

SECTION 18

TAKING PART IN PUBLIC LIFE

Section 18

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

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 18?

You will need to consider s. 18 in assessing legislation, a policy or a program where it:

- limits the ability of a category of individuals to take part in municipal and parliamentary elections;
- requires individuals to meet certain conditions in order to be eligible to participate in municipal and parliamentary elections;
- regulates how individuals vote in elections (for example, the method of voting);
- regulates access to employment in the public service or appointment to public office;
- establishes requirements for membership of public bodies;
- regulates the conduct of elections and the electoral process;
- regulates the suspension and conduct of local government;
- regulates the suspension and removal of statutory office holders.

DISCUSSION

Section 18 protects the following rights:

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

The first question you need to consider under this right is who it applies to.

Who does s. 18 apply to?

The first paragraph of s. 18 (that is, the right to participate in public affairs) applies to all people in Victoria.

By contrast, the right to vote and to access the public service and public office are restricted to only 'eligible' persons.

The term 'eligible' is not defined in the Charter. Eligibility is to be determined by Victorian legislation, that is, persons who are eligible to have the right to vote and stand for election are those that Victorian legislation provides may do so. Eligibility may include both Australian citizens and non-citizens.

Another example where eligibility is determined by other Victorian legislation is eligibility for employment in the public service, which is determined by the *Public Administration Act 2004* (Vic).

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

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

Concept of 'public affairs'

The expression 'public affairs' is a broad concept, which embraces the exercise of governmental power by all arms of government at all levels.¹⁴⁶ It is not limited to legislative processes but includes participation in non-government organisations and public debate. For example, it will include the formulation of policies regarding disability discrimination through to a local council's decision regarding the frequency of rubbish collection.

Section 18 acknowledges that participation in public affairs may be direct, or indirect through freely chosen elected representatives. Examples of direct participation considered by the UN Human Rights Committee are:

- exercising power as members of Parliament or by holding executive office;
- voting in an election or a referendum to change a Constitution;
- taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community;
- taking part in bodies established to represent citizens in consultation with government;
- exerting influence through public debate and dialogue with elected representatives.¹⁴⁷

Indirect participation occurs where people elect a body to represent them. In this case, the UN Human Rights Committee has considered that bodies elected by the people must in fact exercise governmental power; the elected body cannot be a mere advisory body with no legally enforceable powers.¹⁴⁸ The Westminster-style system of government found in Victoria falls within this understanding.

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

For this reason it is recommended that policy officers consider:

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

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

¹⁴⁶ *UN Human Rights Committee, General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [5].*

¹⁴⁷ *Ibid* [8].

¹⁴⁸ Sarah Joseph, Jenny Schultz, Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, 2000, OUP) 655.

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

Right to vote

The right to vote must be established by law. The right to vote does not include as a corollary the right not to vote.

The right to vote may be subject to reasonable limitations under s. 7 of the Charter.

This right is confined to 'eligible persons'. Section 48 of the *Constitution Act 1975* (Vic.) provides that only persons of 'the full age of eighteen years' are eligible to vote and excludes people who have been convicted of treason or are serving a sentence of five years or more for an offence against the law of Victoria, the Commonwealth or another state or territory.¹⁴⁹

Section 18 makes clear that in order to exercise these rights, people need the opportunity to do so. This means that a government must put in place measures that enable eligible persons to exercise their right to vote. The UN Human Rights Committee has said that the opportunity to vote may require:

- positive measures to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement, which prevent persons entitled to vote from exercising their rights effectively; and
- information and materials about voting to be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.¹⁵⁰

149 *Constitution Act 1975* (Vic.), s. 48. Section 12 of the New Zealand Bill of Rights Act 1990 expressly provides that electoral rights are only enjoyed by those who are of or over the age of 18 years. By contrast, s. 17 of the *Human Rights Act 2004* (ACT) provides that 'every citizen' has the right to vote, leaving age requirements to be viewed as a reasonable limitation under s. 28 (the equivalent of s. 7 of the Charter).

150 *UN Human Rights Committee, General Comment 25*, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [12].

Right to be elected

The right to stand for election ensures that eligible voters have a free choice of candidates in an election.

