



Parliamentary Joint Committee
on Human Rights

Guide to human rights

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Introduction

This Guide has been prepared to provide an introduction to the 25 key human rights protected by the seven human rights treaties which form part of the committee's mandate. Many of these rights are also found under the common law or in the Australian Constitution, and indeed the drafters of these international treaties drew heavily on the common law democratic tradition when framing these rights. In some instances, the common law or the Constitution may provide greater protection for human rights: in such cases, the international treaties provide that these enhanced rights should continue alongside the minimum rights found in the international treaties.

This guide is not intended to be comprehensive or legalistic, rather, it seeks to provide a short and accessible overview of the key rights and how the rights may be applied. Case studies are provided to illustrate how each right can be applied in practice. Further information about the rights listed in the Guide, the sources of the case studies and where to go for a more comprehensive analysis of the rights is found in the References section at the end of the Guide. The committee has also published two guidance notes which are found at the end of this Guide at Appendix 1 and 2.

Functions of the committee

The committee was established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) and has the following functions:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Human rights are defined in the Act as those contained in the following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);

- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD) (together the seven human rights treaties).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of, and respect for, human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for, and recognition of, human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited. All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

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Australia's obligations under human rights law

1.1 Australia's obligations under international human rights law are threefold:

- *to respect* – requiring government not to interfere with or limit human rights;
- *to protect* – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights; and
- *to fulfil* – requiring government to take positive measures to fully realise human rights.

1.2 Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person. This includes an obligation to investigate alleged violations promptly, thoroughly and effectively through independent and impartial bodies. It also requires appropriate reparation for victims of abuses, which can include compensation, apologies or changes in relevant laws and practices.

Who has human rights obligations?

1.3 Australia has voluntarily accepted obligations under the seven core UN human rights treaties. These human rights obligations apply to all branches of the Australian government – the Parliament, the executive, and the judiciary including all branches of the state and territory governments. It is the nation-state of Australia that is answerable at the international level for any failure to fulfil the obligations in the core human rights treaties, whether this is the result of the acts or omissions of the Commonwealth, or of a State or Territory. Under international law it is the state that has an obligation to ensure that persons enjoy human rights.

1.4 Human rights treaties do not directly bind non-state actors such as individuals, groups or corporations. Under international human rights law a state is bound to take all reasonable measures, including having in place appropriate laws or practices, to prevent individuals, groups or companies from breaching the rights of others, and to provide remedies where such breaches take place.

1.5 While Australia has obligations under international human rights treaties, these obligations are directly enforceable in Australia only if they are implemented in domestic legislation. Therefore, unless there are specific Australian laws bringing rights guaranteed by these treaties into force, the obligations are not legally binding under Australian law.

1.6 The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

When do human rights obligations apply?

1.7 While the specific circumstances and content of an obligation depend on the wording of the treaty in question, the overarching framework of respecting, protecting and fulfilling human rights applies to both civil and political rights and economic, social and cultural rights.

Civil and political rights

1.8 Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

1.9 While Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights, there is some flexibility allowed in the implementation of these rights. This is often referred to as the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. However, there are some obligations in relation to economic, social and cultural rights which are obligations of immediate effect. These require the government to:

- take immediate steps to identify appropriate baselines and to develop concrete plans for realising economic, social and cultural rights, accompanied by mechanisms for monitoring progress;
- satisfy, at the very least, certain minimum aspects of the rights;
- not unjustifiably deprive a person of access to an existing right;
- ensure that people enjoy economic, social and cultural rights without discrimination; and
- adhere to certain process requirements by ensuring accountability and transparency in decision making and to ensure people can access relevant information and constructively participate in decisions that affect them.

Who do human rights apply to?

1.10 Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

1.11 Under the UN human rights treaties, human rights belong to individuals and groups of individuals. The treaties do not confer rights on companies or other incorporated bodies.

Can human rights be limited?

1.12 Human rights law recognises that reasonable limits may be placed on most rights and freedoms. Absolute rights, of which there are few, may never be lawfully limited.

1.13 Much of the committee's focus is scrutinising legislation to determine whether a bill or regulation that limits a human right is nevertheless justifiable under international human rights law.

Absolute rights

1.14 The following absolute rights may never be limited by Australia::

- the right not to be subjected to torture, cruel, inhuman or degrading treatment;
- the right not to be subjected to slavery;
- the right not to be imprisoned for inability to fulfil a contract;
- the right not to be subject to retrospective criminal laws;
- the right to recognition as a person before the law.

Limitations on rights

1.15 For all other rights, limitations (or restrictions) may be imposed on the human right provided certain standards are met. Some rights have express limitation clauses setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause. In general, any legislative measure that limits a human right has to comply with the following criteria (limitation criteria) in order for the limitation to be considered justifiable:

- Prescribed by law;
- Legitimate objective;
- Rational connection; and
- Proportionality.

Limitation Criteria

Prescribed by law

1.16 Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law), it must also be accessible and precise enough so that people know what they need to comply with or when the authorities can restrict the exercise of their rights.

1.17 This means that discretionary powers must be appropriately circumscribed and include adequate safeguards to prevent against abuse. For example, if legislation gives discretion to a public official, the power must not be open-ended and non-

reviewable; the legislation should clearly indicate the scope of the discretion and how it should be exercised.

Legitimate objective

1.18 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. In general, it will not be a legitimate objective to limit a right simply to prevent an outcome that may be undesirable, offensive to some or inconvenient.

Rational connection

1.19 It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. The key question is whether the relevant measures are likely to be effective in achieving the objective being sought. It is not enough to put forward a legitimate objective if, in fact, the measure limiting the right would not make a real difference to achieving that objective.

Proportionality

1.20 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.

1.21 Proportionality has a particular legal meaning. In considering whether a limitation on a right is proportionate, some factors that might be relevant include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

1.22 Many of the rights in the human rights treaties include a requirement that any limitation on rights must not be arbitrary or unlawful. This has generally been interpreted as requiring the test set out above to be followed: that the limitation be necessary, reasonable and proportionate and that there are adequate safeguards against abuse.

Retrogressive measures

1.23 In respect of economic, social and cultural rights, such as the right to work, social security, an adequate standard of living, health, education and culture, there is

a duty to realise rights progressively. As such, there is a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. Retrogressive measures can only be justified if consideration is given to the totality of economic and social rights; that is, looking at all the competing priorities presented by the range of economic and social rights.

Legal basis of human rights

1.24 International human rights law draws on a long history of rights development stretching from the Magna Carta of 1215, common law rights, and the Universal Declaration on Human Rights in 1948. Many of these treaties, particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which set out universally accepted minimum standards of human rights, draw heavily on this history.

Human rights treaties

1.25 Australia has agreed to be bound by a number of international human rights treaties, including the seven human rights treaties which form part of the committee's mandate. The seven human rights treaties cover:

- civil and political rights;
- economic, social and cultural rights;
- rights of the child;
- rights of persons with disabilities;
- prohibition on racial discrimination;
- prohibition on discrimination against women; and
- prohibition on torture.

1.26 The ICCPR and the ICESCR are the primary sources for most of the key rights. Other treaties build on these rights in relation to particular groups (such as women, people with disabilities, children and racial groups).

UN human rights treaty bodies

1.27 There are a number of UN committees made up of independent experts that monitor implementation of the various human rights treaties (known as UN human rights treaty bodies). The UN Human Rights Committee is responsible for monitoring implementation of the ICCPR and the Committee on Economic, Social and Cultural Rights monitors implementation of the ICESCR.

1.28 Every four to five years, Australia is required to submit reports to these UN committees explaining how the rights are being implemented in Australia.

1.29 In addition, individuals can take complaints against Australia to a number of UN human rights treaty bodies in relation to alleged violations of rights.

1.30 In their General Comments or General Recommendations, the committees publish their interpretation of the meaning of specific human rights treaty provisions and also on thematic issues. They also publish their interpretation of human rights when considering reports submitted by states parties (known as Concluding Observations) and in making decisions on individual complaints (communications). These are not formally binding on states under international law, however these

statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties.

1.31 In understanding how human rights are to be applied, the committee has regularly looked to the way in which the UN human rights treaty bodies have interpreted the UN human rights treaties, as well as to the interpretations by comparable regional human rights courts and the domestic human rights courts of other countries. Human rights instruments, whether international, regional or national, largely deal with fundamental, universal and overlapping rights, and often contain similar provisions. As such, case law from other domestic systems, including cases brought under the European Convention on Human Rights (which is very similar to the ICCPR), can be a valuable resource in understanding how human rights are to be applied in practice. While none of this is binding on how the committee carries out its scrutiny function, it can assist the committee in gaining a broader understanding of the content and application of human rights.

Key human rights

Right to life

Source: article 6 of the ICCPR (right to life) and article 9(1) of the ICCPR (security of the person)

1.32 The right to life has three core elements to it:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others;
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

Prohibition of arbitrary killing by the state

1.33 Australia is not only prohibited from imposing the death penalty, it is also required to prevent arbitrary killing by the security forces and police.

