validity of legislation that can lead to forfeiture of property without a guarantee of an *inter partes* hearing[918]
- an appeal from a conviction of a driving offence on the basis of a preliminary brief after the person failed to appear[919]
- an application by a person declared to be a vexatious litigant to set aside the Court's orders declaring him to be such[920]
- class action proceedings in which issues arose as to the nature and exercise of judicial power in respect of settlements approved by the Court[921]
- an appeal from a summary judgment following a refusal to grant an application for an adjournment[922]

---

911 *Knight v Sellman* [2020] VSC 320.
912 *Rich v Howe* [2017] VSC 483.
913 *Zhong v Attorney-General* [2020] VSC 302.
914 *Marijancevic v Page* [2020] VSC 68; *Austin v Dwyer* [2019] VSC 837; *Goode v Common Equity Housing Ltd* [2019] VSC 841.
915 *Hague v The Queen* [2019] VSCA 218.
916 *Chopra v Department of Education and Training* [2019] VSC 488; *Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* [2017] VSC 646. In *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, Bell J observed that self-represented litigants are usually disadvantaged in legal proceedings and effective participation can be substantially diminished by disability. Consequently, a judge has a duty to ensure a fair trial by providing due assistance. [114] [130] [146] *Citing Tomasevic v Travaglini* [2007] VSC 337: [132] This case provides important guidance for a court when encountering self-represented litigants to ensure a fair hearing, especially where litigants have cognitive disability or when their first language is not English. See also *Trkulja v Markovic* [2015] VSCA 298 [32]–[43].
917 *LG v Melbourne Health* [2019] VSC 183.
918 *Nguyen v Director of Public Prosecutions* (2019) 59 VR 27; 276 A Crim R 215; 342 FLR 452.
919 *Kinnersly v Johnson* (2018) 58 VR 214.
920 *Attorney-General for the State of Victoria v Kay* [2009] VSC 337 discussed in *DBE17 v Commonwealth of Australia* (2018) 361 ALR 423 [116].
921 *Bendigo and Adelaide Bank Ltd v Laszczuk* (2018) 129 ACSR 386.
922 *Deputy Commissioner of Taxation (Cth) v Bourke* [2018] VSC 380.

- a challenge to the determination that applications for leave to appeal needed to be determined without notice to the convicted individuals where there was an issue as to the identity of a police informer and a threat to her life[923]
- an appeal in which it was contended that there had not been a fair trial of a civil action as a party had not been put fairly on notice that a particular legal claim was being relied upon[924]
- an appeal from a decision refusing an application for parole.[925]

In *Davies*[926] the Court of Appeal noted that s 24 created a right to legal representation but that this was only reflective of the common law. It was further noted that in a criminal trial it is not unfair if the defendant is unrepresented because he or she persistently neglects or refuses to take advantage of legal representation that is available.

11.14.3 Queensland

Section 31 of the Queensland *Human Rights Act* provides for the right to a fair hearing.

Cases in which this provision has been considered include:

- tribunal proceedings in which the question of whether the exclusion of the public and media from the hearing and the making of non-publication orders were compatible with human rights[927]
- criminal proceedings where issues arose as to the right to access protected counselling communications and the interplay between evidentiary provisions and human rights[928]
- numerous proceedings of QCAT where the hearing was held in private[929]
- a challenge by an unsuccessful candidate for mayor to the decision to hold an election seeking the quashing of the result by the Court of Disputed Returns[930]
- proceedings in which questions arose as to the making of interim orders, in cases of urgency, without a hearing[931]
- an application for a stay of a criminal proceedings contending that the prosecution is likely to result in an unfair trial.[932]

[923] *AB v CD & EF* [2017] VSCA 338.
[924] *Cresswell v Cresswell* [2017] VSCA 272.
[925] *Manuel Defrutos v The Queen* [2016] VSCA 24.
[926] *Davies v The Queen* [2019] VSCA 66 [427]. Seals *Slaveski v Smith* (2012) 34 VR 206.
[927] *LO v Director-General, Department of Justice and Attorney-General* [2022] QCAT 16. See *also PIM v Director-General, Department of Justice and Attorney-General* [2020] QCAT 188; *MAP v Director-General, Department of Justice and Attorney-General* [2020] QCAT 527.
[928] *TRKJ v Director of Public Prosecutions (Qld)*; *Kay v Director of Public Prosecutions* (Qld) [2021] QSC 297.
[929] See e.g., *SFV v Director-General, Department of Justice and Attorney-General* [2021] QCAT 223.
[930] *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623.
[931] *DHA* [2020] QCAT 325.
[932] *Volkers v R* [2020] QDC 25.

11.15 Rights in criminal proceedings

11.15.1 The Australian Capital Territory

Section 22 of the ACT *Human Rights Act* sets out a number of rights in criminal proceedings encompassing the rights:

- to the presumption of innocence (s22(1))
- to be told promptly and in detail, in a language he or she understands, the nature and reasons for the charge (s22(2)(a))
- to adequate time and facilities to prepare a defence and to communicate with lawyers or advisers (s22(2)(b))
- to trial without reasonable delay (s22(2)(c))
- to be tried in person and to defend in person or through legal assistance (s22(2)(d))
- to be told about the right to legal assistance (s22(2)(e))
- to have legal assistance provided, if it is in the interests of justice, without payment if he or she cannot afford to pay (s22(2)(f))
- to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses under the same conditions as prosecution witnesses (s22(2)(g))
- to have the free assistance of an interpreter if unable to understand or speak the language in court (s22(2)(h))
- not to be compelled to testify against him/her self or to confess guilt (s22(2)(h)(i))
- if a child: to a procedure that takes account the child's age and the desirability of promoting rehabilitation (s 22(3))[933]
- to have a conviction and sentence reviewed by a higher court in accordance with law (s22(4)).

The ACT Supreme Court has observed that the right to a fair trial protected by the common law prior to sections 21 and 22 being enacted largely conforms with the recognition of the right to a fair trial in those provisions.[934]

The specified rights in criminal proceedings overlap with a number of other human rights provided for in the legislation, including the overarching right to a fair trial in s 21. The right of a person charged with a criminal offence is entitled to be tried without unreasonable delay (s22(2)(c)) overlaps with the right to liberty and security of person (s18(4)).

Recent cases in which the rights in criminal proceedings have been invoked include:

- proceedings in which the failure of the prosecution to record and keep a record of the applications for search warrants and the reasons for issuing the warrants resulted in a

[933] The common law also encompasses the need for rehabilitation of young offenders. See *R v Voss* [2003] NSWCCA 182; ; *KT v R* (2008) 182 A Crim R 571 at [22]-[23]; *R v BM* (Unreported, Supreme Court of the ACT, 29 October 2012, Refshauge J).
[934] *Hakimi v Legal Aid Commission (ACT)* [57]-[60]; see also *R v Will* [2017] ACTSC 356 [347].

lack of access to relevant information and an alleged lack of procedural fairness precluding judicial review[935]

- cases and appeals in respect of sentences imposed on young offenders[936]
- proceedings in which the Court appointed an intermediary for the complainant[937]
- criminal proceedings ordered to proceed by way of judge alone during the COVID-19 crisis[938]
- an application for judicial review of a decision to refuse an application for a grant of legal aid for a special leave application to the High Court[939]
- applications for a permanent stay of criminal proceedings[940]
- applications for leave to appeal out of time[941]
- appeals against conviction[942]
- a case in which a question arose as to whether the Attorney-General should make a request for mutual assistance on behalf of the defendants to obtain documents overseas[943]
- proceedings in which a question arose as to whether an appellant had an enforceable right to be provided with legal representation at public expense on an appeal[944]
- an appeal in which it was contended that the appellant had been denied a fair trial because he was denied the opportunity to cross-examine a victim[945]
- proceedings in which questions arose as to whether finding an offence 'proved' amounted to a 'conviction' such as to give rise to a right to appeal [946]
- a case in which a prisoner sought orders that he be permitted legal advisory visits from another prisoner for the purpose of an appeal against sentence[947]
- an application to withdraw a plea of guilty on the basis of alleged duress to enter a plea[948]
- proceedings in which it was contended that prisoner had a right to access a personal computer, documents, faxes and access to the Austlii website for the purposes of an appeal[949]

---

[935] *Zeltner v Deputy Registrar of the Supreme Court of the Act* [2021] ACTSC 276.
[936] See e.g., *MT v The Queen* [2021] ACTCA 26; *R v BS-X* (2021) 16 ACTLR 238*; R v KS*; *R v KN*; *R v KI* (No 2) [2021] ACTSC 23; *R v KN* [2020] ACTSC 218; *KN v Frizzell* [2020] ACTSC 217.
[937] *R v QX (No 2)* [2021] ACTSC 244.
[938] *R v Vunilagi*; *R v Vatanitawake*; *R v Masivesi*; *R v Macanawai* (2020) 354 FLR 452; *R v IB (No 3)* (2020) 15 ACTLR 161; 282 A Crim R 532; 352 FLR 103.
[939] *Gillies v Legal Aid Commission New South Wales* [2020] NSWSC 505.
[940] *R v Watson (No 2)* (2019) 349 FLR 233; *R v Kalachoff (No 3)* [2019] ACTSC 264; *R v Chute (No 4)* (2018) 337 FLR 222.
[941] *Potts v The Queen* (2019) 343 FLR 296; *Aroub v The Queen* [2018] ACTCA 13.
[942] See e.g., *Stubbs v The Queen* [2017] ACTCA 58.
[943] *BA v Attorney-General* (2017) 266 A Crim R 497; 319 FLR 329.
[944] *Achanfuo-Yeboah v The Queen* [2016] ACTCA 71.
[945] *PM v Beck* [2016] ACTSC 314.
[946] *Parkinson v Alexander* (2016) 11 ACTLR 190; 258 A Crim R 278; *Bloxham v Wyte* (2013) 278 FLR 365.
[947] *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70.
[948] *Ayala v Poole* [2016] ACTSC 63.
[949] *Islam v Director-General, Justice and Community Safety Directorate* [2015] ACTCA 60.

- an appeal from a finding in which the Court held that it had no jurisdiction to hear an appeal from a refusal to vary a disqualification period imposed for a drink-driving offence[950]
- proceedings in which it was contended that the right to a speedy trial had been infringed[951]
- proceedings in which the right to an expeditious hearing and the right to legal representation by counsel of choice were in conflict[952]
- proceedings in which a questions arose as to whether the right to a fair hearing was displaced by domestic violence legislation providing for a right to obtain a protection order in the absence of a party and the right of a child to be represented by an adult guardian[953]
- an application for a stay of sentence and release on bail.[954]

11.15.2 Victoria

Section 25 of the Victorian *Charter* specifies various rights in respect of criminal proceedings similar to those contained in s22 of the ACT *Human Rights Act* which are referred to above.

Proceedings in which this right has been relied upon or referred to include:

- a criminal appeal in which a question arose as to whether the right to have a conviction and sentence reviewed by a higher court includes a right of *de novo* appeal[955]
- cases in which trial delays (including arising out of the COVID-19 crisis) were contended to weigh in favour of release on bail[956] or a permanent stay of the proceedings[957]
- proceedings by a prisoner contending that access to a laptop computer was necessary for the purpose of preparing legal matters and communication with lawyers[958]
- a case in which the limitations on the use of coercively obtained information was considered[959]
- an appeal from a conviction for murder where a question arose as to whether the form of the indictment (encompassing two charges for the one offence) may have not complied

[950] *Burow v The Queen* (2015) 11 ACTLR 157.
[951] *The Queen v Thomson (No 3)* [2015] ACTSC 379; *R v Forsyth* (2013) 281 FLR 62; *Nona v The Queen* [2012] ACTCA 55; *Russell v Pangallo* [2012] ACTMC 4.
[952] *R v GZ* (2012) 229 A Crim R 1.
[953] *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125.
[954] *Achanfuo-Yeboah v The Queen* [2016] ACTCA 71.
[955] *Mokbel v County Court of Victoria* [2021] VSC 191.
[956] See e.g., *Re Shea* [2021] VSC 207; Re *Raffoul* [2020] VSC 848; *DPP (Cth) v Barbaro* (2009) 20 VR 717; 193 A Crim R 369. See also *Tilley v The Queen* (2008) 83 ALJR 233; 251 ALR 367.
[957] See e.g., *Director Of Public Prosecutions and Respondent v BDX (No 2) - and – Attorney-General for the State Of Victoria and Intervener* (2010) 27 VR 536.
[958] *Minogue v Falkingham* [2021] VSC 185.
[959] *Midson v State of Victoria (Ruling)* [2021] VSC 120 [19].

with the requirement for accused persons to be informed of the case he or she has to meet[960]