The UN Human Rights Committee has made clear that any restrictions on the right to stand for election, such as minimum age, must be justified on objective and reasonable criteria. Moreover, persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.¹⁵¹

This right also requires that conditions for standing for an election, such as nomination dates, fees or deposits, should be reasonable and not discriminatory. Moreover, the grounds for removal of elected office holders should be established by laws based on objective and reasonable criteria and should incorporate fair procedures.

As with the right to vote, the right to be elected is not conferred on all Victorians; it is limited to 'eligible' persons.

Eligibility is determined by legislation, including the *Constitution Act*. In that Act, people who have been convicted of an indictable offence punishable by imprisonment for five years or more are not qualified to be elected as a member of Parliament (s.44(3)). In addition to section 44, you should also refer to sections 48 and 49 of the *Constitution Act* for qualification requirements to stand for election.

151 *Ibid* [15].

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

The Charter provides that eligible persons have a right to have access to the Victorian public service and public office. Note also that the Charter¹⁵² amends s. 8 of the *Public Administration Act 2004* (Vic.) (in the consequential amendments) by inserting human rights into the public service values.

Meaning of 'public service' and 'public office'

The concepts of 'public service' and 'public office' are not defined in the Charter.

In international law, the term 'public service' extends to all positions within the executive, judiciary and legislature and other areas of state administration such as lecturers in public universities. In international human rights law, 'public office' would not appear to differ from the interpretation of 'public service'.

The position is different in Victorian law. The Public Administration Act defines 'public service' in the narrower sense of employees of the Crown. This definition of 'public service' applies to all references to that term in any Act, unless the contrary intention appears, pursuant to s. 38 of the *Interpretation of Legislation Act 1984* (Vic.). This means that 'public service' in the Charter only covers the public service in the general sense of employees of the Crown, whereas 'public office' is intended to cover other office holders, such as the judiciary, members of Parliament and holders of office in other areas of state administration.

What does the right encompass?

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

The UN Human Rights Committee has said:

'... affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures.'¹⁵³

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

REASONABLE LIMITS ON THE RIGHTS IN SECTION 18

Like all of the human rights protected in the Charter, the rights in section 18 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

152 Section 47 of the Charter and cl. 5 of the Schedule.

153 *UN Human Rights Committee, General Comment 25*, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003) [23].

KEY POINTS TO REMEMBER

- Section 18 protects various rights of political participation.
- Conditions relating to the exercise of these rights should be based on reasonable, objective and non-discriminatory criteria.
- The right to participate in public affairs applies to all people in Victoria. The right to vote and to occupy public office applies only to 'eligible' persons.
- Eligibility is to be determined by Victorian legislation.
- These rights may be subject to reasonable limitations. You should refer to the discussion on s. 7 of these Charter Guidelines.
- The right to participate in public affairs may extend to participation in non-government organisations and public debate, but does not provide a right to a specific outcome from such participation.
- The right of eligible persons to vote requires measures to be put into place to enable eligible persons to exercise their right to vote. It does not confer a right *not* to vote.
- The right of eligible persons to be elected may be limited, provided that restrictions can be reasonably and objectively justified.
- Eligible persons also have a right to access the public service and public office.
- The concepts of 'public service' and 'public office' together encompass the public service in the narrow sense of employees of the Crown as well as the executive, judiciary and legislature and other areas of state administration.
- The criteria and processes for appointment, promotion, suspension and dismissal in the public service and in public office ought to be objective and reasonable.

MEASURES TO IMPROVE COMPLIANCE

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

RELATED RIGHTS AND FREEDOMS

If your policy or legislation raises an issue under section 18, you should check whether it also raises an issue under the following Charter provisions:

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

HISTORY OF THE SECTION

Section 18 is modelled on article 25 of the ICCPR but does not reflect all of its terms.

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

BIBLIOGRAPHY

Book

1. Sarah Joseph, Jenny Schultz, Melissa Castan
The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (2nd edn, 2000, OUP) 655.

Case Law

2. *Sauvé v. Canada (Chief Electoral Officer)*
[2002] 3 SCR 519.

Legislation

3. *Constitution Act 1975* (Vic.), s. 48.
4. *New Zealand Bill of Rights Act 1990*, s. 12.
5. *Human Rights Act 2004* (ACT), s. 17.

Other Sources

6. *UN Human Rights Committee, General Comment 25*, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 168 (2003).