1.34 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

1.35 In order to effectively meet this obligation, Australia must have in place adequate legislative and administrative measures to ensure police and the armed forces are adequately trained to prevent arbitrary killings.

Obligation to protect the right to life

1.36 The right to life also requires the state to take steps to safeguard lives by:

- having effective criminal legislation in place and properly enforcing it; for example criminal prosecutions for murder, manslaughter and criminal negligence resulting in death;
- requiring the police to take reasonable steps to protect persons from others where credible threats have been made against them;
- taking appropriate steps to prevent accidental death, by having a framework in place to provide effective deterrence against preventable accidents;
- taking reasonable steps to protect people in state custody, including protecting people from violence and suicide and providing appropriate health care in detention;
- prohibiting the deportation or extradition of a person to another country where there is a real risk that their life would be endangered, for example by imposition of the death penalty;

- taking measures to reduce infant mortality and to increase life expectancy.

Effective investigation

1.37 The right to life requires that there be an effective official investigation into all deaths which result from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;
- be independent and impartial;
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Right to security of the person

1.38 The right to security of the person is broader than the right to life. It requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

Case study

In 2009 the UN Human Rights Committee examined Australia's record in relation to the right to life and expressed its concern at reports of excessive use of force by law enforcement officials against certain groups, such as Indigenous people, racial minorities, persons with disabilities and young people. It also expressed its regret that under Australian law investigations of allegations of police use of force are carried out by the police themselves and not by an independent body.

It recommended that Australia establish a mechanism for independent investigations into the use of force by law enforcement officials. It also suggested there be increased training to law enforcement officers on the principle of proportionality when using force, and noted that restraint devices, such as tasers, should only be used in situations where greater or lethal force would otherwise have been justified.

Prohibition against torture, cruel, inhuman or degrading treatment

Source: article 7 of the ICCPR; CAT

1.39 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute, meaning it can never be justified under any circumstances. The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely; and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

1.40 Also linked to the prohibition against torture, cruel, inhuman or degrading treatment is the right to humane treatment in detention.

What amounts to torture or cruel, inhuman or degrading treatment?

1.41 What amounts to torture or cruel, inhuman or degrading treatment will depend on all the circumstances of the case, including the vulnerabilities of the victim. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. It does not extend to pain or suffering which arises only from, or is inherent or incidental to, lawful sanctions (for example, suffering arising only from time spent in a general prison environment following conviction).

1.42 Prolonged solitary confinement, indefinite detention without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all been found to breach the prohibition against torture or cruel, inhuman or degrading treatment.

Prohibition

1.43 The most obvious element of the prohibition against torture or cruel, inhuman or degrading treatment is that the state itself is prohibited from subjecting a person to such treatment. This applies in all contexts where the state exercises some form of control over a person, including in prisons, hospitals, schools, aged care facilities, disability care services and the military.

Torture evidence

1.44 Australian courts and tribunals must not admit evidence that has been obtained through the use of torture, regardless of where the torture took place.

Deportation to torture

1.45 The absolute prohibition against torture or cruel, inhuman or degrading treatment also prohibits Australia from exposing people to the danger of such treatment or punishment by another country. Where there are substantial grounds to believe there is a real risk that a person would be subjected to such treatment in another country, Australia is under an obligation not to extradite or deport the person to that country.

Effective investigation and prevention

1.46 As with the right to life, the prohibition against torture or cruel, inhuman or degrading treatment requires an official and effective investigation to be undertaken when there are credible allegations against public officials.

1.47 Australia is also required to have in place legislative and administrative measures to prevent torture and ill-treatment by both state officials and third parties, and to punish it when it occurs. All public officials involved in the custody or treatment of anyone under state control must receive appropriate training to prevent ill-treatment.

Case study

Between 2009 and 2010, 46 people who entered Australia and were recognised to be refugees were detained and denied refugee visas following adverse security assessments against them. They were not told the reasons for the assessments, could not challenge the assessments and as recognised refugees could not be sent home, so faced years of indefinite detention.

In 2013 the UN Human Rights Committee found that this treatment amounted to a breach of the prohibition against torture or cruel, inhuman or degrading treatment. It considered that the combination of the arbitrary nature of the detention, its indefinite duration, the refusal to provide information or avenues of review and the difficult conditions of detention cumulatively inflicted serious psychological harm.

Prohibition against slavery and forced labour

Source: article 8 of the ICCPR

1.48 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. Although the slave trade was abolished many years ago, modern-day slavery and trafficking persists.

1.49 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another and subjecting them to 'slavery-like' conditions.

1.50 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. This does not include lawful work required of prisoners or those in the military; work required during an emergency threatening the community; or other work or service that is a part of normal civic obligation (for example, jury service).

1.51 The obligation on the state is not to subject anyone to such treatment itself, and also to ensure there are adequate laws and measures in place to prevent private individuals or companies from subjecting people to such treatment (such as laws and measures in place to prevent trafficking).

Case study

In 1994, Siwa-Akofa Siliadin, a 15 year old Togolese girl was brought to France by an employer who promised to regularise her immigration status and arrange for her education in exchange for housework until she had paid back her airfare. Later that year the girl was 'lent' to friends to help with housework and look after their young children. She stayed for almost four years, during that time she worked 15 hours a day, seven days a week, slept on the floor and was never paid. Her immigration papers had been taken off her and her immigration status was never regularised.

Under French law at the time the couple who exploited Ms Siliadin were only liable for breaching employment conditions, not for breaching any criminal laws as France had not enacted legislation criminalising forced labour. The European Court of Human Rights found that France, in not providing specific and effective protection for Ms Siliadin, was in breach of its obligations to prohibit slavery and forced labour.

Right to liberty

Source: article 9 of the ICCPR

1.52 The right to liberty of the person is one of the oldest human rights, dating back to the Magna Carta of 1215. It is not a right never to be deprived of liberty, as this is a legitimate form of state control (i.e. to punish offenders). Rather, it is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

Prohibition against arbitrary detention

1.53 The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. It is not enough that an arrest or detention is carried out in accordance with Australian law: the law, and the enforcement of it, must not be arbitrary under human rights law.

1.54 The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Therefore, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention; regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

1.55 The right applies to all forms of deprivations of liberty, including detention in criminal cases, immigration detention, forced detention in hospital (such as involuntary admission for psychiatric treatment), detention for military discipline and detention to control the spread of contagious diseases.

1.56 The right applies to *deprivations* of liberty, such as incarceration at a particular location, rather than *restrictions* on whether a person can move freely around, which is dealt with under the right to freedom of movement (see pages 21-22 for discussion of freedom of movement).

Right to reasons for arrest and to be informed of criminal charge

1.57 A person who is arrested is entitled to be informed, at the time of the arrest, of the reasons for the arrest. This requires enough factual information to indicate the substance of why the person was arrested. This applies whenever the state initiates the process to deprive a person of their liberty, both in a criminal and non-criminal context (for example, immigration detention or detention in a psychiatric facility).

1.58 Anyone charged with an offence should also be promptly informed of the charges against him or her (this right applies only in the criminal context).

Rights of people detained on a criminal charge

1.59 Anyone who is arrested or detained and charged with a criminal offence has the right to be promptly brought before a judicial officer who can decide whether they should continue to be detained.

1.60 A person awaiting trial is entitled to be tried within a reasonable time or otherwise released. This is linked to criminal process rights, discussed at pages 25-27.

1.61 Detention pending trial should be the exception. Bail should normally be granted, except where there is a likelihood that the accused might abscond or tamper with evidence or interfere with witnesses.

Right to challenge detention

1.62 Anyone who is arrested or detained, for any reason, has the right to challenge the lawfulness of their detention in court without delay. This right reflects the common law right to habeas corpus. It applies to everyone in any form of detention. A court that considers the case must have the power to order the release of the person if it finds the person was arbitrarily or unlawfully detained.

1.63 The right requires that review of the detention should be made available without delay, which means having an opportunity to access the courts at the latest within a few days of being detained. This also includes a right to have access to legal representation, and to be informed of that right, in order to effectively challenge the lawfulness of the detention.

Right to compensation

1.64 Anyone unlawfully deprived of their liberty has a right to compensation. This applies if the detention is unlawful under international human rights law, even if it may be 'lawful' under Australian law.

Case study

In the UK in 1997, a man with severe autism was admitted to hospital following an incident of disturbed behaviour at a day care centre. He was not committed under the *Mental Health Act 1983*; rather the doctors admitted him as an 'informal patient', despite his inability to consent to this. Over a period of three months the man was detained in hospital on an informal basis, before being admitted as an involuntary patient under the Act. Proceedings for judicial review of the decision to admit him as an informal patient failed in the UK.