- judicial review proceedings including the question of whether the accused must be present when consent to summary jurisdiction is entered[961]
- applications for trial by judge alone given the delays in jury trials[962]
- an appeal in which the question of whether a notice of alleged incriminating conduct must be served by the prosecution in summary trials as well as jury trials was considered[963]
- proceedings for judicial review of the decision of the Attorney-General rejecting a petition for mercy and declining to refer the matter to the Court of Appeal[964]
- judicial review proceedings arising out of an unsuccessful application for the trial judge to recuse himself on the grounds of reasonable apprehension of bias[965]
- applications for bail[966]
- a case in which international jurisprudence in respect of 'equality of arms' was utilised to in considering the rights in s 24(1) and s 25 of the *Charter*[967]
- proceedings in which the question arose as to whether legislation which placed an evidential burden on any person found loitering to adduce or identify evidence of reasonable excuse infringed the presumption of innocence[968]
- judicial review proceedings arising out of a decision of the Magistrates' Court not to transfer a matter to the Koori Court[969]
- criminal proceedings in which the prosecution sought to adduce evidence of admissions made to police by an elderly Italian migrant with only partial English where he was interrogated by police without an interpreter[970]
- an application for an extension of time within which to commence judicial review proceedings arising out of enforcement orders following a failure to pay infringement penalties[971]
- an application of leave to appeal from a decision to make disclosures to convicted persons in respect of a police informer - the appeal sought to prevent disclosure that a barrister was a registered police informer while she acted for her clients[972]

---

960 *Duca v The Queen* (2020) 62 VR 214.
961 *Treloar v Richardson* (2020) 284 A Crim R 357.
962 *DPP v Verduci* [2020] VCC 1166; *DPP v Truong & Bui* [2020] VCC 806.
963 *Director of Public Prosecutions v Dyke* (2020) 61 VR 207.
964 *Zhong v Attorney-General* [2020] VSC 302.
965 *North (a Pseudonym) v The Queen* [2020] VSCA 1.
966 *Re Brown* [2019] VSC 751; *Re LD* (2019] VSC 457; *Application for Bail By HL (No 2)* [2017] VSC 1; *Application for Bail BY HL* [2016] VSC 750; *DPP v S E* [2017] VSC 13; *Dinh v Director of Public Prosecutions* (2015) VSC 31; *Woods v DPP* (2014) 238 A Crim R 84.
967 *Davies v The Queen* [2019] VSCA 66.
968 *Director of Public Prosecutions v Rayment* (2018) 57 VR 622; 275 A Crim R 486.
969 *Cemino v Cannan* (2018) 56 VR 480.
970 *Director of Public Prosecutions v Natale (Ruling)* [2018] VSC 339.
971 *Re Greco* [2018] VSC 175.
972 *AB v CD & EF* [2017] VSCA 338.

- judicial review of a decision by prison authorities to refuse an application by a prisoner for 'supervised internet access' for the purpose of an application to the High Court for special leave[973]
- an application by the defence for the purpose of obtaining documentary evidence in a foreign country[974]
- proceedings by children arising out of the use of a maximum-security adult gaol as a youth justice centre and youth remand centre[975]
- an application for a stay of proceedings where an accused under 17 at the time of the alleged offence was not charged until he was 19 and thus lost the opportunity for the matter to be determined in a Children's Court[976]
- appeal proceedings arising out of the refusal of persons being examined to answer questions and whether they could be punished for contempt[977]
- a case concerning the rights of a child charged with serious crimes in a superior court[978]
- judicial review proceedings arising out of offences whilst in prison including whether the prisoner had been denied natural justice and procedural fairness in connection with the hearing[979]
- judicial review proceedings in which the close connection between legal aid and human rights was considered[980]
- proceedings arising out of the decision of the Director of Police Integrity not to investigate a complaint of cruel, inhuman and degrading treatment[981]
- proceedings in which the legislative abrogation of the privilege against self-incrimination was considered[982]
- judicial review proceedings in which the right to have the free assistance of assistants and specialised communication tools and technology if a person has a communication or speech difficulties that require such assistance (s 25(2)(k)) was sought to be relied upon, along with other grounds arising out of the refusal of an adjournment[983]
- a challenge to the validity of a coercive powers order[984]

---

973 *Rich v Howe* [2017] VSC 483.
974 *BA v Attorney-General* (2017) 266 A Crim R 497.
975 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441.
976 *Earl Baker (a pseudonym)[1] v Director of Public Prosecutions , Attorney-General for the State of Victoria and Victorian Equal Opportunity and Human Rights Commission* (2017) 270 A Crim R 318.
977 *The Queen (on the application of the Chief Examiner) v Da (a pseudonym)[1]* (2016) 263 A Crim R 429.
978 *DPP v SL* (2016) 263 A Crim R 193.
979 *Kotzmann v Prison Supervisor E Wang* [2015] VSC 760.
980 *Bayley v Nixon and Victoria Legal Aid* [2015] VSC 744.
981 *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129; *Bare v Small* [2013] VSC 129.
982 *R v IBAC* (2015) 253 A Crim R 35. See *also R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459 [78].
983 *Macdonald v County Court of Victoria [*2013] VSC 109.
984 *R v Debono* [2013] VSC 407. See also *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415; 198 A Crim R 305.

- proceedings in which the question of whether the *Charter* gave rise to enforceable right to legal aid, independent of the exercise of discretion by a legal aid body[985]
- proceedings in the High Court on appeal from a declaration of the Court of Appeal that a statutory reversal of the burden of proof of possession of drugs cannot be interpreted consistently with the right to the presumption of innocence in the *Charter*[986]
- medical disciplinary proceedings in which a question arose as to whether the presumption of innocence applied at a hearing before the Medical Practitioners Board.[987]

11.15.3 Queensland

Section 32 of the Queensland *Human Rights Act* specifies numerous rights in respect of criminal proceedings similar to the provisions in the ACT and Victorian legislation. Section 33 makes separate provision for the rights of children in the criminal process.

Cases in which these provisions have been considered include:

- an application to require production of protected counselling communications[988]
- applications for trial before a judge, including during the COVID-19 pandemic[989]
- a challenge to a negative notice issued under working with children legislation.[990]

11.16 Compensation for wrongful conviction

The right to compensation for wrongful conviction at section 23 of the ACT *Human Rights Act* is unique to that Act. There is no comparable provision in the *Human Rights Act* (Qld) or Victorian *Charter*.

Section 23 provides:

> (1) This section applies if –
>
> a. anyone is convicted by a final decision of a criminal offence; and
> b. the person suffers punishment because of the conviction; and
> c. the conviction is reversed or he or she is pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
>
> (2) If this section applies, the person has the right to be compensated according to law.
> (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

[985] *Slaveski v Smith* (2012) 34 VR 206; 218 A Crim R 25.
[986] *Momcilovic v The Queen* (2011) 245 CLR 1.
[987] *Sabet v Medical Practitioners Board* (2008) 20 VR 414.
[988] *TRKJ v Director of Public Prosecutions (Qld)*; *Kay v Director of Public Prosecutions (Qld)* [2021] QSC 297.
[989] *R v Mitchell* [2020] QDC 89*; RTM v The Queen* [2020] QDC 93.
[990] *Jamie Luke Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152.

Until recently, there had been no direct judicial consideration of s 23 in the ACT, which is drawn from Article 14(6) of the *ICCPR*. In 2019, this changed with the delivery of judgment pursuant to s 23 for the plaintiff Mr David Eastman in a landmark compensation amount of $7,020,000.[991]

In *Eastman*, the requirements of ss 23(1)(a) and (b) were conceded by the defendant to be not in issue in the proceedings.[992] The defendant argued that Mr Eastman's conviction had not been 'reversed' and that he had not been subject of a 'miscarriage of justice' within the meaning of s 23(1)(c).[993]

The reversal argument relied on the fact that at the time that Mr Eastman commenced proceedings under s 23 the Full Court of the ACT Supreme Court had ordered, on the basis of defects in his original trial, that Mr Eastman's conviction for murder be quashed and he be re-tried. Mr Eastman was acquitted in that re-trial.[994] The defendant submitted that, Mr Eastman's conviction had not been 'reversed' as he could still have been re-convicted for murder.[995] Elkaim J found this without foundation, holding that '[w]hen the conviction was quashed it was reversed.'[996]

The defendant contended further that as Mr Eastman was ordered to be subject of a re-trial, his quashed conviction did not 'conclusively' show a miscarriage of justice because Mr Eastman could have been re-convicted.[997] The defendant's argument was rejected on three bases:

- Mr Eastman was ultimately acquitted by the re-trial, effectively endorsing the reversal of his conviction;[998]
- on his conviction being quashed, Mr Eastman returned to a position where he was innocent until proven guilty beyond reasonable doubt;[999] and
- the defendant's argument would unduly confine the scope of s 23 only to cases where new evidence showed the crime had been committed by a person other than the convicted, denying compensation for cases in which newly discovered facts establish the original trial had been improperly conducted so as to result in a miscarriage of justice.[1000]

Justice Elkaim also confirmed that the words 'new or newly discovered facts' in section 23(2)(c) should be read as meaning that the 'discovery and identification' of the facts forming the basis of the miscarriage of justice are required to be new.[1001] In the proceedings, this applied to the discovery, after the trial, that forensic evidence relied upon in Mr Eastman's original trial was

[991] *Eastman v the Australian Capital Territory* (2019) 14 ACTLR 195; 348 FLR 251.
[992] Ibid [88-89].
[993] Ibid [21].
[994] Of which Mr Eastman was subsequently acquitted: *Eastman v the Australian Capital Territory* [2019] ACTSC 280, at [2(h)].
[995] *Eastman v the Australian Capital Territory* (2019) 14 ACTLR 195; 348 FLR 251 at [22].
[996] Ibid [25].
[997] Ibid [28].
[998] Ibid [33].
[999] Ibid [34].
[1000] Ibid [35].
[1001] Ibid [36], [40].

flawed while the defendant had submitted that the flaws in the forensic evidence were not 'new or newly discovered' as they existed at the time of the original trial.[1002]

In considering the terms 'miscarriage of justice' in s 23, Justice Elkaim referred to Gleeson CJ's judgment in *Nudd v The Queen* as influential.[1003] In *Nudd v the Queen*, Chief Justice Gleeson explained that a miscarriage of justice ground embraces both 'outcome and process as requirements of justice according to the law' and that an 'unjust conviction is one form of miscarriage' while another 'is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just'.[1004]

The Court held that s23(2) entitled Mr Eastman to a cause of action for compensation, rejecting the Territory's contentions that the provision does not equate to a freestanding right to compensation and should be read as obliging the Territory to provide a remedy for wrongful conviction satisfiable by the availability of discretionary act of grace payments from the Government.[1005]

Prior to this, some commentators had suggested that s 23 should be read in light of *Lewis v Australian Capital Territory*, concerning the interpretation of s 18(7) of the ACT *Human Rights Act* which provides that anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention. In *Lewis*, Refshauge J found s 18(7) satisfied by the availability of remedies for the common law tort for false imprisonment rather than establishing an additional head of compensation under s 18(7).[1006]The hearing in that case was in February 2016 but judgment was not delivered until February 2018 when the plaintiff was awarded damages of $1.00. An application for leave to appeal out of time was allowed.[1007]The Court of Appeal dismissed the appeal but did not consider it necessary to decide whether the *Human Rights Act* provides a separate right to damages distinct from the tort of unlawful imprisonment.[1008]The appeal to the High Court was dismissed.[1009]

In *Eastman*, in awarding compensation the Court held that s 23(1)(a) should be read purposively to refer to all convictions reversed after the commencement of the ACT *Human Rights Act* and so

---

[1002] Ibid [38], [40].
[1003] Ibid [47].
[1004] Ibid [47].
[1005]Ibid [55]-[71].
[1006] See *Lewis v Australian Capital Territory* [2018] ACTSC 19 [474]. However, in *Strano v Australian Capital Territory* [2016] ACTSC 4 [33], Penfold J had observed in obiter that sections 18 and 23 should be considered differently as there is no common law cause of action to obtain a remedy equivalent to s 23 and claims for compensation for wrongful convictions in circumstances of a miscarriage of justice have typically been subject to discretionary *ex gratia* payments by the executive with cannot be compelled. In *Eastman v the Australian Capital Territory* (2019) 14 ACTLR 195; 348 FLR 251 at [149-151], Justice Elkaim referred to Penfold J's remarks in obiter as persuasive in interpreting s 18(7).
[1007] *Lewis v Australian Capital Territory* [2018] ACTCA 49. Issues sought to be canvassed in the foreshadowed appeal included whether damages for vindication of deprivation of liberty are available in tort and whether the *Human Rights Act* provides an entitlement to damages for loss of liberty which is separate to the cause of action in tort.
[1008] *Lewis v Australian Capital Territory* [2019] ACTCA 16 [73].
[1009] *Lewis v Australian Capital Territory* (2020) 94 ALJR 740; 381 ALR 375.