The European Court of Human Rights found that his three month detention amounted to an arbitrary deprivation of liberty. In particular, it found that the lack of any fixed procedural rules, including any formalised admission procedures setting out who could admit a person and for what reason, the lack of time limits and review mechanisms to determine the ongoing need to detain, failed to protect against arbitrary deprivations of liberty.

It also found that as there was only a right to judicial review of the detention and not to review requiring an examination of the merits of the clinical view justifying the detention, this breached the right to challenge the detention.

Right to humane treatment in detention

Source: article 10 of the ICCPR

1.65 The right to humane treatment in detention provides that all people deprived of their liberty must be treated with humanity and dignity.

1.66 This applies to everyone in any form of state detention, including prisons, immigration detention and forced hospital detention (including psychiatric wards). It also applies to private detention centres where it is administered under the law and authority of the state (for example, privately run prisons).

1.67 This right is linked to the prohibition against torture, cruel, inhuman or degrading treatment (see pages 14-15). It provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty.

1.68 The obligation on the state includes:

- a prohibition on subjecting a person in detention to inhumane treatment (including lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty;
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Prisons

1.69 In addition to the general right to humane treatment in detention and the right to liberty, the following rights apply to persons in prison:

- people accused of an offence must be separated from people convicted of an offence, except in exceptional circumstances (this is linked to the concept of the presumption of innocence);
- people accused of an offence must be subjected to separate treatment as is appropriate to their status as unconvicted people;
- juvenile detainees must be separated from adults, their cases considered as quickly as possible and be treated appropriate to their age and legal status (see the rights of children at pages 47-48 for further detail);
- prisons should focus on the rehabilitation of convicted prisoners, including through providing education and training opportunities.

Case study

In 1998 two men were arrested in Australia under an extradition warrant as they were wanted over financial offences in Mexico. While awaiting their extradition hearing they were kept in custody on a number of occasions (and bailed at other times).

During some of this time they were held with convicted prisoners (including extremely violent offenders) in a high security prison. When being transported to prison the men were shackled and manacled and strip searched. On one occasion the two men were held together for one hour in a cell built to accommodate only one person, with space for only one person to sit down.

The UN Human Rights Committee considered the case and found that some of this treatment meant that Australia was in breach of its obligation to treat people in detention with humanity and dignity. This applied even though the men were held within a private detention facility.

Freedom of movement

Source article 12 of the ICCPR

1.70 The right to freedom of movement provides that:

- people lawfully within Australia have the right to move freely within Australia and choose what location to live in;
- all people have the right to leave Australia; and
- no one can be arbitrarily denied the right to enter his or her own country.

Free movement within Australia

1.71 The right to freedom of movement is linked to the right to liberty – a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.72 The obligation requires not only that the state must not prevent people from moving freely, but also that the state must protect people from others who might prevent them from moving freely, for example, by having laws against domestic violence.

1.73 The right also includes the freedom to choose where to live; although this can be limited to protect the rights of others, for example, to protect the right to private property or the rights of Indigenous people.

1.74 As the right applies to those lawfully within Australia, Australia may place restrictions on non-citizens entering Australia and may, in certain circumstances, impose limited restrictions on individuals already in Australia.

1.75 Limitations can be placed on the right as long as they are lawful and proportionate. Particular examples of the reasons for such limitations include the need to protect public order, public health, national security or the rights of others.

Freedom to leave any country

1.76 The right also includes a right to leave Australia, either temporarily or permanently. This applies to both Australian citizens and non-citizens.

1.77 As international travel requires the use of passports, this right includes a right to obtain necessary travel documents without unreasonable delay or cost.

1.78 As with the right to freedom of movement within Australia, there can be limitations on the right to leave a country, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

Right to enter own country

1.79 The right to enter one's own country includes a right to remain in the country, return to it and enter it.

1.80 There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

1.81 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship – it might also apply when a person has very strong ties to the country.

Case study

In 1973, Stefan Nystrom came to Australia from Sweden when he was 27 days old, where he remained until he was 33 years old. He thought he was an Australian citizen as he had limited ties to Sweden (including speaking only English). Following a string of criminal convictions that began when he was 10, Australia cancelled his permanent visa in 2003 and deported him to Sweden in 2006.

The UN Human Rights Committee found that the deportation breached Mr Nystrom's right to remain 'in his own country'. It found that while Mr Nystrom was not an Australian citizen, he had lived his entire life in Australia since he was 27 days old and had strong ties to the Australian community, including his Australian family. As such, the Committee found that Australia was his own country and his deportation from Australia was arbitrary and a breach of article 12 of the ICCPR.

Right to a fair hearing

Source: article 14(1) of the ICCPR (fair hearing) and article 13 of the ICCPR (expulsion of aliens)

1.82 The right to a fair hearing is a fundamental part of the rule of law and the proper administration of justice. The essential right to a fair hearing provides that all persons are:

- equal before courts and tribunals;
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.83 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined, such as:

- private law rights, for example property, contract, negligence and other civil law proceedings;
- proceedings relating to the applicability of social security benefits;
- some employment decisions (such as dismissals); and
- family law decisions (including child custody).

1.84 However, it may not apply to areas such as disciplinary proceedings or the extradition or deportation of non-citizens. However, if a court or tribunal has nonetheless been given the power under Australian law to determine the matter, the fair hearing guarantees will apply.

Equality before the courts and access to justice

1.85 All parties before a court or tribunal are to have the same basic procedural rights, including both sides having a reasonable opportunity to present their case. For example, both sides are to have the same rights to present and contest evidence, examine witnesses or appeal a decision, and a defendant who is held in custody pending trial is not to be disadvantaged by reason of their detention.

1.86 All people are to have equal access to the courts, regardless of citizenship or any other status. This requires that no one is to be barred from accessing courts or tribunals (although there are limited exceptions if these are based on objective and reasonable grounds, for example vexatious litigants). To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Right to a public hearing

1.87 The right to a fair hearing includes the right to a public and oral hearing – a principle central to the open and transparent administration of justice. However, in exceptional circumstances proceedings may be conducted in private if:

- it is necessary and proportionate to do so for reasons of public order, morals or national security;
- the interests of the private lives of the parties require privacy;
- it is in the best interest of a child; or
- there are special circumstances where the publicity would be prejudicial to the interests of justice.

1.88 This right includes a right to a concluded hearing and delivery of judgement within a reasonable time.

Independent and impartial courts and tribunals

1.89 The right to a fair hearing includes a right to an independent, impartial and competent court or tribunal. This relates to the separation of powers between the judiciary and the executive and the requirement that judges do not have, and are not seen to have, any conflicts of interest.

Expulsion of aliens

1.90 For immigrants lawfully within Australia, article 13 of the ICCPR provides that procedural rights must be available before they can be expelled from Australia. This includes a right to submit reasons against their expulsion and the right to a review of their case (although this can be restricted on national security grounds).

Case study

In 2008 in the UK a control order was placed on 'AT' on the basis that he was a member of an organisation involved in opposition to the now-ousted Gaddafi regime (which had been proscribed as a terrorist organisation). This order controlled where AT could live, where he could go and who he could associate with.

The order was made on the basis of closed material, so that AT did not know the full case against him. He was given no reasons as to why the security services considered that he retained links with the proscribed organisation and so he could do no more than deny this without addressing any specific allegations.

The UK courts and the European Court of Human Rights have held that failing to give a person sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations, breaches the right to a fair hearing. There can be no fair hearing if a case against a person is based solely or to a decisive degree on closed materials and where open material consists only of general assertions.

Criminal process rights

Source: article 14(2)-(7) ICCPR

1.91 In addition to the general fair hearing rights set out above, there are additional specific rights that apply when a person has been charged with a criminal offence or otherwise subject to a penalty which may be considered criminal. Much of these are drawn from generally recognised principles of the common law. See also the right to humane treatment in detention (page 19), the prohibition on retrospective criminal laws (page 28) and the rights of accused children (page 48).

1.92 Note that depending on the nature and severity of the penalty, a penalty or sanction may be considered to be 'criminal' for the purposes of human rights law, even if it is classified as 'civil' under Australian law. See Appendix 2 for more information.

Right to be presumed innocent

1.93 Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. This means that the prosecution has the burden of proving the charge beyond a reasonable doubt. Offences that reverse the burden of proof (for example, by requiring a defendant to prove certain matters in order not to be convicted) will engage this right.

1.94 The right to be presumed innocent also requires all public authorities (including the police) not to prejudice the outcome of a case, and the media is required to avoid undermining the presumption of innocence when reporting on trials.

Right not to incriminate oneself

1.95 The right to a fair hearing for those charged with a criminal offence also includes the right not to be compelled to testify against oneself or to confess guilt, otherwise known as the prohibition against self-incrimination. If a person is ill-treated in order to obtain a confession, this may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see pages 14-15).

1.96 The prohibition against self-incrimination, together with the right to be presumed innocent, also provides for a right to silence during investigations or in pre-trial questioning as well as at trial. These rights also include the right not to have adverse inferences drawn from choosing to remain silent.

Right not to be tried or punished twice (double jeopardy)

1.97 A person who has been finally convicted or acquitted of an offence has a right not to be tried or punished again for that offence. This applies only to criminal offences and not to disciplinary measures that do not amount to criminal sanctions.

1.98 The right does not necessarily prohibit the resumption of a criminal trial in exceptional circumstances, such as where evidence is discovered that was not available or known when the person was acquitted.

Minimum guarantees in criminal proceedings

1.99 All people charged with a criminal offence have, in addition to the general rights to a fair trial, the right to the following minimum guarantees:

- **to be informed promptly of any charge against them**, including the right to be told as soon as they are formally charged and in a language which they understand;
- **to have adequate time to prepare a defence**, which varies depending on the nature and complexity of the case;
- **to have adequate facilities to prepare a defence**, such as access to documents and evidence;
- **to be tried (and final judgment given) without undue delay**, with what amounts to 'undue' delay depending on the nature and complexity of the case and the conduct of the parties (a lack of resources to bring about the trial is no excuse);
- **to be tried in person**, except where the person, after being adequately notified of the trial, chooses not to appear;
- **to choose their own lawyer**, including the right to meet with their lawyer promptly and confidentially (or to choose not to have a lawyer, unless the interests of justice require one);
- **to have access to effective legal aid** for those who cannot afford to pay for a lawyer of their own choice and where the interests of justice require it (which may depend on the seriousness of the offence);
- **to present relevant witnesses and examine witnesses against them** in the same manner as the prosecution; and
- **to have access to a free interpreter for those who need it**, for all stages of the process (including police interviews and court hearings).

Right to appeal and right to compensation

1.100 Everyone convicted of a criminal offence has the right to have both their conviction and any sentence reviewed by a higher court. This includes a right to review of both the facts and the law (not just judicial review of questions of law). In general, the fair hearing guarantees applicable at trial also apply on appeal. However, the guarantee does not necessarily require a full retrial or an oral hearing at the appeal, but it must provide for an evaluation of the evidence presented at trial.

1.101 Where there has been a miscarriage of justice and the person has been punished for an offence and subsequently acquitted, the person is entitled to compensation.

Limitations

1.102 Many of the criminal process rights may be limited if the limitation criteria are met. For example, the right to legal aid may not necessarily apply when a person has been charged with a minor traffic offence, and the right of a defendant to represent themselves in person may not allow a defendant to personally cross-examine a vulnerable witness. See pages 7-8 on limitations on rights.

Case study

In 2006 police searched an apartment and found prohibited drugs hidden in the apartment. Momcilovic owned and lived in the apartment with her partner, a convicted drug trafficker. Forensic evidence linked the drugs to her partner and there was no forensic evidence linking the drugs to Momcilovic. She denied all knowledge of the drugs or of her partner's involvement in trafficking. Her partner admitted the drugs were his and that Momcilovic had no knowledge of the drugs.

Despite this, in 2008, Momcilovic was convicted of drug trafficking. The conviction was based on Victorian drug laws which reversed the burden of proof. The laws provided that where a prohibited drug is found inside a person's property it is deemed to be in the person's possession, unless they can prove to the jury that they did not know of the drug's presence.

The Victorian Court of Appeal held that this reversal of the burden of proof was inconsistent with the right to be presumed innocent (the case was later appealed to the High Court which determined the case on different grounds).

Prohibition against retrospective criminal laws

Source: article 15 of the ICCPR

1.103 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time it was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right, where an offence is decriminalised, to the retrospective decriminalisation (if the person is yet to be penalised).

1.104 Laws which set out offences need to be sufficiently clear to ensure people know what conduct is prohibited.

1.105 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law. This relates to crimes such as genocide, war crimes and crimes against humanity.

1.106 This prohibition supports long-recognised criminal law principles that there can be no crime or punishment without law. This is an absolute right and it can never be justifiably limited.

1.107 This right applies only to retrospective criminal laws and does not apply in civil cases. However, depending on the nature and severity of the penalty, a penalty or sanction may be considered to be 'criminal' for the purposes of human rights law, even if it is classified as 'civil' under Australian law.

Case study

Between 1987 and 1988 a company illegally imported peas into France in breach of French customs laws. Proceedings were brought in 1994 against the company's Director who was subsequently convicted and fined. In 1992 French legislation was amended so that such importation was no longer a crime under French law.

The UN Human Rights Committee found that as there was no longer an offence under French law at the time proceedings were brought against the Director, and therefore no penalty, he should have benefited from the lighter (now non-existent) penalty.

Right to privacy

Source: Article 17 of the ICCPR

1.108 The right to privacy is the right not to have one's private, family and home life or correspondence unlawfully or arbitrarily interfered with. It also includes the right to protection by law of one's reputation.

1.109 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.110 The right to privacy requires that the state:

- does not itself arbitrarily invade a person's privacy; and
- adopt legislative and other measures to protect people from arbitrary interference with their privacy from others (including by corporations).

1.111 Whether an interference with privacy is permissible will depend on whether a person has a reasonable expectation of privacy in the circumstances.

Respect for private life

1.112 The right to privacy requires respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

1.113 In order for the right to be effective, every person has the right to find out what personal data is stored in relation to them, for what purpose and who has access to their information. Effective measures should also be adopted to ensure unauthorised persons are not able to access personal information.

1.114 The right to privacy not only protects informational privacy, it also includes protection of our physical selves against invasive action, including:

- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

1.115 The right to privacy prohibits unlawful and arbitrary body searches, and any lawful searches must be carried out in a manner consistent with the dignity of the person being searched.

Respect for the home

1.116 The right not to have one's home arbitrarily interfered with prohibits arbitrary interference with a person's home and workplace, including by unlawful surveillance, unlawful entry or arbitrary evictions. Searches of a person's home or workplace should be restricted and should not be allowed to amount to harassment.

Respect for family life

1.117 Respect for family life applies to a range of family types and protects against interference with personal family relationships. See the right to protection of the family at pages 32-33 for further information.

Respect for correspondence

1.118 Respect for correspondence prohibits the arbitrary interception or censoring of a person's mail (including email and web access) and the bugging or recording of personal conversations. This also includes respect for professional duties of confidentiality, such as the confidentiality of legal and medical communications with clients or patients.

Right to reputation

1.119 The right to reputation requires legislative protection, including the right to a remedy, against unlawful attacks against a person's reputation, including attacks by private individuals as well as by the state.

Limitations on the right to privacy

1.120 The right to privacy needs to be balanced against other rights, particularly the right to freedom of expression. It can be limited as long as it can be demonstrated that the limitation meets the limitation criteria.

1.121 The concept of arbitrariness requires that any interference with privacy, even when provided for by law, should be reasonable in the particular circumstances. An interference with privacy that provides for review and supervision by an independent and impartial body is more likely to be considered to be a reasonable limitation. See pages 7-8 for more information on limitations on rights.

Case study

A number of Australian jurisdictions have introduced police powers to stop and search people in public places without the need for suspicion. If people are in any area that has been designated as one in which the police can stop and search without suspicion (such as parts of the city during major events) a person can be randomly stopped by the police and the police can conduct a pat down search and search of their outer clothing and bags. This differs from the usual requirement that the police need to have formed a reasonable suspicion that an offence may have been, or will be committed, before a search can be conducted.

Similar UK laws were found to be incompatible with the right to privacy by the European Court of Human Rights. The Court held that a forced search of a person and their belongings clearly interfered with the person's right to privacy. It found that as the authorisation and stop and search powers were not properly constrained and were not subject to adequate safeguards against abuse, the powers were arbitrary and could not be said to be in accordance with law.

In 2009 the Victorian government, in introducing legislation that brought in such powers, acknowledged that the legislation allowing for random stop and searches was incompatible with the right to privacy.

Protection of the family

Source: articles 17 and 23 of the ICCPR and article 10 of the ICESCR

1.122 The family is recognised under human rights law as the natural and fundamental group unit of society and is therefore entitled to protection.

1.123 The right to protection of the family requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

1.124 The right also encompasses:

- a right to marry (with full and free consent) and found a family;
- a right to equality in marriage (such as laws protecting both spouses equally) and protection of any children on divorce; and
- protection for new mothers, including maternity leave.

What is a 'family'?

1.125 Human rights law gives a broad definition of what constitutes a 'family'. It refers not only to spouses, parents and children, but also to unmarried and same-sex couples and extended family members.

1.126 Cultural traditions should be taken into account when defining the 'family'. In Australia many cultures, including Indigenous cultures, see 'family' as extending to grandparents, aunts, uncles, cousins and those with kinship ties. As such, the right to protection of the family extends beyond the nuclear family.