that the assessment of damages commences from the date of conviction even where the conviction occurred prior to s 23 commencing.[1010] It was agreed by the parties that compensation should be calculated up to the plaintiff's release and not extend to any damages suffered after.[1011]

The Court approached damages under s 23 'in the broad sense of the plaintiff's right to be compensated for a particular type of harm' and as 'the counterbalance or requital for the years the plaintiff spent in prison.'[1012] In determining the amount of compensation, the Court accounted for the following factors: the length of time of imprisonment; experiences of the plaintiff while imprisoned; loss of working life and economic capacity; insult to reputation; and the need to compensate for the wrongfulness of imprisonment.[1013] The Court held the plaintiff was not entitled to compensation for vindication of public law wrongs as a separate head of damages.[1014]

While s 31 of the ACT *Human Rights Act* allows for reference to international law in interpreting the rights provided by the Act, in *Eastman* Elkaim J found it unnecessary to refer to the treatment and implementation of Article 14(6) of the *ICCPR* in other countries and jurisdictions, including in light of s 31(2)(a) which refers to 'the desirability of being able to rely on the ordinary meaning of [the] Act.'[1015]

Nevertheless, in other jurisdictions the requirement that there be a 'new or newly discovered fact' showing a miscarriage of justice is a high bar to demonstrate.[1016] For example, in the United Kingdom, courts have not been satisfied that judicial error in admitting inadmissible evidence in trial was a 'new or newly discovered fact' that entitled a wrongfully convicted man to compensation; findings that laws under which a woman was convicted were *ultra vires* also did not meet that standard.[1017]

11.17 Right not to be tried or punished more than once

11.17.1 The Australian Capital Territory

Section 24 of the ACT *Human Rights Act* provides for a right not to be tried or punished 'again for an offence' of which a person 'has already been finally convicted or acquitted in accordance with law.' Section 24 gives effect to article 14(7) of the *ICCPR*. Section 24 also reflects the common law on double jeopardy that a person may not be put to trial or punished twice for the same offence.[1018] At common law, an accused may enter pleas of *autrefois convict* or *autrefois acquit*,

[1010] *Eastman v the Australian Capital Territory* (2019) 14 ACTLR 195; 348 FLR 251 at [89].
[1011] Ibid [104-105].
[1012] Ibid [111], [140].
[1013] Ibid [137-139].
[1014] Ibid [109].
[1015] Ibid [12]-[15].
[1016] Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Collation of Factsheets on each right under the ACT Human Rights Act 2004* (February 2015) 40.
[1017] Ibid 40.
[1018] See *Pearce v The Queen* (1998) 194 CLR 610.

barring any conviction with regard to the same offence of which they have been convicted or acquitted, respectively.[1019]

The section 24 protection applies to circumstances where proceedings are brought against a person for precisely the same, or substantially the same, offence as before.[1020] The Supreme Court considered the meaning of the term 'an offence' in section 24 in *R v DU*:

> Is the term to be construed narrowly as referring to a charge containing the same legal elements as the offence for which the accused has previously been tried and punished, or is it to be given a broader interpretation encompassing any charge based on the same alleged acts?[1021]

The Supreme Court surveyed European jurisprudence and tentatively expressed the view, in *obiter*, that case law supports the narrower interpretation of the words 'an offence'.[1022] The Court also observed that the common law pleas on *autrefois convict* and *autrefois acquit* are narrowly confined to circumstances 'where there is a coincidence of legal elements and a coincidence of facts' (in respect of the latter, that is the evidence needed to establish the offences).[1023] The Court also observed that the XCourt has inherent powers to issue a stay of proceedings in appropriate cases to prevent abuse of its process, including where the operation of the narrow pleas related to double jeopardy are not available.[1024] While the Court did not make a finding on which interpretation of 'an offence' is to be preferred, its reasoning appears to support the narrower construction.

The section 24 right protects against the re-litigation of the same offence. Section 24 will also protect a criminal accused from conviction for two offences in the one indictment, where the charges arise from precisely the same acts and consist of or include the same legal elements.[1025] Thus, in O*'Neill*, in circumstances where the accused was charged with two separate offences arising from the same act, this operated so that on the accused's conviction for the first offence, the Court did not proceed to consider the second count.[1026]

Section 24 applies to offences for which a person has been *finally* convicted or acquitted, so does not limit available appeal or review proceedings. The right will only be engaged once avenues for appeal or review are exhausted or time-barred. For example, in *Fricker*, the Court rejected a submission that section 24 affected or limited the right of the prosecutor to appeal against an acquittal, where legislation provided for an appeal by the prosecution by way of review of an acquittal on the ground that the decision should not have been made as a matter of law.[1027]

[1019] *R v DU* [2018] ACTSC 281 [47].
[1020] *R v O'Neill* [2004] ACTSC 64 [13].
[1021] *R v DU* [2018] ACTSC 281 [36].
[1022] Ibid [45].
[1023] Ibid [45].
[1024] Ibid [51], [54].
[1025] *R v O'Neill* [2004] ACTSC 64 [13].
[1026] Ibid [13], [50].
[1027] *King v Fricker* [2007] ACTSC 101 [28]-[29].

Section 24 refers to the right not to be 'tried or punished again' for the same offence. The Full Court of the ACT Supreme Court affirmed in *Bandarage* that, on ordinary principles of statutory construction, the provision only applies to criminal offences and not to disciplinary measures that are not a sanction for a criminal offence.[1028]

The right also does not protect against non-punitive consequences arising from an offender's criminal behaviour, for example the confiscation of property pursuant to confiscation of criminal assets legislation after the property holder's conviction of an offence.[1029] Measures that are designed to be preventative of crime or protective rather than punitive are also unlikely to be engaged by the section 24 right.[1030]

Other cases in which the right in s 24 has been relied on or referred to include:

- an application for a stay of the indictment on the ground, inter alia, that the accused was exposed to the possibility of double jeopardy[1031]
- an appeal from criminal convictions in which it was contended, inter alia, that double jeopardy precluded conviction on two of the offences for which the accused was found guilty[1032]
- a criminal proceeding in which an issue arose as to whether a court could re-sentence a person to a more severe sentence than the original sentence.[1033]

11.17.2 Victoria

Section 26 of the Victorian *Charter* provides that a person cannot be tried or punished more than once for an offence which has previously resulted in a conviction or acquittal.

This right has been held not to be applicable to the imposition or maintenance of a supervised treatment order.[1034]

In an application for review of a decision of VCAT in disciplinary proceedings against an architect the Court of Appeal held that the applicant could not rely upon conceptions of double punishment:

> The purpose of disciplinary proceedings is primarily to protect the public, and not to punish the practitioner. We therefore consider that, in the same way that the rule against duplicity does not operate strictly in non-criminal proceedings, the common law rule

[1028] *Council of the Law Society of the ACT v Bandarage* [2019] ACTSCFC 1 [122]-[123].
[1029] See *ACT Director of Public Prosecutions v Nikro* [2017] ACTSC 15 [36], [59] in which the defendant applied for an order under s40C of the ACT *Human Rights Act* that his interest in property not be subject to confiscation as criminal assets, on the basis that would be unlawful as incompatible with his rights under section 24. See also *DPP v Warren* [2015] ACTSC 111 where it was sought to exclude assets from forfeiture.
[1030] *ACT Director of Public Prosecutions v Nikro* [2017] ACTSC 15 [36].
[1031] *R v QX* [2021] ACTSC 187.
[1032] *KN v The Queen* (2019) 14 ACTLR 289.
[1033] *Barron v Laverty* (20190] 346 FLR 442.
[1034] *MOT (Human Rights)* [2022] VCAT 84.

against double punishment recognised in criminal proceedings cannot apply with the same strictness (if it applies at all) to disciplinary proceedings.[1035]

In *Bryar* consideration was given to the provisions of the *Charter* and the principles in relation to double jeopardy in determining whether a police informant can seek review by way of a hearing *de novo* to a magistrate from a decision of a judicial registrar. [1036]

In *Jackson* the Court of Appeal considered whether convictions and orders for cumulation amounted to double punishment.[1037]

In *Swain* the issue of 'double punishment' arose in the context of a review of the refusal to provide the applicant with accreditation to drive a commercial passenger vehicle as a private bus service. The VCAT Member held that the issue was not one of 'double punishment' but rather protection of the public that was at the forefront of occupational licensing.[1038]

11.17.3 Queensland

Section 34 of the Queensland *Human Rights Act* provides that a person must not be tried or punished more than once. This provision has been considered in:

- numerous proceedings before QCAT in respect of decisions under working with children legislation[1039]
- proceedings arising out of the suspension of a teacher[1040]
- an application to the Court of Appeal for an extension of time for leave to appeal against sentence[1041]
- judicial review proceedings arising out of the classification of a prisoner as an 'enhanced security offender'.[1042]

11.18 Retrospective criminal laws

11.18.1 The Australian Capital Territory

Section 25 of the ACT *Human Rights Act* protects against the retrospective operation of criminal laws, both in respect of offences and penalties. Section 25(1) states that 'No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.' That provision reflects the longstanding common law disavowal of

---

[1035] *McSteen v Architects Registration Board of Victoria* [2018] VSCA 96 [65] footnote omitted.
[1036] *Director of Public Prosecutions v Bryar* (2014) 241 A Crim R 172.
[1037] *Jackson v The Queen* [2010] VSCA 179.
[1038] *Swain v Department of Infrastructure (General)* [2008] VCAT 848 [24].
[1039] See e.g., *LB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 140; *HK v Director-General, Department of Justice and Attorney-General* [2021] QCAT 130; *TD v Director-General, Department of Justice and Attorney-General* [2021] QCAT 138; *ZB v Director-General, Department of Justice and Attorney-General* [2021] QCAT 82.
[1040] *Queensland College of Teachers v Teacher TNE* [2020] QCAT 484.
[1041] *R v Hickey* [2020] QCA 206.
[1042] *Boyy v Executive Director of Specialist Operations of Queensland Corrective Services* [2019] QSC 283.

retroactive criminal offences which are inconsistent with the operation of the rule of law. It is also reflected in section 84A(1) of the *Legislation Act 2001* (ACT), which states that 'If a law makes an act or omission an offence, the act or omission is only an offence if done or not done after the law commences,' albeit that s25(1) applies more narrowly to *criminal* offences only.

In *EN* consideration was given to legislative changes to maximum penalties which potentially subjected persons to higher penalties than those applicable when the offence was carried out. Section 25(2) of the *Human Right Act* was held to limit the applicable maximum penalty to that applicable at the time when the offence was committed.[1043] However, the section does not prevent convicted persons from getting the benefit of lower penalties that are enacted after the commission of the offence.

In *Barron* a question arose as to whether in re-sentencing a penalty may be imposed which exceeds the original sentence. The issue was resolved without being necessary to deal with the *Human Rights Act* issue. [1044]

The operation of s 25(1) has been subject of relatively little judicial consideration.[1045] Following the decision of the ACT Supreme Court in *Djenadija*, it is unlikely that section 25(1) extends to the retrospective reach of changes to procedural rather than substantive laws, regardless of whether the subject matter of the criminal proceeding predates the commencement of the procedural rules.[1046] In that case, invoking s25(1) among other legal principles, the defendant unsuccessfully submitted that as the offences with which he was charged were allegedly committed prior to the commencement of the *Evidence Act 2011* (ACT), common law rules applying to tendency evidence rather than the evidence legislation should apply.[1047] In rejecting that submission, the Court referred to the unanimous High Court judgment in *Rodway* in which the Court held 'there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure.'[1048]

Section 25(2) provides for circumstances in which the penalty for a criminal offence changes. Section 25(2) states that a 'penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed'.[1049] Section 25(2) specifies that a person who committed an offence will be subject to the benefit of any subsequent reduction in the penalty for it. Section 25(2) is also reflected in subsections 84A (2) and (3) of the *Legislation Act 2001* (ACT), on changes in penalties for offences.

[1043] *R v EN* [2019] ACTSC 35.
[1044] *Barron v Laverty* (2019) 346 FLR 442.
[1045] See, for example, *Tully v The Queen* [2016] ACTCA 4 [153].
[1046] *R v Djenadija* [2015] ACTSC 29.
[1047] Ibid [7].
[1048] Ibid [11], citing *R v Rodway* (1990) 169 CLR 515.
[1049] See, for example, *Edwin v R* [2014] ACTCA 47 [15] ('The respective legislatures had increased the penalties for those offences subsequent to their commission by the Appellant. In the absence of a specific transitional provision to the contrary, the penalty at the date of the commission of the criminal offence in question applies.')