Family unification

1.127 An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will engage this right.

1.128 There can be limits on this right provided the limitation seeks to achieve a legitimate objective, has a rational connection to that objective, and is proportionate to that objective. For example, a child may be legitimately removed from his or her parents if to do so is in the best interests of the child, and family members might be separated from one another due to migration laws if there is a legitimate state interest in deporting someone or restricting entry and this is proportionate in all the circumstances, and does not discriminate against particular categories of non-citizens. See pages 7-8 for more information on limitations on rights.

Case study

In the mid-1980s two Indonesian nationals arrived separately in Australia on short term visas. Both overstayed their visas and remained unlawfully in Australia. The two met in Australia and in 1988 had a baby in Australia, named Barry. In 1998 Barry became an Australian citizen. In 2000, when Barry was 13 years old, his parents were scheduled to be removed from Australia as they did not hold valid visas. Barry, as an Australian citizen, was entitled to remain in Australia.

The UN Human Rights Committee considered the case and found that deporting the parents and requiring the family to choose whether a 13 year old child, who was an Australian citizen and had lived his whole life in Australia, should remain in Australia alone or accompany his parents, amounted to an interference with their family life. It found that while there is significant scope for states to enforce their immigration policy, that discretion is not unlimited. In this case, given the period of time the parents had lived in Australia and as Barry was an Australian attending an Australian school, more needed to be shown to justify the removal of both parents other than simple enforcement of immigration laws. As no other reasons had been given, the Committee found a breach of the right to protection of the family.

Freedom of religion

Source: article 18 of the ICCPR

1.129 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion (e.g. to be atheist) or to have non-religious beliefs protected (e.g. philosophical beliefs such as pacifism or veganism).

1.130 It also includes the right not to be coerced in any way that might impair a person's ability to have or adopt a religion or belief of his or her own choice. For example, requiring a person not to wear religious dress, in the absence of a legitimate and proportionate objective, could be seen as coercion against the exercise of one's religion.

1.131 The right to freedom of religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of religion, but that the state should also take steps to prevent others from coercing persons into having, or changing religion.

1.132 The right also requires the state to respect the convictions of parents and guardians of children in the provision of education. This allows public schools to teach particular religions or beliefs, but only if it is taught in a neutral and objective way or there is a non-discriminatory alternative for those children whose parents or guardians do not wish them to be educated in that religion or belief.

Limitations on exercising religion

1.133 While the right to hold a religious or other belief or opinion is an absolute right, the right to exercise one's belief can be limited given its potential impact on others.

1.134 The right can be limited as long as it can be demonstrated that the limitation meets the limitation criteria and is necessary to protect public safety, order, health or morals or the rights of others.

Case study

A Sikh in France claimed his right to freedom of religion was breached by a French requirement that he remove his turban for the purposes of an identity card photo. As he had refused on religious grounds to remove his turban he had been denied a residence card and was unable to access a range of benefits.

The UN Human Rights Committee found that requiring the removal of the turban for the photograph was not legitimately required for the purposes of public safety and order. It held that as the turban did not cover the face there was no need from an identification point of view to require the photo to be taken without the turban.

This decision is in contrast to a case involving Canada where a Sikh man refused to wear a hard hat at work to protect him from injury and electric shock because of his turban. In this case the UN Human Rights Committee held that the limitation on the right to freedom of religion was justified as a matter of public safety.

Freedom of expression

Source: articles 19 and 20 of the ICCPR and article 21 of the CRPD

1.135 The right to freedom of expression is a crucial right in a democracy as it is essential for political debate and open and transparent government, and forms the basis for the effective exercise of many other rights.

1.136 The right includes the right to freedom of opinion, and applies not only to the imparting and seeking of ideas and information, but also to receiving information.

1.137 The right to freedom of expression requires the state:

- not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate;
- to protect the freedom to impart and receive information and ideas, including through a free, uncensored press, encouragement of an independent and diverse media and protection for journalists;
- to protect the freedom to seek and receive information held by the state on matters of legitimate public concern, including by ensuring easy, prompt, effective and practical access to such information; and
- to put in place effective measures to protect against attacks on free speech.

1.138 Restrictions on the media, including the internet and social media, which limit the information and ideas that can be imparted and received will limit the right to freedom of expression. The ability of journalists to protect their sources is also an important element of the right to freedom of expression.

1.139 For the right to be meaningful for people with disability, information must be provided in accessible and appropriate formats and technologies to enable them to exercise their right to freedom of expression.

What is expression?

1.140 The types of expression protected under this right include:

- political expression and commentary on public affairs;
- cultural and artistic expression; and
- commercial expression.

1.141 The right to political expression is given particular protection given its importance to the democratic process. Cultural and artistic expression is also robustly protected given its importance to the development of ideas and individual fulfilment.

1.142 Expression includes not only verbal expression such as books, newspapers, posters and audio-visual and electronic expression (including the internet), but also non-verbal communication such as dress and unfurling a banner.

1.143 The right to freedom of expression, to be meaningful, protects both popular and unpopular expression and ideas, including expression that may shock and offend some people.

Limitations on free speech

1.144 The right to freedom of expression is expressly recognised to carry with it special duties and responsibilities. Unfettered free speech can infringe on other rights, such as the right to privacy and reputation or pose a threat to safety. As such, limitations on freedom of expression may be justified in certain circumstances.

1.145 Limitations may be justifiable if they meet the limitation criteria and are necessary to respect the rights of others, to protect national security, public order, public health or morals. See pages 7-8 for more information on limitations on rights.

Case study

In 1998 Patrick Coleman delivered a public address in a Townsville shopping mall on a broad range of political topics. He did so without first having obtained a council permit to make the statement in a public mall. He was charged and convicted of the offence of delivering an unlawful address in a pedestrian mall and fined \$300. After refusing to pay the fine he was jailed for five days.

In 2006 the UN Human Rights Committee found that Mr Coleman had made a public address on public interest issues that were not threatening or disruptive and did not pose a danger to public order. As it was unnecessary to restrict Mr Coleman's freedom of expression the Committee concluded that Australia's reaction was disproportionate and violated Mr Coleman's right to freedom of expression.

Freedom of assembly

Source: article 21 of the ICCPR

1.146 All people have the right to peaceful assembly. This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views.

1.147 The right applies regardless of where people are assembling – it may be inside or outside, on public or private property, it may be a protest march or demonstration that moves from place to place or it may be stationary, such as sit-ins, meetings or motionless protests.

1.148 The right only applies to peaceful protest, it does not protect intentionally violent protests.

1.149 The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be justified);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Limitations

1.150 Limitations on the right to freedom of assembly may be justifiable if they meet the limitation criteria and it is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. See pages 7-8 for more information on limitations on rights.

Case study

In 2003 UK police stopped a group of three buses with around 120 people on board who were on their way to attend a protest against the Iraq War at an airbase. The police were aware the people were seeking to attend the protest.

The police searched the buses and while they found there was no proper basis on which to arrest anyone, they decided to turn the coaches back and prevent all on board from attending the protest, on the basis they might cause a breach of the peace if they attended the protest. The police forced the buses to return to London with all on board and prevented the buses from stopping along the way.

The UK courts held that the police's action breached the protestor's rights to freedom of assembly (and the right to freedom of expression). The courts held that as there was no imminent threat to the breach of the peace, the limitation on the right to protest was not imposed in accordance with law and was a disproportionate restriction on the right to protest.

Freedom of association

Source: article 22 of the ICCPR

1.151 All people have the right to freedom of association with others; that is to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

1.152 This right supports many other rights such as freedom of expression, religion, assembly and political rights, as without freedom of association, the effectiveness and value of many of these rights would be significantly diminished. The existence of associations, including those that peacefully promote ideas and values that may not accord with the views of the majority, is the cornerstone of democracy.

1.153 The right to freely choose who to associate with also includes the right not to associate with others if their membership would not be compatible with the aims and interests of the association (although only if it is reasonable and proportionate to do so). However, this may not apply if membership of a particular association is required for employment in a particular profession.

1.154 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association; and
- punishing people for their membership of a group.

1.155 The right does not expressly protect the activities that the association undertakes, only the ability of individuals to join together, without interference, for a common purpose.

Limitations

1.156 Limitations on the right to freedom of association may be justifiable if they meet the limitation criteria and it is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. See pages 7-8 for more information on limitations on rights.

Case study

In 1990 a political party was formed in Turkey in order to participate in a general election. The party included policies aimed at seeking recognition of the Kurdish population in Turkey. The Turkish Constitutional Court made an order to dissolve the party on the basis that its political views may promote separatism.

The European Court of Human Rights held that dissolving a peaceful political party was a breach of the right to freedom of association. It held that political parties are a form of association that is essential to the proper functioning of democracy. The Court found that while the protection of national security might have been a legitimate aim, as political parties are so essential to democracy, only convincing and compelling reasons can justify restrictions on them.