The ACT Supreme Court has looked to international jurisprudence in addressing the meaning of 'penalty' for the purpose of section 25(2). In *R v PM*, Refshauge J referred to criteria identified in *R v Field* [1050] citing the European Court of Human Rights case *Welch v United Kingdom*[1051] to determine whether action following a criminal offence can be characterised as a 'penalty'.[1052] Relevant criteria are:

> (i) whether the measure is imposed following a criminal conviction;
> (ii) the nature and purpose of the measure;
> (iii) its characterisation under national law ;
> (iv) the procedures involved in the making and implementation of the measure;
> (v) its severity;
> (vi) the substance, rather than the form, in determining whether the measure forms part of a "regime of punishment" [paragraph references omitted].[1053]

'Penalty' goes beyond any term of imprisonment to encompass other penal measures that are part of a criminal sentence which might include non-custodial sentences, correction orders, fines or other measures. In *Nikro,* for example, the ACT Court of Appeal treated the automatic disqualification of a driver's licence pursuant to his sentence for a driving offence as a 'penalty' subject to the benefit of section 25(2).[1054]

ACT courts have not yet directly addressed the issue of whether parole regimes fall within the concept of 'penalty' in section 25(2). In respect of an equivalent provision to section 25(2) in the *New Zealand Bill of Rights Act 1990*, New Zealand courts have taken the view that 'penalty' refers to 'variations in the maximum or minimum penalty which may be imposed by the Court at sentencing' and does not encompass issues related to non-parole or remission.[1055]

The ACT Supreme Court has construed the 'penalty that applied to the offence when it was committed' as meaning the maximum penalty available in sentencing at the time the offence was committed.[1056] The effect of that construction is that section 25(2) will only be enlivened where a penalty is imposed which is heavier than the maximum penalty at the time of commission of the offence.

The beneficial operation of section 25(2) in respect of reduced penalties has also been considered. The ACT Court of Appeal affirmed the relevance of section 25(2) to determining the maximum

---

[1050] *R v Field* [2003] 1 WLR 882.
[1051] *Welch v United Kingdom* [1995] ECHR 4.
[1052] *R v PM* [2009] ACTSC 24 [72].
[1053] Ibid [72].
[1054] *Nikro v Sullivan* [2014] ACTSC 12 [16]-18].
[1055] *R v PM* [2009] ACTSC 24 [74].
[1056] *R v XH (No 2)* [2016] ACTSC 350 [38].

term of imprisonment where a historic criminal offence has been replaced with a new criminal offence with a lesser term of imprisonment.[1057]

The ACT Supreme Court has also referred to section 25(2) in applying the benefit of the reduced penalty for a new offence, notwithstanding that the new offence and provisions applying to it were not identical to the historic offence applying at the time of the criminal conduct.[1058]

ACT courts have also treated section 25(2) as relevant to the application of section 33(1)(za) of the *Crimes (Sentencing) Act 2005* (ACT). Section 33 requires a court to consider particular matters in sentencing an offender where relevant, including 'current sentencing practices' pursuant to s33(1)(za).[1059] In *Scheeren*, in considering current sentencing practices in sentencing an offender for historic child sexual abuse offences, Justice Penfold held that s33(1)(za) should be interpreted in a manner compatible with section 25 of the ACT *Human Rights Act* to 'permit consideration of sentencing patterns at the time when the relevant offence was committed, where those patterns are more lenient than current sentencing patterns.'[1060]

11.18.2 Victoria

Section 27(1) of the Victorian *Charter* prohibits persons form being convicted of matters which were not criminal at the time when they were engaged in. Penalties must not be imposed which are greater than those in force when the offence was committed (s 27(2)) but offenders may be eligible for reduced penalties (s 27(3)). The provisions do not affect the trial or punishment of a person for any act or omission which was a criminal offence under international law at the relevant time (s 27(4)).

In *Tyrell Carson* the Court of Appeal, in refusing leave to appeal, held that the common law presumption against retrospectivity does not apply to statutes that are merely procedural and the *Human Rights Act* was not infringed by legislation that provided for determination by a judge alone.[1061]

In *Bradley,* although there was no change in the maximum penalty between when the offence was committed and the date of conviction many years later, the Court noted that:

> The problem of how to sentence an offender in circumstances where there has been a long delay between the commission of the offence and the imposition of sentence can be acute. That is particularly so where sentences for that particular offence have, over the years, greatly increased.[1062]

[1057] *R v MC (No 2)* [2019] ACTSC 61 [2], citing *R v XH (No 2)* [2016] ACTSC [37]-[39] (in which Penfold J held that the lesser sentence should be applied notwithstanding that the new offence was not an identical one to the offence at the time of commission).
[1058] *R v XH (No 2)* [2016] ACTSC 350 [37]-[39].
[1059] *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(za).
[1060] *R v Scheeren* [2014] ACTSC 272 [44]-[57]; see also *R v WR (No 5)* [2015] ACTSC 258 [36].
[1061] *Tyrell Carson (a pseudonym)[1] v The Queen* (2020) 284 A Crim R 289.
[1062] *Bradley v The Queen* [2017] VSCA 69 [118]. See also *R v AMP* [2010] VSCA 48.

The right under s 27(2) does not require a comparison between the actual penalty imposed and the penalty that would probably have been imposed by the sentencer at the time when the offence was committed. The penalty applicable at the earlier time is that which is prescribed by law.[1063]

In *WBM* a question arose as to whether a statutory scheme, providing for the registration of sex offenders, constitutes a penalty or punishment, so as to attract the principles of double jeopardy, or the principles against the imposition of retrospective penalties.[1064]The legislative scheme was held not to constitute a '*penalty*' within the meaning of s 27(2) of the *Charter*.

11.18.3 Queensland

Section 35 of the Queensland *Human Rights Act* deals with retrospective criminal laws in terms similar to the Victorian *Charter*. This has been invoked, unsuccessfully, in several cases.[1065]

11.19 Freedom from forced work

Each of the ACT *Human Rights Act* (s26), *Human Rights Act* Qld (s 18) and Victorian *Charter* (s11) contain a right to freedom from forced work. Each protect:

- A person from being held in slavery or servitude;[1066] and
- A person from being made to perform forced or compulsory labour.[1067]

Each statutes provides that 'forced or compulsory labour' does not include:

- work or service normally required of a person who is under detention because of a lawful court order, or who is conditionally released from detention under a court order (or, in Queensland and Victoria, ordered to perform work in the community);
- work or service required because of an emergency or calamity threatening the life or wellbeing of the community;
- work or service that forms part of normal civil obligations.[1068]

In Queensland, a further exception to 'forced compulsory labour' is 'work or service performed under a work and development order under the *State Penalties Enforcement Act 1999*.[1069]

The freedom from forced work has not been subject of consideration in reported proceedings in the ACT, Queensland or Victoria to date. The provision is derived from Article 8 of the *ICCPR* and

---

[1063] *DPP v Leys* (2012) 44 VR 1; 296 ALR 96.
[1064] *WBM v Chief Commissioner of Police* (2010) 27 VR 469; 203 A Crim R 167.
[1065] *Health Ombudsman v Raynor* [2021] QCAT 25; *Crossman v Queensland Police Service* [2020] QDC 122; *Crossman v Queensland Police Service* [2020] QDC 123.
[1066] *Human Rights Act 2004* (ACT) s 26(1); *Human Rights Act 2019* (Qld) s 18(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 11(1).
[1067] *Human Rights Act 2004* (ACT) s 26(2); *Human Rights Act 2019* (Qld) s 18(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 11(2).
[1068] *Human Rights Act 2004* (ACT) s 26(3); *Human Rights Act 2019* (Qld) s 18(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 11(3).
[1069] *Human Rights Act 2019* (Qld) s 18(3).

the *European Convention on Human Rights* also contains a prohibition on slavery and forced labour in Article 4.[1070]

The Victorian Judicial College *Charter of Human Rights Bench Book* contains analysis of international law and comparative jurisprudence on the two limbs of the freedom, observing that jurisprudence should be treated with 'discrimination and care.'[1071]

11.20 Cultural rights – generally

Each jurisdiction protects, in addition to the particular cultural rights of Aboriginal and Torres Strait Islander peoples, the cultural rights of particular ethnic, religious and linguistic communities.[1072] The right imposes an obligation not to deny persons of a particular cultural, religious, racial or linguistic background (described as 'minorities' in s 27(1) of the ACT *Human Rights Act*), in community with other persons of that background, to enjoy their culture, to declare and practise their religious and use their language. The provisions are based upon Article 27 of the *ICCPR*.

In the ACT, there has been no detailed judicial or tribunal consideration of general cultural rights.

In Queensland, in *Taniela* the Queensland Civil and Administrative Tribunal found conduct of the respondents in proposing to unenroll a six year-old child of Cook Islands/Niuean origin from the Australian Christian College if he did not cut his hair in compliance with the school's uniform policy, where it is a cultural custom of the Cook Islands/Niue to cut a first born son's hair at a coming-of-age ceremony at age 7, contravened the *Anti-Discrimination Act 1991* (Qld).[1073] The applicant submitted that the *Anti-Discrimination Act 1991* (Qld) should be interpreted by the Tribunal in a way that was compatible with s 27 cultural rights.[1074] The Tribunal found it unnecessary to address the s 27 issue because of the plain meaning and application on the facts of the *Anti-Discrimination Act 1991* (Qld).[1075]

On appeal, the applicant argued that ss15(2), 15(4), 26(2) and 27 were relevant in interpreting the AD Act. The appeal tribunal considered the arguments relating to the HR Act did not assist the applicant.[1076]

In Victoria, s 19(1) cultural rights have not been subject of substantive consideration. In *Hoskin* the Victorian Civil and Administrative Tribunal addressed the relevance of s 19(1) in considering the Great Bendigo City Council's grant of a permit to develop a mosque in Bendigo.[1077] While the permit application was brought by a body corporate, the Australian Islamic Mission Incorporated,

[1070] https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57337.htm.
[1071] *Momcilovic v The Queen* (2011) 245 CLR 1 [19] (French CJ).
[1072] *Human Rights Act 2004* (ACT) s 27(1); *Human Rights Act 2019* (Qld) s 27; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).
[1073] *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249.
[1074] Ibid [60].
[1075] Ibid [153].
[1076] *Australian Christian College Moreton Ltd & Anor v Taniela* [2022] QCATA 118 at [42] & [43].
[1077] *Hoskin v Greater Bendigo City Council & Anor* [2015] VCAT 1124, at [92]-[105].

the Tribunal considered the rights under ss 14 (freedom of religion) and 19(1) of the individuals who would use the mosque as relevant.[1078] The Tribunal cited with approval *Rutherford* in which the Tribunal stated, 'the Court should be slow to adopt a construction which could have the effect of preventing the use of premises by persons who wish to practice their religion at the place where they wish to do so.'[1079]

In *Hobsons Bay* VCAT found the s 19 rights of women of particular cultural or religious backgrounds to be able to swim without men present at a leisure centre during limited women-only hours justified limitations on the rights of men under ss 8 and 12 of the Victorian *Charter* to access the leisure centre.[1080]

More recently, in seeking interlocutory declaratory and injunctive relief to restrain the defendants from constructing part of a Highway through traditional Djab Wurrung lands, including destroying six trees of cultural significance, the Djab Wurrung plaintiff in *Thorpe* sought relief contending that the defendants were acting incompatibly with ss 19(1) (general cultural rights) and 19(2) (Aboriginal and Torres Strait Islander cultural rights) as one of the claims against the defendants.[1081] The Court found that the *Charter* rights did not take the matters at issue any further than the other two claims relied upon by the plaintiff and did not address them in granting an injunction.[1082]

Elsewhere, Debeljak has suggested that, while evidently requiring an assessment of the reasonableness and justification of restrictions, infringements of cultural rights are likely in closed environments such as prisons due to restrictions on the ability to freely exercise cultural and religious practices or maintain family and kinship connections while in closed environments.[1083] The same comment might apply to closed psychiatric facilities, for example.

11.21 Cultural rights - Aboriginal and Torres Strait Islander peoples

Each of the jurisdictions protects the distinct cultural rights of Aboriginal and Torres Strait Islander peoples, as recognised in the *ICCPR*, *ICESCR* and the *UN Declaration on the Rights of Indigenous Peoples*.[1084] Each of the statutes defines the scope of those rights slightly differently, as set out in the table below.

ACT Human Rights Act, s 27(2)	**Human Rights Act (Qld), s 28**	**Victorian Charter, s 19(2)**

[1078] *Hoskin v Greater Bendigo City Council & Anor* [2015] VCAT 1124, at [99].
[1079] Ibid [100], citing *Rutherford v Hume City Council* [2014] VCAT 876.
[1080] *Hobsons Bay City Council & Anor (Anti-Discrimination Exemption)* [2009] VCAT 1198, at [35]-[45].
[1081] *Thorpe v Head, Transport for Victoria & Ors* [2020] VSC 804, at [24].
[1082] Ibid [62].
[1083] Julie Debeljak, 'The Rights of Prisoners under the Victorian Charter: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *UNSW Law Journal* 1332, fn 14.
[1084] *Human Rights Act 2004* (ACT) s s 27(2); *Human Rights Act 2019* (Qld) s 28(1)-(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(2).

Denies prohibition of the cultural rights of Aboriginal and Torres Strait Islander peoples to maintain, control, protect and develop their: • Cultural heritage and distinctive spiritual practices, observances, beliefs and teachings (s 27(2)(a)); • Languages and knowledge (s 27(2)(b)); • Kinship ties (s 27(2)(c)). Also denies the prohibition of the cultural rights of Aboriginal and Torres Strait Islander peoples to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued (s 29(2)(d)).	Denies prohibition of the cultural rights of Aboriginal and Torres Strait Islander peoples, with other members of their community: • To enjoy, maintain, control, protect and develop their own identity and cultural heritage, including their: traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings (s 28(2)(a)); language including traditional cultural expressions (s 28(2)(b)); and their kinship ties (s 28(2)(c)); • To maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom (s 28(2)(d)); • To conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources (s 28(2)(e)).	Denies prohibition of the cultural rights of Aboriginal persons*, with other members of their community: • To enjoy their identity and culture (s 19(2)(a)); and • To maintain and use their language (s 19(2)(b)); and • To maintain their kinship ties (s 19(2)(c)); and • To maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs (s 19(2)(d)). *While s 19(2) refers to the rights of 'Aboriginal persons', the term 'Aboriginal' is defined at s 3(1) to mean 'a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples.'

The ACT Supreme Court and ACT Civil and Administrative Tribunal have not yet considered s 27(2) of the ACT *Human Rights Act*.

In Victoria, s 19(2) has been subject of some consideration. In *Clark-Ugle* the Victorian Court of Appeal held that the right of Aboriginal and Torres Strait Islander peoples in section 19(2)(d) can be enjoyed both by Aboriginal persons who live on the land with which they have a connection and by those who maintain a distinctive spiritual, material and economic relationship with the land while living elsewhere.[1085]

[1085] *Clark-Ugle v Clark* [2016] VSCA 44, [143]-[144].

Following this line of reasoning, in *Gardiner* Richards J found that a determination that a group of Aboriginal persons is a traditional owner group for an area of land under the *Traditional Owner Settlement Act 2010* (Vic) will not be determinative of their enjoyment of s 19(2) cultural rights in relation to that area.[1086]

Section 19(2) has also been considered in the context of criminal proceedings. In *Cemino* Ginnane J found that a Magistrate considering whether to transfer a criminal matter to the Koori Court has a function under s 19(2)(a) because the exercise of their discretion will affect the Aboriginal person's enjoyment, in the sense of having the benefit of, their identity and culture through access to the Koori Court's procedures and determinations when they are charged with a criminal offence.[1087] Ginnane J found that a Magistrate is obliged, in exercising their discretion whether to transfer criminal proceedings against an Aboriginal person to the Koori Court , to consider the content of s 19(2)(a) as part of the proper exercise of their discretion but that there would be no undue limitation on the right if the discretion is exercised properly and the transfer refused.[1088]

In that case, Ginnane J also said that an aspect of Aboriginal or Torres Strait Islander peoples' right to enjoy culture pursuant to s 19(2)(a) is 'effective participation of a person in decisions that affect them,' while not considering this point and its implications in greater depth.[1089]

Ginnane J found that when the Magistrates' Court is hearing transferring decisions, the *Charter* applies to the Court pursuant to s6(2)(b). This section provides that the *Charter* applies to courts and tribunals to the extent they have certain functions. Courts must consider the cultural rights of Aboriginal people and their right to equality when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court. [1090]In *Re GG*, the Victorian Supreme Court held that the requirement in s 3A of the *Bail Act 1977* (Vic) that an Aboriginal person's cultural background and issues should be Aboriginal cultural issues be taken into account in making bail determinations should be read with the cultural rights of Aboriginal and Torres Strait Islander peoples in s 19(2) of the *Charter*.[1091]

The Court stated that the intertwining of s 3A and s 19 of the *Charter* 'mandate that appropriate consideration is accorded to a person's Aboriginal cultural identity in adopting procedures and making determinations in a bail application,' observing that 'this mandatory consideration is amplified in the case of an Aboriginal child as connection to their cultural identity will undoubtedly be ruptured through the impact of custody and incarceration.'[1092]

However, in *Re GG*, the Court also cited with approval Bell J's observation in *DPP v SE* that, while s 3A requires cultural considerations to be taken into account, the provision does not mandate a

---

[1086] *Gardiner v Attorney-General (No. 2)* [2020] VSC 252, [53]-[54].
[1087] *Cemino v Cannan* (2018) 56 VR 480, [147].
[1088] Ibid [147]-[148].
[1089] Ibid [114].
[1090] VEOHRC intervened in this case. See generally: https://www.humanrights.vic.gov.au/legal-interventions/cemino-v-cannan-and-ors-sep-2018/.
[1091] *Re GG* [2021] VSC 12.
[1092] Ibid [44].

particular outcome and that, for example, bail may be refused to an Aboriginal applicant posing an unacceptable risk to community safety even after taking s 3A into account.[1093]

In *DPP v SE*, Bell J noted that the capacity to impose bail conditions to mitigate any risk is particularly important in the context of an Aboriginal child due to their especial vulnerability to physical and emotional harm and negative formative influence upon them.[1094]

The cultural rights in s 28 of the Queensland legislation go beyond both the ACT and Victorian statutes in particular by their articulation of *environmental* cultural rights.

It remains to be seen how these rights are relied upon in substance, however proceedings have already raised s 28. In *Waratah Coal* proceedings before the Queensland Land Court concerned a claim that a grant of a mining lease and environmental authority to mine thermal coal in the Galilee Basin in Queensland would be incompatible with the cultural rights of Aboriginal and Torres Strait Islander peoples.[1095] It was contended that accretion of greenhouse gases in the atmosphere will adversely affect First Nations peoples in specific ways, including by causing disruption to traditional cultural practices, including those that depend on connection to place and ecological systems including through harm to traditional waters and lands.[1096]

Although outside the context of any applicable human rights provisions, Federal Court proceedings brought by Tiwi Islanders seeking to challenge an approval for an offshore gas pipeline licence on the grounds of interference with spiritual connection to sea country and cultural heritage was recently unsuccessful.[1097]

11.22 Right to education

Only the ACT *Human Rights Act* (s 27A) and the *Human Rights Act* (Qld) (s 36) recognise a right to education.

In the ACT, s 27A provides for the right of every child to have 'access to free, school education appropriate to his or her needs.'

In Queensland, s 36(1) provides that every child has the right to have 'access to primary and secondary education appropriate to the child's needs.'

Section 27A(2) of the ACT *Human Rights Act* states that everyone has the right to have 'access to further education and vocational and continuing training.' 'Further education' has been construed broadly to encompass tertiary education (s 27A(2)).[1098]

[1093] Ibid [45], citing *DPP v SE* [2017] VSC 13, [20].
[1094] *DPP v SE* [2017] VSC 13, [38].
[1095] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4.
[1096] Ibid [110].
[1097] *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.
[1098] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [67]-[68].

Section 36(2) of the *Human Rights Act* (Qld) recognises the right of every person to 'have access, based on the person's abilities, to further vocational education and training that is accessible to all.' The Queensland provision does not protect a right to access to tertiary education. However, vocational education may involve or encompass tertiary education.

The right to education in ss 27A(1) and (2) in the ACT is limited by s 27A(3) to aspects described as 'immediately realisable':

- to enjoy the rights to access education without discrimination (s 27A(3)(a)); and
- a parent or guardian's right to choose a child's schooling in accordance with their moral and religious convictions (other than schooling provided by the government), subject to the schooling meeting the minimum educational standards at law (s 27A(3)(b)).

There is no equivalent limitation in Queensland.

11.22.1 The Australian Capital Territory

In the ACT, the right to education to date has only been considered substantively in case. In *Islam* the Supreme Court rejected the contention that a single attempt to charge a prisoner for photocopying done in pursuit of tertiary studies could amount to s 27A(3) discrimination.[1099] In *Andreopolous* a discrimination complaint alleging the failure of a university to make reasonable adjustment for exams was dismissed.[1100]The issue was raised in other proceedings against the University of Canberra and the Commonwealth.[1101]

11.22.2 Queensland

In Queensland, the right to education has been relied upon or adverted to in a number of cases determined by the Queensland Civil and Administrative Tribunal (QCAT). In *SF*, QCAT held that the right of a child with disability of a mother who had moved due to domestic violence to access education appropriate to their needs, along with other rights, outweighed a Departmental requirement to provide her residential address in registering her child for home education.[1102] The Tribunal found that the applicant had met the procedural requirements for home education in her family's circumstances and set aside the decision of the Department not to grant home education registration for failure to provide a residential address.[1103]

In *Taniela* it was submitted without the Tribunal deciding the point that the s 36(1) right of a child to access primary education appropriate to their needs (s 36(1)) would encompass a right to a Christian education in circumstances where the child is Christian.[1104]

[1099] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [152].
[1100] *Andreopolous v University of Canberra (Discrimination)* [2020[ACAT 95.
[1101] *Manny v Commonwealth of Australia; Manny v University of Canberra* [2023] ACTSC 160.
[1102] *SF v Department of Education* [2021] QCAT 10, at [50]. The other rights relied upon included: equal protection of the law without discrimination; the right to privacy; and protection of the child (see [43]).
[1103] Ibid [54].
[1104] *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249, at [151].

11.23 Right to work and other work-related rights

Only the ACT *Human Rights Act* contains a right to work and other work-related rights. Section 27B, which was introduced to the Act in 2020, states:

(1) Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
(2) Everyone has the right to the enjoyment of just and favourable conditions of work.
(3) Everyone has the right to form or join a work-related organisation, including a trade union, with the objective of promoting or protecting their economic or other social interests.
(4) Everyone has the right to protection against acts of anti-union discrimination in relation to their employment.
(5) Everyone is entitled to enjoy these rights without discrimination.

Notes to s 27 B state that aspects of the right to work under international law are subject to an obligation as to their progressive realisation and directing attention to Article 8(4) of the *OP-ICESCR* as international law relevant to interpreting progressively realisable rights.

Section 27B has been adverted to in numerous decisions in proceedings brought by solicitor Emmanuel Ezekiel-Hart against the Council of the Law Society of the ACT and others.[1105] In the most recently reported of these decision, Mr Ezekiel-Hart was declared to be a vexatious litigant.

11.24 Property rights

Both the *Human Rights Act* (Qld) (s 24) and Victorian *Charter* (s 20) recognise property rights, although the protections are drafted differently.

The term 'property' is not defined in either statute[1106] and there has been very little consideration of the meaning of 'property' in jurisprudence in either jurisdiction to date. Pound and Evans contend that 'property' is likely to encompass all real and personal property interests recognised under general law (e.g., interests in land, shares and contracts) and may include statutory rights as well.[1107]

[1105] See: *Ezekiel-Hart v Council of the Law Society of the ACT & Anor* [2021] ACTSC 133; *Ezekiel-Hart v Council of the Law Society of the ACT (No 2)* [2022] ACTSC 29; *Ezekiel-Hart v Council of the Law Society of the Act (No 3)* [2022] ACTSC 300; *Ezekiel-Hart v The Council of the Law Society of the ACT (No 2)* [2023] ACTSC 207 ; *Ezekiel-Hart v The Council of the Law Society of the Act; (No 7)* [2024] ACTSC 12.
[1106] In Queensland 'property' is defined in the *Acts Interpretation Act 1954* (Qld) Schedule 1.
[1107] Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Pyrmont, 2008)), 144-145.

In respect of interests in land, in both the cases of *Smiths and Joseph,* Deputy President Dwyer referred to s 20 of the Victorian *Charter* as encompassing legal or proprietary interest(s)' and the ability to use or develop' land.[1108]

11.24.1 Queensland

The Queensland provision protects:

- the right to own property alone or in association with others (s 24(1)); and
- the right of a person not to be arbitrarily deprived of their property (s 24(2)).

Since its introduction in Queensland, s 24 has not been addressed in any great detail in case law. In three cases in which it has been considered - *CC*[1109], *DLD*[1110] and *DKM*[1111] - QCAT has found that the appointment of a guardian or administrator for financial decision-making enlivens its consideration of s 24 as imposing a limitation on property rights, while ultimately finding in each that the appointment was a reasonable limitation in the circumstances.

Property rights are discussed in a decision of the QCAT on an application for an exemption to limit residence in a manufactured home park to people over the age of 50.[1112]

Section 20 of the Victorian *Charter* has also been considered in the context of considering guardianship and administration applications.[1113]

11.24.2 Victoria

Section 20 of the Victorian *Charter* provides 'a person must not be deprived of his or her property other than in accordance with law.'