In this case the Court found there could be no justification for hindering a political group solely because it seeks to publicly debate the situation of part of the state's population and to take part in the nation's political life in order to find, according to democratic rules, peaceful and workable solutions.

Right to take part in public affairs

Source: article 25 of the ICCPR

1.157 The right to take part in public affairs has three elements to it:

- the right of every citizen to take part in the conduct of public affairs, either directly or through elected representatives;
- the right of every citizen to vote and to stand for election; and
- the right of every citizen to have equal access to positions in the public service.

1.158 Unlike all other human rights which apply to all people in Australia's jurisdiction, the right to take part in public affairs applies only to Australian citizens (although other rights, such as the right to freedom of expression and association apply to all people in Australia and enable participation in public debate).

1.159 In order for this right to be meaningful, other rights such as freedom of expression, association and assembly, must also be respected, given the importance of free speech and protest in a free and open democracy.

Taking part in public affairs

1.160 The right to take part in public affairs is an essential part of a democratic government that is accountable to the people. It applies to all levels of government, including local government.

1.161 People can exercise this right directly (by standing for election or voting on specific issues via a referendum) or indirectly (by electing bodies to represent them).

Voting and standing for election

1.162 The right to vote and to be elected requires:

- the freedom to vote at genuine periodic elections, free from undue influence or interference;
- universal and equal suffrage and each vote to be of equal value;
- measures to ensure all people entitled to vote can exercise the right, including removing obstacles for voter registration and positive steps to overcome difficulties people may face in voting, such as illiteracy, disability, language barriers, poverty and distance;
- the holding of secret ballots and independent assistance for those with disability in casting their vote;
- laws in place to protect the integrity of the voting system and an independent electoral authority to oversee the electoral process; and

- administrative and legal requirements imposed on a person standing for office to be reasonable and non-discriminatory (including reasonable registration fees and requirements).

Access to the public service

1.163 The right to have access to positions in the public service is based on general terms of equality and principles of merit. This right requires:

- that the criteria and processes for appointment, promotion, suspension and dismissal of people to the public service must be objective and reasonable;
- all people holding public service positions must be free from political interference or pressures; and
- in some instances, affirmative action may be necessary to ensure equal access to public service for all citizens.

1.164 The term 'public service' applies to all administrative positions within the executive, judiciary and legislature and other areas of public administration, such as school teachers and lecturers in public universities.

Limitations

1.165 The right to take part in public may be limited if the limitation criteria are met. There may be reasonable limits on the right to vote, such as age restrictions. It is considered unreasonable to restrict the right to vote on grounds of physical disability, party membership or to impose literacy, educational or property requirements.

1.166 It may be reasonable to restrict a person from standing for office if it is clear that their policies are aimed at destroying the rights and freedoms of others (for example, Far Right fascists). In addition, restrictions on campaign expenditure may be justified if it is necessary to preserve the integrity of the electoral processes. See pages 7-8 for more information on limitations on rights.

Case study

Under current UK law, anyone in prison on the day of an election, who has been convicted of an offence, is not entitled to vote. This blanket restriction on the right to vote applies to all prisoners, irrespective of the nature or gravity of the offence or the length of the prisoner's sentence.

The European Court of Human Rights found that this blanket ban breached the right to vote. Although the right to vote can be limited, any limitation must pursue a legitimate aim and be proportionate. It found that such a general, automatic and indiscriminate restriction was disproportionate.

The UN Human Rights Committee came to the same conclusion in a case concerning Russia, which imposed the same blanket ban on all prisoners, finding such a broad restriction unreasonable.

Right to equality and non-discrimination

Source: articles 2, 3 and 26 of the ICCPR, articles 2 and 3 of the ICESCR, ICERD, CEDAW, CRPD, and, and article 2 of the CRC.

1.167 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights.

1.168 The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.169 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

What is discrimination?

1.170 The right to non-discrimination applies to any form of distinction, exclusion, restriction or preference that has the effect of nullifying or restricting the enjoyment of human rights or freedoms on a prohibited ground. This includes grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.171 The ICCPR defines 'discrimination' as a distinction based on a personal attribute which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.

1.172

Direct discrimination

1.173 There will be direct discrimination when someone is treated less favourably than another person in similar circumstances on the basis of a prohibited ground (for example, because of their race or sexual orientation). The test is one of substantive equality, so that differential treatment based on a protected status may be permissible if it is based on objective and reasonable grounds in pursuit of a legitimate objective.

Indirect discrimination

1.174 There will be indirect discrimination when even though a practice, rule, requirement or condition is non-discriminatory on its face, it impacts disproportionately on certain groups, and the practice, rule, requirement or condition cannot be demonstrated to be reasonable.

Differential treatment and special measures

1.175 The right to equality and non-discrimination does not mean identical treatment in every instance. The principle of substantive equality sometimes requires positive action on the basis of a protected status to reflect relevant differences between different groups. This differential treatment can be justified if it is based on objective and reasonable criteria and seeks to achieve a legitimate goal.

1.176 Measures based on a protected status that are consistent with the principle of substantive equality are 'special measures' or 'temporary special measures'. These involve giving a temporary benefit or preference to members of a disadvantaged group for the sole purpose of advancing the rights of that group.

Case study

Mr Young had a relationship for 38 years with his same-sex partner. In 1998 his partner, a war veteran, died. Mr Young then applied for a pension as a veteran's dependant. His application was rejected on the basis that pensions were only available where the person had been married to the veteran or had been in a de facto relationship with a veteran of the opposite sex.

The UN Human Rights Committee found that Australia was in breach of the right to equality and non-discrimination, as the only reason he was refused a pension was on the basis of his and his deceased partner's sexual orientation. It held that it could not be shown that such a distinction was reasonable or objective.

Rights of children

Source: CRC and articles 10(2)-(3), 14(4) and 24 of the ICCPR

1.177 Children have special rights under human rights law taking into account their particular vulnerabilities. Under a number of treaties, particularly the CRC, children's rights are protected. All children under the age of 18 years are guaranteed these rights.

1.178 The rights of children includes the right of children to develop to the fullest; protection from harmful influences, abuse and exploitation; family rights; and access to health care, education and services that meet their needs.

1.179 States are required not to deny children basic human rights and are also required to give special protection to children in their laws and practices.

1.180 In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;
- there must be a focus on the child's right to life, survival and development, including the child's physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Best interests of the child

1.181 Human rights law requires that in all actions concerning children the best interests of the child must be a primary consideration. This must be assessed from the child's perspective rather than that of their parents or the state.

1.182 It not only requires that the rights of the child be taken as a primary consideration when different interests are being considered, it also provides that any laws that are open to interpretation are interpreted in a way which most effectively serves the child's best interest and any decision that will affect a specific child or children generally must evaluate any possible impact on the child.

1.183 What is in the best interests of the child should be able to be adjusted according to the specific situation of the child or children affected and consider their personal context and needs.

1.184 While the best interests of the child may not be the only relevant consideration, it is to be given high priority and is not to be considered as just one of several considerations; larger weight should be given to what serves the child best.

Children in the criminal process

1.185 There are specific rights in both the ICCPR and the CRC for children in the criminal justice system. In particular, any child accused of a criminal offence has to be treated in a way that takes account of their age and immaturity and the importance of promoting their rehabilitation.

1.186 In addition to the fair trial rights that apply to adults, children have rights to have their age taken into account so that the arrest, detention or imprisonment of a child is to be a last resort and for the shortest appropriate period of time. Any child who is imprisoned must be separated from adults and given treatment that is appropriate to their age and legal status.

1.187 Measures should be promoted for dealing with accused children without resorting to judicial proceedings, such as care, guidance and supervision orders, counselling, probation, foster care and educational and vocational training programs.

Case study

In 1999, Corey Brough, a 16 year old Aboriginal boy with a mild intellectual disability, was sentenced to imprisonment for eight months for burglary, assault and causing bodily harm. He was detained in a juvenile prison in New South Wales. One month later Corey was transferred to an adult prison after he violently participated in a riot. In the adult prison he was placed in a 'safe-cell' in a segregated area, and shortly afterwards he began to self-harm. After an altercation with four prison officers he was placed in solitary confinement for 72 hours where he was exposed to continual artificial lights, stripped to his underwear and deprived of his blanket. Corey later attempted suicide.

The UN Human Rights Committee found that Corey's treatment was not appropriate for someone in such a vulnerable position, particularly given his age, disability and Indigenous status. It found Australia in breach of the requirement to treat prisoners with humanity and dignity, to separate children from adults in prison and to be given treatment appropriate to their age and legal status, and the requirement that children be protected as required by reason of their age and vulnerability.

Right to self-determination

Source: article 1 of the ICESCR and article 1 of the ICCPR

1.188 All peoples have the right to self-determination. This is not an individual right but is a right that peoples have as a group.

1.189 There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and
- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

1.190 In the Australian context the right to internal self-determination is the most relevant, and has particular significance in relation to Aboriginal and Torres Strait Islander peoples.

1.191 It provides that where there are identifiable groups of Indigenous people, they have the collective right to have control over their destiny and the right to freely choose their own political, economic and social system and pursue their cultural development.

1.192 The right to self-determination requires the state to give access to and to ensure representation of such groups in the democratic process, particularly in relation to decision-making on issues affecting traditional land and economic activities. This includes the right of Indigenous Australians to preserve their group identity and culture, to lead lives of dignity and to be consulted on issues affecting them.

1.193 The UN Declaration on the Rights of Indigenous Peoples provides further guidance on the different dimensions of the right to self-determination, including that Indigenous peoples should have the right to self-governance and to be actively involved in developing and determining health, housing and other economic and social programs that affect them.

Case study

In 2009, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, visited Australia in order to report on the situation of Aboriginal and Torres Strait Islander peoples in Australia.

The Special Rapporteur recommended that the Australian government take an approach that 'not just promotes social and economic wellbeing of indigenous peoples, but that also advances their self-determination and strengthens their cultural bonds'. In particular, he recommended that the Australian government:

- encourage Indigenous self-governance at the local level;
- ensure Indigenous participation in the design, delivery and monitoring of programs;
- promote culturally appropriate programs that incorporate or build on Indigenous peoples' own initiatives; and
- secure Indigenous peoples' rights over lands, resources and heritage sites.

Right to work

Sources: articles 6, 7 and 8 of the ICESCR

1.194 The right to work is a right of all people to have the opportunity to gain their living by work they freely choose, allowing them to live in dignity. It is a right to decent work, providing an income that allows the worker to support themselves and their family, which respects fundamental human rights and provides safe and healthy conditions of work.

1.195 It is not to be understood as providing an unconditional right to obtain employment or for the state to provide everyone with employment; rather it is a right to choose an occupation and engage in work. It applies to all types of work, both in the public and private sectors, and to the formal and informal labour market.

1.196 The right to work provides:

- that everyone must be able to freely accept or choose their work; including that a person must not be forced in any way to engage in employment (see also the prohibition against slavery and forced labour at page 16);
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated;
- that there is a system of protection guaranteeing access to employment, including:
 - that specialised employment services are made available to support people in finding employment;
 - that there are technical and vocational education plans in place to facilitate access to employment;
 - that the labour market is open to everyone without discrimination (including that work be physically accessible for people with disability); and
 - that measures are taken to reduce the number of workers outside the formal economy; and
- that all workers have the right to just and favourable conditions of work, particularly safe working conditions, and the right to join trade unions.

1.197 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect the right to work; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right. See pages 5-6 for more information on Australia's obligations.

Conditions of work

1.198 The right to work includes a right to just and favourable conditions of employment, including that:

- remuneration provides everyone with a fair wage and a decent living and equal remuneration for equal work of equal value (particularly between men and women);
- workers are provided with safe and healthy working conditions, with policies in place designed to minimise, as far as possible, workplace health hazards, and mechanisms to investigate workplace accidents;
- there is equal opportunity for all workers to be promoted on the basis of competence and seniority;
- there are adequate rest and leisure periods, working hours are reasonably limited and there are periodic holidays with pay.

Right to join trade unions

1.199 The right to work also recognises the right of everyone to form and join trade unions, which is linked to the right to safe and healthy working conditions. It includes the right to strike, when the strike is exercised in conformity with law.

1.200 Trade unions are entitled to function freely, subject only to limits prescribed by law and which are necessary, reasonable and proportionate.

1.201 This is linked to the right to freedom of association (see pages 40-41), and the right to join trade unions likely includes a right not to be compelled to join a union.

Case study

In 2009 the UN Committee on Economic, Social and Cultural Rights, in considering Australia's report on its implementation of economic, social and cultural rights, made a number of comments on the gender gap in the workforce. It was concerned that despite efforts to improve gender equality, a wage gap still persisted between men and women in the workforce, particularly in managerial positions.

It recommended that efforts to enhance equality between men and women in the workforce be strengthened, particularly initiatives aimed at implementing the principle of equal pay for work of equal value.

More broadly, the Committee noted its concern with the high unemployment rates among Indigenous Australians, asylum-seekers, migrants and people with disabilities, and recommended that special measures be designed to address the significant barriers they face to enjoy their right to work, including measures to protect them from exploitation.

Right to social security

Source: article 9 of the ICESCR

1.202 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty. This right plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

1.203 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires:

- that social support schemes are available to people in need, established under law, supervised by public authorities and sustainable;
- benefits payable (either in cash or in kind) must be adequate, both in amount and duration, to enable people to realise the right to an adequate standard of living and the right to health care; and
- accessibility (including universal coverage without discrimination; qualifying conditions that are reasonable, proportionate and transparent (and any withdrawal of benefits must be done in accordance with law, be reasonable and subject to due process); and affordable (if contributions are required)).

1.204 Measures considered to provide social security include:

- contributory schemes, such as superannuation; and
- non-contributory schemes, such as pensions or unemployment benefits, which can apply to everyone in a particular group or be targeted at people with specific needs.

1.205 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect social security; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right. See pages 5-6 for more information on Australia's obligations.

When social security may be required

1.206 There are specific situations that have been recognised as those in which a person has a right to access social security, including:

- health care and sickness (to ensure health care is accessible, affordable and adequate to all, and cash benefits are provided to people unable to work because of ill-health);
- old age (particularly for groups who have not had access to other contributory schemes such as superannuation);

- unemployment and workplace injury;
- family and child support (taking into account the circumstances of both children and adult dependents);
- paid maternity leave (to cover all women who have a baby for an adequate period of time);
- disability support; and
- benefits to dependent family members on the death of the breadwinner who had rights to benefits.

Case study

In 2012 Australia introduced changes to legislation that removed family payment benefits for certain low income parents, particularly single parent families. The changes meant that while these parents were eligible for unemployment benefits, they were no longer eligible for a parenting payment, leading to a significant decline in the income of many families.

The UN Special Rapporteur on extreme poverty and human rights, and the Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and practice, wrote to the Australian government to express their concerns about the human rights implications of these changes. In particular, they noted that a key part of the right to social security is that the benefits must be adequate to enable recipients to enjoy minimum essential levels of an adequate standard of living. They noted that cutting existing levels of support was likely to be a retrogressive measure in relation to the right to social security, requiring justification. They also noted that the measures disproportionately affected women (as the majority of single parents are single mothers) and as such may have been indirectly discriminatory.

Right to an adequate standard of living

Source: article 11 of the ICESCR

1.207 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.208 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living. See pages 5-6 for more information on Australia's obligations.

Food

1.209 The right to food includes a requirement that food be:

- affordable to those on the lowest incomes (for example, by ensuring that the minimum wage and social security benefits are sufficient to meet the cost of nutritious foods and other basic needs);
- made available to satisfy people's dietary needs;
- safe for human consumption and free from adverse substances; and
- culturally appropriate.

Water

1.210 Although not expressly referred to in article 11 of the ICESCR, it is accepted that the right to water is part of the right to an adequate standard of living. The right to water requires that the state ensure there is sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. This includes:

- protection against arbitrary and unlawful disconnection of water;
- water to be made available on a non-discriminatory basis;
- access to a minimum amount of safe drinking water to sustain life and health;
- community participation in water and sanitation related decision making;
- sustainable access to water resources for agriculture to realise the right to adequate food; and
- protection of water resources from depletion, contamination and proposed developments;
- access for Indigenous people to water resources on traditional lands and protection from interference and pollution.

Housing

1.211 The right to housing is a right to live somewhere in security, peace and dignity; it is not just a roof over one's head. It is a right to adequate housing. Factors that go to whether housing is adequate include that:

- people should have a degree of security of tenure that provides legal protection against forced eviction, harassment and other threats;
- people should have access to essential facilities, including safe water, sanitation, and energy for cooking, heating and lighting;
- housing related costs should be affordable; that is they should be commensurate with income levels so other basic needs are not compromised. This may require the state to establish housing subsidies and protection for tenants from unreasonable rent increases;
- housing should be habitable;
- housing should be accessible, with housing law and policy taking into account the special housing needs of disadvantaged groups;
- housing should be located in areas accessible to employment and health and other services, and should not be built on polluted sites; and
- the way housing is constructed should be culturally appropriate.

Case study

The UN Special Rapporteur on Adequate Housing, an independent expert appointed by the UN Human Rights Council, visited Australia in 2006. His report noted that while some good practices had been put in place to implement the right to housing, in some parts of Australia and for certain groups there was a serious national housing crisis.

The Special Rapporteur noted various indicators that demonstrated regressive results, including reductions in public housing stock; soaring private rental rates; an acknowledged housing affordability crisis; and no real reduction in the number of homeless. The report noted that Australia lacked a clear, consistent, long-term and holistic housing strategy and concluded that Australia had failed to implement the human right to adequate housing.