Both s 24(2) of the *Human Rights Act* (Qld) and s 20 of the Victorian *Charter* only apply where there has been an act to 'deprive' a person of their property. This gives rise to a question of whether the degree of interference with a person's property amounts to deprivation. While direct, indirect or de facto dispossession of property is likely to amount to deprivation, it is questionable whether the temporary or provisional transfer of the title to property, a reduction in its value or repairable damage to property will.[1114]

For the right in s 20 to be enlivened, the Victorian provision requires that the deprivation have occurred other than 'in accordance with law'. If an alleged deprivation of property appears to have taken place subject to a statutory provision, act or decision according to the law, the relevant

---

[1108] *Smiths v Hobsons Bay City Council* (2010) 175 LGERA 221, [18]; *A Joseph v Melbourne Water & Western Water* [2010] VicPR 110, [59]. See also: *Swancom Pty Ltd v Yarra City Council* [2009] VCAT 923, [22].
[1109] *CC* [2020] QCAT 367, [4] & [33].
[1110] *DLD* [2020] QCAT 237, [4], [61].
[1111] *DKM* [2020] QCAT 443, [52].
[1112] See *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 at [130] to [157].
[1113] For example: *EHV (Guardianship)* [2020] VCAT 501, [38]; *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327.
[1114] https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57411.htm.

question is its lawfulness and, if lawful, the engagement of section 20 does not require further consideration.[1115]

In *EHV,* following international jurisprudence, the Victorian Civil and Administrative Tribunal held that 'to be in accordance with the law, the law must be publicly accessible, clear and certain and not operate arbitrarily.'[1116] This formulation goes beyond consideration of the phrase in s 20 to date. In *EHV ,* as in *PJB (Patrick's case)*, it was found that the *Guardianship and Administration Act* clearly is 'law' and the judgment of the Tribunal in the proceedings would determine the administrator's power to sell property of the represented person satisfying the requirement 'in accordance with law' without advancing or requiring further engagement with s 20.[1117]

The formulation of the right not to be deprived of property in the *Human Rights Act* (Qld) is broader that the Victorian provision, in that it protects against 'arbitrary' deprivation of property. While arbitrariness encompasses consideration of lawfulness, interference with a right can be arbitrary although it is lawful.[1118] In Queensland cases so far, there has not been any detailed consideration of the concept of arbitrariness in the context of s 24. Interpretation of arbitrariness in the context of other protected rights has addressed elements such as inappropriateness, injustice, predictability and proportionality.[1119]

If the rights in s 24 of the *Human Rights Act* (Qld) and s 20 of the Victorian *Charter* are enlivened, consideration is required of whether limitations on those rights are reasonable and justified. There has been limited judicial consideration of this in case law in Victoria to date.

In *Goode*, while the Tribunal found no apparent evidence that the respondent community housing provider had deprived or sought to deprive the applicant of her property by seeking to inspect the property she rented from it, as it was acting within the legal framework provided by the *Residential Tenancies 1997* (Vic), subject of scrutiny of the Residential Tenancies List at VCAT, sought to negotiate mutually acceptable solutions and to act consistently with its obligations to manage the properties that it was responsible for.[1120]

As with other rights in the state and territory human rights statutes, except for s 23 of the ACT *Human Rights Act*, neither s 24 of the *Human Rights Act* (Qld) or s 20 of the Victorian *Charter* provide for compensation for deprivation of property.

However, whether compensation has been provided may be relevant to the consideration of whether a deprivation of property was arbitrary (in the case of Queensland) and reasonable (in the case of both jurisdictions).

[1115] See, for example, *Smiths v Hobsons Bay City Council* (2010) 175 LGERA 221, [18]; *A Joseph v Melbourne Water & Western Water* [2010] VicPR 110, [59]; *Swancom Pty Ltd v Yarra City Council* [2009] VCAT 923, [22].
[1116] *EHV (Guardianship)* [2020] VCAT 501, [167].
[1117] Ibid [168]; *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, [92].
[1118] *EHV (Guardianship)* [2020] VCAT 501, [165]
[1119] *Monaghan v ACT (No 2)* [2016] ACTSC 352 [227]-[234].
[1120] *Goode v Common Equity Housing Limited (Human Rights)* [2016] VCAT 93, [69]-[73].

11.25 Right to health services

Section 37 of the *Human Rights Act* (Qld) provides that 'every person has the right to access health services without discrimination' and that 'a person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.' The provision has been considered in a number of recent decisions of QCAT,[1121] the District Court[1122] and the Queensland Supreme Court.[1123]

The ACT *Human Rights Act* and Victorian *Charter* do not contain a right to health services.

12 Enforcing human rights obligations through proceedings

12.1 Proceedings against public authorities for breaching the ACT *Human Rights Act*

Pursuant to section 40B(1) of the ACT *Human Rights Act*, failure of a public authority to comply with its s 40B(1) obligations is unlawful. Section 40B must be read with section 40C, which establishes a right to bring proceedings for contravention of those obligations.

Section 40C applies if a person:

- claims that a public authority has acted in contravention of section 40B (s 40C(1)(a)); and
- alleges that the person is or would be a victim of the contravention (s 40C(1)(b)).

The term 'victim', as used in s 40C(1)(b), is not defined by the legislation. However, ACT courts have adopted the view that only individuals, or natural persons, can be a 'victim' within the meaning of s 40C(1)(b) and entitled to bring legal proceedings under s 40C.[1124] That is because s 6 of the ACT *Human Rights Act* provides that only 'individuals' have human rights.[1125]

If the s 40C(1) standing requirements are satisfied, s 40C(1) provides that a person may:

> (a) start a proceeding in the Supreme Court against the public authority; or
> (b) rely on the person's rights under [the ACT Human Rights Act] in other legal proceedings.

Section 40C(1)(a), distinct from both the Victorian *Charter* and the *Human Rights Act* (Qld), provides for an independent cause of action against public authorities for breaches of human rights in the jurisdiction of the ACT Supreme Court. Under s 40C(3), proceedings under s 40C(2)(a) must be brought within one year from the date that the public authority allegedly contravened s

[1121] *Vanilla Rentals v Tenant* [2023] QCAT 519; *In the matter of ICO* [2023] QMHC 1; *PQR* [2023] QCAT 44; *SDP* [2022] QCAT 414; *GNR* [2022] QCAT 430; *REN* [2022] QCAT 313.
[1122] *TLE v R* [2022] QDC 297; *Woolston v Commissioner of Police* [2022] QDC 70.
[1123] *R v Finn* [2023] QSC 10; *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252; *Attorney-General for the State of Queensland v Grant* [2022] QSC 180.
[1124] *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165 [292]-[293], also citing *Chaloner v Australian Capital Territory* [2013] ACTSC 269 [29].
[1125] Ibid [292]-[293], also citing *Chaloner v Australian Capital Territory* [2013] ACTSC 269 [29].

40B, unless the Supreme Court grants leave otherwise.[1126] To date, s 40C(2)(a) has only been relied upon in a limited number of proceedings.

Alternatively, s 40C(2)(b) allows a person to 'rely on the person's rights under the [ACT Human Rights] Act in other legal proceedings'. The availability of a human rights claim under s 40C(2)(b) is therefore conditional on a person have another, existing cause of action. The explanatory statement to the *Human Rights Amendment Bill 2007*, by which s 40(2)(b) was introduced to the legislation, anticipated that those proceedings might include for example 'an action brought against a public authority under the *Administrative Decisions (Judicial Review) Act 1989*, or an order in a civil or criminal proceeding, a stay of proceedings or exclusion of evidence.'[1127]

Reliance on s 40C(2)(b) is not limited, in contrast to s 40(C)(2)(a), to proceedings in the ACT Supreme Court.[1128] It is available in proceedings in inferior courts and tribunals in the ACT (currently, the ACT Magistrates Court including the ACT Children's Court and ACAT). There is also no statutory time bar for the human rights claim in such proceedings, albeit that the availability of other proceedings may be subject to relevant limitation periods. What remedies are available in inferior courts and tribunals, however, may differ to those available in the Supreme Court.

The availability of proceedings under s40C does not affect other rights a person may have in relation to an act or decision of a public authority: s 40(5)(a).

12.2 Relief for contravention of human rights

12.2.1 The Australian Capital Territory

Part 5A of the ACT *Human Rights Act* also imposes obligations on public authorities. As we have discussed, courts and tribunals can be considered public authorities when acting in their administrative capacity.[1129] Courts and tribunals may also hear proceedings against public authorities for breaching their obligations, pursuant to s 40C, and issue relief for those breaches.

Section 40C(4) empowers the ACT Supreme Court to grant the relief it considers appropriate in a proceeding under section 40C(2), *except damages*. The power in s 40C(4) applies whether proceedings are brought under subsection (2)(a) or the rights are relied on in other proceedings in the Supreme Court under subsection (2)(b).[1130]

[1126] *Human Rights Act 2004* (ACT) s 40C(3).

[1127] Explanatory Statement to the Human Rights Amendment Bill 2007, cited in *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* [2014] ACTSC 26 [21].

[1128] See *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* [2014] ACTSC 26 [21] (rejecting an implied qualification to s 40C(2)(b) that it refers to other proceedings in the Supreme Court).

[1129] *Human Rights Act 2004* (ACT) s 40(2)(b).

[1130] *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* [2014] ACTSC 26 [20].

In *Islam v Director-General of the Department of Justice and Community Safety Directorate*, the Supreme Court described its determination of appropriate relief under the ACT *Human Rights Act* as including a 'balancing process' guided by four objectives:

> [F]irst, addressing the wrong caused by the contravention of the Act; second, deterring future violations; third, making an order that can be complied with; and fourth, ensuring fairness to all those who might be affected by the relief.[1131]

The Court also observed that, generally, its concern in granting relief pursuant to section 40C is to ensure that any ongoing infringement of rights ends.[1132]

The remedies provided by the Supreme Court under s 40C(4) may be the same, for example, as administrative law remedies or those available through the Court exercising its inherent powers. In respect of the latter, for instance, the Court has stayed proceedings for unreasonable delay in bringing a defendant to trial in contravention of s 22(2)(c) of the ACT *Human Rights Act*.[1133] The Supreme Court has also commented that a finding itself by the Court is an important part of the remedy.[1134]

The Supreme Court considered limitations on its power under s 40C(4) in *Islam v Director-General of the Department of Justice and Community Safety Directorate*.[1135] Associate Justice McWilliam held that sections 40B and 40C create stand-alone rights, notwithstanding that some of the remedies available will be the same as under other procedures (for example, judicial review).[1136] Accordingly, the Court's power to grant relief under s 40C is to be read according to ordinary principles of statutory construction.[1137] The effect this is that s 40C is not constrained by principles governing other remedies, except where that statutory construction is available.[1138]

The proceedings in *Islam* concerned alleged breaches of the applicant's rights in his treatment in gaol. The respondent submitted that the Court's power to grant relief under s 40C(4) was to be read in the context of principles on judicial review that it is generally not for the courts to intervene with the management and control of prisoners.[1139] The Court rejected that submission, holding that the power to grant relief and rights under the Act are not to be read subject to, or in the context of, principles applying to judicial review.[1140]

[1131] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [73].
[1132] Ibid [73].
[1133] See, for example, *R v Forsyth* [2013] ACTSC 179 (in which the Supreme Court issued a permanent stay of proceedings where there has been unreasonable delay in bringing a person to trial, in contravention of section 22 of the *Human Rights Act* (rights in criminal proceedings)).
[1134] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [72].
[1135] Ibid.
[1136] Ibid [30].
[1137] Ibid [30].
[1138] Ibid [30].
[1139] Ibid [24]-[30].
[1140] Ibid [24]-[30].

The express power to grant relief in s 40C is given only to the ACT Supreme Court.[1141] The provision is silent on the ability of *other* courts and tribunals to grant relief for contraventions of s 40B in s 40C(2)(b) proceedings. In *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* ('*LM*'), the Court adopted the view that, in absence of a general statutory power, a court or tribunal may grant relief for a breach of s 40B by exercising its express statutory power, power under the common law or its implied or incidental powers, as relevant, provided that the threshold for relief is met according to the relevant applicable requirements.[1142] Master Mossop explained that notwithstanding the silence in s 40C on the power of inferior courts and tribunals, 'effect must be given to the general words of s 40(2)(b)'.[1143] In the context of discussing the Magistrate Court's power to grant relief under its statutory jurisdiction, Master Mossop noted:

> That can properly be done notwithstanding the absence of specific statutory powers such as those conferred upon the Supreme Court so long as any relief based upon reliance upon human rights is within the scope of the statutory powers which are otherwise available to the Court.[1144]

In *LM*, the Court held that the defendant could rely upon his rights under the ACT *Human Rights Act* and seek a permanent stay of proceedings under the power implied in the statutory jurisdiction of the ACT Magistrates Court to prevent abuses of its process.[1145] That relief could be granted if the threshold for that relief was met under the relevant authorities.[1146]

Pursuant to s 40C(5)(b), the operation of s 40C does not affect any right a person has to damages *other* than under s 40C. A note to that provision states: 'See also s 18(7) and s 23'. One issue that remains unsettled, at the time of writing, is whether sections 18(7) and 23(2) confer independent rights to compensation under the ACT *Human Rights Act*. Those provisions provide for a right to compensation for unlawful arrest or detention and for wrongful conviction, respectively.