Right to health

Source: article 12 of the ICESCR

1.212 The right to health is fundamental to the exercise of other human rights. It is a right to enjoy the highest attainable standard of physical and mental health. The right to health is not a right to be healthy (given that is often not in the state's control); rather it is a right to have access to adequate health care as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

1.213 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect the right to health; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to health. See pages 5-6 for more information on Australia's obligations.

1.214 Health care should meet certain key requirements, including:

- there must be a sufficient quantity of functioning public health care facilities;
- access to health care must be universal and provided without discrimination (including located where people can access it and affordable);
- health services and facilities must be culturally appropriate, respectful and maintain patient confidentiality;
- health care must be scientifically and medically appropriate and of good quality.

Right to reproductive and sexual health

1.215 The right to health includes a right to control your own health and body, including your sexual and reproductive health. This includes a right to have equal access to sexual and reproductive health services, such as family planning, care during and after pregnancy, and access to information.

Right to a healthy environment

1.216 The right to health includes, not only a right to health care, but also a right to safe and healthy working conditions and a healthy environment. This includes access to safe drinking water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information.

1.217 It requires steps to be taken to minimise unsafe working practices, and protection of the population from environmental health hazards, including steps to discourage abuse of alcohol or the use of alcohol or harmful drugs or substances.

Case study

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, an independent expert appointed by the UN Human Rights Council, visited Australia in 2009. His report noted that while Australians generally received excellent access to health care, health service delivery to Indigenous Australians and to people in detention raised concerns.

In particular, the Special Rapporteur made a number of recommendations, including, that Australia:

- establish independent regular inspections of all places of detention, including immigration detention;
- develop a national health policy, including a detailed plan for the full realisation of the right to health;
- give priority to human rights education, particularly for health professionals, and address the inadequacy of educational services for remote communities which impacts on the right to health;
- increase resources for the diagnosis, treatment and prevention of mental illnesses within prisons;
- reconsider the policy of mandatory detention of asylum seekers arriving by boat, and place detainees with a history of torture and trauma in the community; and
- ensure appropriate training is provided to non-medical personnel in immigration detention.

Right to education

Source: articles 13 and 14 of the ICESCR and article 28 of the CRC

1.218 The right to an education is a fundamental human right and plays a vital role in promoting human rights and democracy. Having the right to education is central to individuals being able to fully exercise a number of other rights.

1.219 It is a right to an education directed at the development of a person's humanity and dignity, enabling people to effectively participate in a free society. The right to fundamental education is not limited to children; all people, including adults, have the right to life-long learning.

1.220 The right to education requires that the state provide free primary school education and work progressively to providing free secondary and higher education (including vocational training). The right requires:

- that functioning educational facilities are made available, including adequate buildings, sufficient quantities of trained teachers (receiving competitive salaries), teaching materials, and access to information technology;
- that education is accessible to everyone without discrimination, including being located in safe physical reach or via distance learning, and is affordable to all (with measures taken to enhance educational access for people from disadvantaged groups); and
- that education is relevant, culturally appropriate, of good quality and flexible and tailored to the needs of individual students (including education that is suitable for students of all ages and for those with a disability).

1.221 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right (such as the access to primary education); not to unjustifiably take any backwards steps that might affect access to education; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right, such as free access to secondary and higher education. See pages 5-6 for more information on Australia's obligations.

Primary education

1.222 The right to education requires primary school education to be compulsory for all children and to be made available free of charge. Some indirect costs (such as school uniforms) may be justifiable, but the costs should not create a barrier to any child attending school.

Secondary education, vocational training and higher education

1.223 Secondary education must be made available to all students and should not be dependent on a student's apparent capacity or ability. It should prepare students for vocational and higher educational opportunities.

1.224 Technical and vocational education, aimed at helping students achieve personal development and full and productive employment, should be made available to all.

1.225 Higher education should be made available to all on the basis of capacity, and should have a flexible curriculum and varied ways of delivery (such as distance learning).

1.226 Concrete steps are required to be taken by the state towards achieving free secondary, vocational and higher education to ensure availability of education to all.

Educational freedom and academic freedom

1.227 The right of parents and guardians to choose to have their child educated in conformity with their own religious and moral views is recognised. However, while the teaching of the general history of religion and ethics is permitted in public schools, it must be taught in an unbiased and objective way, and there must be provision made for non-discriminatory exemptions or alternatives for the children of parents or guardians who object to such teaching.

1.228 Parents and guardians also have the right to have their children educated other than in public schools, as long as this conforms to minimum educational standards laid down by the state.

1.229 The right to education can only be properly enjoyed, particularly in the area of higher education, if there is academic freedom for staff and students. Academics must be free to pursue, develop and transmit their ideas and knowledge without discrimination or fear of repression. This requires the autonomy of higher education institutions and a degree of self-governance in relation to their academic work, standards and management.

Case study

In 2012 the Committee on the Rights of the Child examined Australia's record on children's rights, including the right to education. While it welcomed a number of developments, the Committee expressed concerns about the serious difficulties many Indigenous children and children in remote areas faced in accessing education. It noted that attendance, literacy, numeracy and other attainment levels for Indigenous students continued to be significantly lower than for non-Indigenous students. In particular, it highlighted that the education system did not have adequate measures in place to cater for the needs of non-English speaking students.

The Committee recommended greater oversight and integration of the education system with other groups such as social workers, health workers and the police, and that there be a commitment to bilingual models of education.

Right to culture

Source: article 15 of the ICESCR and article 27 of the ICCPR

1.230 All people have the right to benefit from and take part in cultural life. This is linked to a number of other rights, including the right to education, through which values, religions, customs, language and other cultural references are passed on.

1.231 'Culture' has been considered to be a broad and inclusive concept and includes ways of life, language, literature, music and song, religion, rites and ceremonies, sport and games, food, clothing, the arts and customs and traditions.

1.232 A person's decision whether or not to take part in cultural life is a cultural choice and should be respected without discrimination. The right to take part in cultural life may be exercised individually or with others in a community or group. There must be the ability to participate, access and contribute to cultural life, including:

- that cultural goods and services must be available for everyone to enjoy and benefit from (such as libraries, museums, cinemas, sports stadiums, literature, parks and nature reserves);
- there must be opportunities for everyone to enjoy culture without discrimination (for example, access should be facilitated for people with disability, older people and people in remote areas); and
- policies adopted by the state that impact on cultural life must be respectful of cultural diversity, flexible and culturally appropriate.

1.233 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect the right to culture; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right. See pages 5-6 for more information on Australia's obligations.

Right to benefit from scientific progress

1.234 The right to culture also includes the right of everyone to benefit from scientific progress, which is linked to the enjoyment of a number of other human rights, such as the right to health and an adequate standard of living. It includes a right to access the benefits of progress; for example, scientific advancements in medical research should be financially accessible for all.

Protection of scientific, literary or artistic production

1.235 The right to culture includes protection of the moral and material interests of the author of scientific, literary or artistic productions. This is not necessarily the same as protecting intellectual property.

1.236 It includes a right for authors of scientific, literary or artistic productions to be recognised as its creators, and to be able to object to any distortion or modification of their work that could prejudice their reputation. It also provides that authors of such work are entitled to receive some payment for their work. This requires the state to have adequate legislation and other measures in place to provide such protection.

1.237 However, like most rights, this right may be limited if it is necessary, reasonable and proportionate to do so. For example, in order for others to benefit from scientific discoveries it may be necessary to limit the right in order to promote the general welfare of others. In some cases, such limitations may require payment of adequate compensation to use scientific, literary or artistic productions in the public interest.

Right of minority groups to enjoy culture

1.238 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. This right is separate from the right to self-determination as it is conferred on individuals (whereas the right to self-determination belongs to groups). The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

1.239 This right has been identified as particularly applying to Indigenous communities, and includes the right for Indigenous people to use land resources, including traditional activities such as hunting and fishing and to live on their traditional lands. The UN Declaration on the Rights of Indigenous People, while not a legally binding instrument (although reflecting some binding international obligations), usefully expands on the way Indigenous people are entitled to observe their distinct religious and cultural practices and use their own languages.

1.240 The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.

Case Study

In 2000 the UN Human Rights Committee, in considering Australia's reports on the implementation of rights in Australia, expressed its concerns about the native title system and the rights of Indigenous people to enjoy their right to culture. In particular it noted that amendments in 1998 limited the right of Indigenous people and communities in being able to effectively participate in all matters affecting land ownership and use, including their interest in native title lands, particularly pastoral lands.

The Committee noted its concern that securing the continuation and sustainability of traditional forms of economy of Indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, were not always a major factor in determining land use.

In 2009 the Committee again expressed its concerns in relation to native title, and also noted its concerns about the high cost, complexity and strict rules of evidence applying to claims under the *Native Title Act 1993* and the effect this had on the rights of minorities.

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Appendix 1

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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Appendix 2

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that 'civil' penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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