In *Lewis v Australian Capital Territory*, the ACT Supreme Court held that while s 18(7) recognises that a person should be compensated for their unlawful arrest or detention, that requirement is adequately met by the existing law in the ACT on damages for the common law tort of false imprisonment.[1147] At first instance, although Mr Lewis had been wrongly detained, due to a lack of procedural fairness, it was found that he would have otherwise been lawfully detained. He was awarded nominal damages. This was upheld by the ACT Court of Appeal.[1148] The further appeal

[1141] *LM v Childrens Court of the Australian Capital Territory and The Director of Public Prosecutions for the ACT* [2014] ACTSC 26 [58].
[1142] Ibid [21].
[1143] Ibid [21].
[1144] Ibid [21].
[1145] Ibid [26].
[1146] Ibid [26].
[1147] *Lewis v Australian Capital Territory* [2018] ACTSC 19.
[1148] *Lewis v Australian Capital Territory* [2019] ACTCA 16.

seeking substantial compensatory damages and 'vindicatory' damages was dismissed by the High Court.[1149]

12.2.2 **Victoria**

The Victorian *Charter* does not provide for a direct cause of action for breach of human rights.[1150]

12.2.3 **Queensland**

As in Victoria, the *Human Rights Act* in Queensland does not provide for a direct cause of action for breach of human rights.

13. Referral of questions to the Supreme Court

In all three jurisdictions there are provisions for certain human rights matters to be determined by the Supreme Court.

13.1 The ACT

As noted above, the ACT *Human Right Act* provides that a person claiming a breach of human rights by a public authority may either commence a proceeding in the Supreme Court against the public authority or rely upon rights under the Act in other proceedings (s 40C).

13.2 Victoria

Section 33 of the Victorian *Charter* provides that if in a proceeding before a court or tribunal a question of law arises relating to the application of the *Charter*, or a question arises with respect to the interpretation of a statutory provision in accordance with the C*harter*, the question may be referred to the Supreme Court. However, the party must make application for a referral and the court or tribunal must consider that the question is appropriate for determination by the Supreme Court (s 33(1)).

13.3 Queensland

Section 49 of the *Human Rights Act* (Qld) allows for certain matters relating to the legislation to be referred to the Supreme Court of Queensland. In proceedings before a court or tribunal, if a question of law arises relating to the application of the *Human Rights Act* (Qld) or in relation to the interpretation of a statutory provision in accordance with the Act, the question can be referred to the Supreme Court of Queensland or the Court of Appeal where the proceeding is in the Trial Division of the Supreme Court (ss 49(1)-(2), (4)).

The question can be referred only on application of a party to the proceeding and where the court or tribunal considers the question is appropriate for decision of the Supreme Court (s 49(2)). While a referral is pending, the court or tribunal cannot make a decision about a matter to which the question is relevant (s 49(3)(a)). Once the Supreme Court makes a decision, the court or tribunal cannot make an inconsistent decision (s 49(3)(b)). Intervention in proceedings

[1149] *Lewis v Australian Capital Territory* [2020] 94 ALJR 740; 381 ALR 375.
[1150] See s 39(1).

13.4 The ACT

The Attorney General has the right to intervene in a proceeding before a court that 'involves the application of the Act' (s 35). Leave of the court is not necessary for the Attorney General's intervention.

The ACTHRC may, with the leave of the court, intervene in a proceeding before a court that 'involves the application of the Act' (s 36(1)); the court's leave may be subject to conditions (s 36(2)). Proceedings in which intervention rights arise under ss 35 and 36 are not limited to those in the ACT Supreme Court under s 34.[1151]

When exactly a question in a proceeding will 'involve the application of the Act' has been considered by the ACT Supreme Court, in the context of the s 34 notice requirements. In *R v Forsyth*, Penfold J distinguished between a proceeding where a person sought to rely on a right set out in the ACT *Human Rights Act* because it was set out in the Act, and a case where a person relies on common law protections that are also rights in the Act.[1152] In the former case, notices were required; in the latter, they were not.[1153] In *PM v Beck*, the Crown submitted that albeit the appellant was relying on a common law right and not directly on any right created by the ACT *Human Rights Act*, because the appellant's written submissions referred to the Act, the proceedings 'involved the application of the Act'; the Court did not have the benefit of full argument on the point, so elected to require s 34 notices to be issued.[1154] The issue appears not to have been subject to further consideration.

13.5 Victoria

Both the Attorney-General and the VEOHRC may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of the *Charter* or a question arises with respect to the interpretation of a statutory provision in accordance with the *Charter* (s 34(1); s 40(1)).[1155]

13.6 Queensland

[1151] Details of cases in which the ACT Human Rights Commission has intervened are available on the website of the ACT Human Rights Commission: https://www.hrc.act.gov.au/humanrights/court-interventions. Recent cases are: *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83; *R v QX (No 2)* [2021] ACTSC 244.

[1152] *R v Forsyth* [2013] ACTSC 179 [34].

[1153] Ibid [34].

[1154] *PM v Beck* [2016] ACTSC 314 [17]-[19].

[1155] The website of the Victorian Equal Opportunity and Human Rights Commission has details of cases involving the *Charter* or the *Equal Opportunity Act 2010* (Vic) in which the Commission has intervened: https://www.humanrights.vic.gov.au/legal-and-policy/legal-interventions/.

Both the Attorney General and QHRC may intervene, and be joined, as a party to a proceeding before a court or tribunal in which:

- a question of law arises that relates to the application of the *Human Rights Act* (Qld); or
- a question arises in relation to the interpretation of a statutory provision in accordance with the *Human Rights Act* (Qld) (s 50(1), in respect of the Attorney-General; s 51(1), in respect of the QHRC).

If the Attorney General or QHRC intervene, they become a party to the proceeding for the purpose of any appeal from an order made in the proceeding (ss 50(2), 51(2)).

In the period 2020-21 the Human Rights Commission intervened in 3 matters in the Supreme Court and 2 matters before the Mental Health Court.[1156]

As at the end of 2023 the Commission had intervened in 9 matters involving the *Human Rights Act* (Qld). In 4 other matters the Commission intervened in proceedings under the *Anti-Discrimination Act 1991* (Qld).[1157]

14. Notice requirements

In each jurisdiction, a party to the proceedings is required to give notice to the Attorney-General and the relevant state or territory human rights body of proceedings involving a question in respect of the application or interpretation of the statute, unless the Attorney-General or human rights body is already a party to the proceedings

14.1 The ACT

Section 34 of the ACT *Human Rights Act* sets out notice requirements if a question arises in a proceeding in the Supreme Court involving the application of the Act or, if the Supreme Court is considering making a declaration of incompatibility and the ACT is not a party to the proceeding (s 34(1)). In those circumstances, the Supreme Court cannot allow the proceeding to continue, except to the extent other matters unrelated to the Act may continue to be heard (s 34(3)(b)), or make the incompatibility declaration unless it is satisfied that:

- notice of the proceeding has been given to the Attorney General and the ACTHRC (s 34(2)(a)); and
- a reasonable time has passed since the notice for the Attorney General and the ACTHRC to decide whether to intervene in the proceeding (s 34(2)(b)).

The ACT Supreme Court can direct a party to the proceeding to provide the notice (s 34(3)(a)). The s 34(2) requirement will not prevent the Supreme Court from hearing and deciding proceedings to the extent they related to the grant of urgent relief of an interlocutory nature, if the Court determines it necessary in the interests of justice (s 34(4)).

[1156] Queensland Human Rights Commission, *Balancing life and liberty: the second annual report on the operation of the Queensland Human Rights Act, 2020-21*, p14.

[1157] Details of the cases in which the Commission has intervened are available at: https://www.qhrc.qld.gov.au/resources/legal-information/interventions.

The ACTHRC is also required to be given notice of certain proceedings in relation to the ACT *Human Rights Act* (s 36) and can, with leave, intervene in proceedings involving the application of the statute (s 34). The Human Rights Commission has no power or function to receive and investigate complaints in relation to breaches of the ACT *Human Rights Act.*

The Court is subject to a procedural obligation under s 34 that, where it is considering making an incompatibility declaration in a proceeding, it must not allow the proceeding to continue or make the declaration before the Attorney General and the ACTHRC are given notice of the proceeding and given a reasonable time to decide whether to intervene.[1158] An exception applies to the extent proceedings relate to urgent relief of an interlocutory nature.[1159]

if the Court is considering making a declaration of incompatibility it must give notice to the Attorney-General and the Human Rights Commission.[1160]

14.2 Victoria

In Victoria, a party to the proceeding must give the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission notice of proceedings in the Victorian Supreme Court or County Court involving question of law relating to the application of statutory interpretation of the Victorian Charter, unless they are already party.[1161]

Particular notice requirements apply in the event that the Supreme Court is considering making a declaration of incompatibility.

A notice requirement also applies in respect of proceedings referred to the Supreme Court.

if the Court is considering making a declaration of inconsistent interpretation , it must give notice in the prescribed form to the Attorney-General and to the VEOHRC and must not make a declaration unless it is satisfied that such notice has been given and that a reasonably opportunity has been given to the Attorney-General and VEOHRC to intervene or to make submissions in respect of the proposed declaration (s 36(3)–(4)).[1162]

14.3 Queensland

If a question of law arises in proceedings in the Supreme Court or District Court that relates to the application of the *Human Rights Act* (Qld) or arises in relation to the interpretation of a statutory provision in accordance with it, or if a question is referred to the Supreme Court under s 49, a party to the proceeding is required to give notice to the Attorney-General and QHRC (s 52(1)). That obligation does not apply if the Attorney General, or if QHRC, is a party to the proceeding (s 52(2)). Notwithstanding the notice requirement, the court or tribunal is not required to adjourn the proceedings (s 52(3)).

[1158] *Human Rights Act 2004* (ACT) s 34(1)-(2).
[1159] *Human Rights Act 2004* (ACT) s 34(5).
[1160] *Human Rights Act 2004* (ACT) s 34.
[1161] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 34 – 35.
[1162] See *R v Momcilovic* (2010) 25 VR 436; [2010] VSCA 50 [156]–[157].

Particular notice requirements apply where the Supreme Court is considering making a declaration of incompatibility. The power of the Supreme Court to make a declaration of incompatibility is clearly expressed to be discretionary. The Supreme Court is, however, subject to a procedural requirement not to make an incompatibility declaration unless the Court itself has notified the Attorney General and the QHRC of the fact in the approved form and provided them a reasonable opportunity for intervention or submissions on the proposed declaration (s 53(4)). The 'approved form' is one that approved pursuant to s 104 of the *Human Rights Act* (Qld).[1163]

The meaning in s 53(2) of the term 'compatible with human rights' is taken from s 8, which makes it clear that the Court is required to consider whether any limitation imposed by human rights on the provision is reasonable and demonstrably justified pursuant to the proportionality analysis in s 13. The Court is therefore required to have concluded that the limitation is not justified within the meaning of s 13 before issuing an incompatibility declaration.

16 Other functions of the Human Rights Commissions

In addition to the right of the ACT, Queensland and Victorian Human Rights Commissions to intervene in court and tribunal proceedings related to the state and territory human rights statutes they have a number of other functions. Here, we briefly address their other functions under those statutes, including the human rights complaint function of the Queensland Human Rights Commission as one avenue by which to seek remedy for breaches of human rights by public entities in Queensland. We also observe that the Human Rights Commissions in each jurisdiction are 'public authorities' or 'public entities' within the meaning of the relevant legislation and subject to the human rights obligations of those bodies in carrying out their functions accordingly.

16.1 The ACT Human Rights Commission

Under the ACT *Human Rights Act*, the ACT Human Rights Commission has a function to review the effect of ACT laws, including the common law, on human rights and to report to the Minister on the results of the review, who is required to table the reports in the Legislative Assembly.[1164] The ACT Human Rights Commission's establishing legislation also provides for educative and advisory functions of the Commission in respect of the ACT *Human Rights Act*.[1165] The Commission has no human rights complaints handling function.

[1163] Section 104 provides that, 'The chief executive may approve forms for use under this Act': *Human Rights Act 2019* (Qld), s 104. No definition of 'chief executive' is provided in the legislation itself, so reference should be had to s 33 (Reference to Ministers, departments and chief executives) of the *Acts Interpretation Act 1954* (Qld).

[1164] *Human Rights Act 2004* (ACT) ss 41(1)-(2).

[1165] *Human Rights Commission Act 2005* (ACT), ss 27(2)(a)-(b). Section 15 of that Act also requires that the Commission act in accordance with the human rights under the ACT Human Rights Act when exercising its functions under the *Human Rights Commission Act 2005* (ACT) or other legislation.

ACT Human Rights Commissioner Dr Helen Watchirs has described the review function as one of 'the [Commission's] most important functions' by which to achieve legislative and practical 'systemic improvements in human rights protection'.[1166] Pursuant to it, the Commission has audited youth and adult detention facilities in the ACT as well as reviewed the treatment of women in detention in accordance with international human rights benchmarks.[1167] In 2019, the ACTHRC released a report into the Bimberi Youth Justice Centre in response to a range of allegations and concerns about the treatment of young people in the detention centre.[1168]

16.2 The Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission has an annual obligation to report to the Attorney-General on the operation of the Victorian *Charter of Rights*, declarations of inconsistent interpretation and override declarations made throughout the year.[1169] The Attorney-General is required to table the report in the Victorian Parliament.[1170] In addition, the Commission can also review the effect of statutory provisions and the common law on human rights on the request of the Attorney-General and the human rights compatibility of public authorities' programs and practices on their request.[1171] It also has educational and advisory functions in respect of the Victorian *Charter of Rights*.[1172]

While the Victorian Equal Opportunity and Human Rights Commission does not have a human rights complaint handling function, the Victorian Ombudsman accepts human rights complaints in respect of breaches of the Victorian *Charter* and can assist in the resolution of human rights complaints through contacting public authorities directly and conducting investigations.[1173] In December 2020, for example, the Victorian Ombudsman issued a report of its investigation finding that the detention and treatment of public housing residents during a hard lockdown of two public housing towers in Melbourne in response to the Covid-19 pandemic violated the Victorian *Charter of Rights*.[1174] We address the state and territory ombudsman regimes elsewhere.

[1166] Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 163.

[1167] Ibid 164; see Australian Human Rights Commission, *Human Rights Audit Reports* <http://hrc.act.gov.au/humanrights/human-rights-audits/> .

[1168] Act Human Rights Commission, ACT Government, *Investigation Report into Bimberi Youth Justice Centre 2019* (2019) < https://hrc.act.gov.au/bimberi-report/>.

[1169] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 41(a).

[1170] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 43(1).

[1171] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 41(b)-(c).

[1172] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 41(d)-(e).

[1173] https://www.ombudsman.vic.gov.au/complaints/human-rights/; https://www.ombudsman.vic.gov.au/our-impact/case-examples/

[1174] https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-covid-19-hard-lockdown-in-july-2020/

16.3 The Queensland Human Rights Commission

The Queensland Human Rights Commission was formerly known as the Anti-Discrimination Commission Queensland until the introduction of the *Human Rights Act* (Qld) in 2019. Of the three state and territory human rights statutes, the Commission is the only one to have a complaints handling function by which it can investigate and conciliate human rights complaints against public entities for breaches of s 58 of the *Human Rights Act* (Qld).[1175]

16.3.1 Human rights complaint handling function

An overview of the process for bringing a human rights complaint to the Queensland Human Rights Commission is set out below.

- ***The complainant.*** A complaint can be brought by an individual who is subject of a public entity's alleged contravention of s 58, their agent or a person authorised by the Commissioner to make the complaint.[1176] Two or more persons can make a joint complaint.[1177]
- ***Initial complaint to public entity.*** For the Commissioner to accept a complaint, a complaint must have been made to the public entity subject of the complaint first. At least 45 business days must have passed without the complainant having received a response or the complainant must have received a response that they consider inadequate.[1178]
- ***Complaints referral.*** The Queensland Ombudsman, Health Ombudsman, Crime and Corruption Commission and Information Commission can, with the consent of the person making the complaint, refer statutory complaints received by them that may also be human rights complaints to the Commissioner.[1179] The Commissioner can also refer complaints to those entities, as well as the NDIS Commissioner, where the Commissioner considers that the complaint could be dealt with more appropriately by those entities.[1180] In exceptional circumstances the Commissioner may accept a complaint made before the period of 45 day business days, or response from the entity, has elapsed.[1181]
- ***Time bar***. There is no time bar on bringing a complaint. However, the Commissioner can refuse to deal with a complaint not made or referred within one year of the alleged human rights contravention that the complaint relates to.[1182] Complaints must concern

[1175] *Human Rights Act 2019* (Qld) s 61(a) (human rights complaint function) and s 63 (defining a 'human rights complaint' by reference to s 58).

[1176] *Human Rights Act 2019* (Qld) s 64(1).
[1177] *Human Rights Act 2019* (Qld) s 64(3).
[1178] *Human Rights Act 2019* (Qld) ss 65 & s 70(1)(a)(c).
[1179] *Human Rights Act 2019* (Qld) s 66.
[1180] *Human Rights Act 2019* (Qld) s 73.
[1181] *Human Rights Act 2019* (Qld) ss 65(2).
[1182] *Human Rights Act 2019* (Qld) s 70(1)(d).

contraventions of human rights that took place after 1 January 2020, the date on which the *Human Rights Act* (Qld) took effect.[1183]

- ***Preliminary inquiries.*** On receipt of a complaint, the Commissioner can make preliminary inquiries about it, which might include requesting and directing production of information through issuing notices enforceable as a court order.[1184]
- ***Mandatory refusal of complaints.*** The Commissioner is required to refuse complaints that are 'frivolous, trivial, vexatious, misconceived or lacking in substance.'[1185]
- ***Discretionary refusal or deferral of complaints.*** The Commission also has the discretion to refuse to deal or to continue to deal with a complaint where: a more appropriate course of action is available under another law for the subject of the complaint;[1186] the subject of the complaint has been appropriately dealt with by another entity;[1187] the requirements for making a prior complaint to the public entity have not been met;[1188] or the complainant does not comply with reasonable requests of the Commissioner, fails to cooperate with the complaints process without reasonable excuse or is non-contactable.[1189] In certain circumstances, the Commissioner can also choose to defer dealing with a complaint.[1190]
- ***Effect of refusal*.** If the Commissioner refuses to deal with a complaint, but for a failure to comply with s 65 (initial complaint to public entity), the complaint lapses and the complainant is barred from making a further complaint in respect of the alleged contravention subject of the complaint.[1191]
- ***Notice of refusal or deferral.*** The Commissioner must give notice and reasons to the complainant and respondent for refusing or deferring the complaint.[1192]
- ***Discrimination complaints process.*** The Commissioner may also elect to deal with a complaint where appropriate under the *Anti-Discrimination Act 1991* (Qld) rather than the human rights complaint process.[1193]
- ***Notice of acceptance.*** The Commissioner must give notice of the acceptance to the complainant and respondent if it accepts the complaint for resolution by the Commission.[1194]

[1183] See *Human Rights Act 2019* (Qld) s 108(2)(b) (the obligations of public entities under the legislation apply only from the date of commencement of the legislation).
[1184] *Human Rights Act 2019* (Qld) s 68 (power to make preliminary inquiries) & s 78 (information-gathering powers).
[1185] *Human Rights Act 2019* (Qld) s 69.
[1186] *Human Rights Act 2019* (Qld) s 70(1)(a).
[1187] *Human Rights Act 2019* (Qld) s 70(1)(b).
[1188] *Human Rights Act 2019* (Qld) s 70(1)(c).
[1189] *Human Rights Act 2019* (Qld) s 70(2)(a)-(c).
[1190] *Human Rights Act 2019* (Qld) s 70(3).
[1191] *Human Rights Act 2019* (Qld) s 72(2).
[1192] *Human Rights Act 2019* (Qld) s 71(1).
[1193] *Human Rights Act 2019* (Qld) s 75.
[1194] *Human Rights Act 2019* (Qld) s 76.

Once a complaint is accepted, the Commissioner can 'take the reasonable action' the Commissioner 'considers appropriate to try to resolve the complaint.'[1195] Without imposing limitations, this can include seeking written submissions, directing that information be provided to the Commission, making enquiries of the parties to the complaint, and causing the complaint to be conciliated.[1196] Sections 79 to 86 of the *Human Rights Act* (Qld) set out various requirements of the conduct of conciliation and the rights of persons taking part. If the conciliation fails, there is no available appeal. However, the rights of a person to seek relief or remedy for a contravention of s 58(1) of the *Human Rights Act* (Qld) are unaffected.[1197]

Since the introduction of the human rights complaint function, the Commission's Annual Report for 2019-2020 shows that the Commission received complaints in which 179 human rights breaches were identified (25.1% of which were alleged breaches of the right to recognition and equality before the law and 12.3% breaches of the right to protection of families and children).[1198] The Commission accepted 88 complaints of alleged breaches of human rights.[1199]

16.3.2 Action by the QHRC on dealing with human rights complaints

If the Queensland Human Rights Commissioner considers a complaint resolved, the Commissioner is required to notify the complainant and respondent as soon as practicable, including stating the outcome (s 89).

If a complaint is not resolved, by conciliation or otherwise, the Commissioner must prepare a report about the complaint as soon as practicable after the QHRC has finished dealing with the complaint, which may include details of action the Commissioner considers the respondent should take to ensure its acts and decisions are human rights compatible (s 88).

The QHRC also has other functions in relation to human rights and the *Human Rights Act* (Qld) (ss 61, 62). Those include reviewing laws for human rights compatibility and educational and promotional activities.

16.3.3 Functions and powers of the QHRC

Section 61 of the *Human Rights Act* (Qld) provides that the QHRC has the following functions under the legislation:

- dealing with human rights complaints under Part 4 of the *Human Rights Act* (Qld) (s 61(a));
- reviewing and reporting to the Attorney General, on the Attorney's request, on the effect of Acts, statutory instruments and the common law on human rights (s 61(b));
- reviewing public entities' policies, programs, procedures, practices and services in relation to their human rights compatibility (s 61(c));

[1195] *Human Rights Act 2019* (Qld) s 77(1).
[1196] *Human Rights Act 2019* (Qld) s 77(2).
[1197] *Human Rights Act 2019* (Qld) s 87.
[1198] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0010/28369/QHRC_AnnualReport2019-20.pdf page 38
[1199] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0010/28369/QHRC_AnnualReport2019-20.pdf page 39

- promoting understanding, acceptance and public discussion of human rights and the *Human Rights Act* (Qld) in Queensland (s 61(d));
- making information about human rights available to the community (s 61(e));
- providing education about human rights and the *Human Rights Act* (Qld) (s 61(f));
- assisting the Attorney General in reviews of the *Human Rights Act* (Qld), pursuant to ss 95 and 96 (s 61(g));
- advising the Attorney General on matters relevant to the operation of the *Human Rights Act* (Qld) (s 61(h));
- any other functions conferred on the QHRC under the *Human Rights Act* (Qld) or another Act (s 61(i)).

16.3.4 QHRC reporting requirements

The QHRC is required under s 91 to prepare an annual report for the Attorney General on the operation of the *Human Rights Act* (Qld) during the year (s 91(1)). The report must include information on the number of declarations of incompatibility, override declarations, details of interventions in proceedings by the Attorney General and QHRC and the number of human rights complaints received by the QHRC (s 91(2)). The Attorney General is required to table the report within six sitting days of its receipt (s 94).

In its second annual report for the period 2020-21 the Queensland Human Rights Commission stated that it had received 369 complaints about human rights. Of the 344 complaints finalised in that year 151 were 'accepted' and of these 47 were resolved. 33 were conciliated and 14 led to 'early intervention'. 70 remained unresolved after conciliation, including those referred to QCAT or the QIRC[1200] The report notes that there was a six month wait for a complaint to be dealt with. The Covid 19 pandemic was said to have resulted in a dramatic increase in complaints and enquiries, including as a result of lockdowns and other pandemic response measures.

17. Commentary

Various commentators have addresses numerous means by which the state and territory human rights legislation may be improved. Reform proposals include:

- conferring human rights complaint resolution powers on the ACT and Victorian human rights commissions;
- providing for stand-alone causes of action for human rights violations in the Victorian and Queensland legislation;
- an enhanced role for public participation in human rights scrutiny bodies;

[1200] Queensland Human Rights Commission, *Balancing life and liberty: the second annual report on the operation of the Queensland Human Rights Act, 2020-21*, chapter on 'Human rights enquiries and complaints'. The report was tabled in the Queensland Parliament on 30 November 2021. These figures include 'piggy-back' complaints. Only complaints accepted under the *Anti-Discrimination Act 1991* (Qld) – that is, accepted piggy-back complaints – can be referred to a tribunal.

- facilitating less expensive and more expeditious processes for the resolution of human rights complaints by tribunals;
- additional funding for legal centres and legal aid bodies to enable them to provide assistance to those with human rights complaints;
- the extension of legislative human rights to encompass various economic and social rights;
- the adoption of human rights legislation in all State and Territory jurisdictions and
- a comprehensive Commonwealth Bill of Rights.

A detailed consideration of these and other reform proposals is outside the scope of the present paper.