

SECTION 19(1)

CULTURAL RIGHTS

Section 19

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

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

You will need to consider s. 19(1) in assessing legislation, a policy or a program where it:

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

These policy triggers are not comprehensive.¹⁵⁴

¹⁵⁴ These policy triggers were drawn in part from the Guidelines on the New Zealand Bill of Rights Act (New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990* (2004) <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>).

DISCUSSION

Section 19(1) confers certain cultural rights on individuals.

It was modelled on article 27 of the ICCPR, which is directed towards 'ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.'¹⁵⁵

However, unlike the ICCPR, section 19(1) does not apply only to 'minorities'. It applies to persons with a particular cultural, religious, racial or linguistic 'background', reflecting the wording of the *Multicultural Victoria Act 2004*. In other words, the cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected. Such persons may or may not be a member of a minority group, in the sense of being in a group with numerically fewer members or members who are in a subordinate position compared with those in the rest of the community.

The rights protected by s. 19(1) are distinct from, and in addition to, all other rights held by people as individuals in common with everyone else. They apply to all people physically present in Victoria – even if they are only in the State on a temporary basis.¹⁵⁶

Scope of the right

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

¹⁵⁵ *UN Human Rights Committee, General Comment 23, Article 27* (Fiftieth session, 1994), UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 158 (2003) [9].

¹⁵⁶ *Ibid* [5.1], [5.2].

'Culture'

Culture manifests itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous people (discussed in relation to s. 19(2)). In international human rights law, the UN Human Rights Committee has adopted a broad and flexible interpretation of the meaning of 'culture' so that in that context it has embraced the maintenance of traditional beliefs and practices (for example, the wearing of traditional dress), but it may also include those social and economic activities that are part of a group's tradition; for example, it may include traditional activities such as fishing or hunting.¹⁵⁷

The UN Human Rights Committee considers that certain activities may be cultural even though they are undertaken for economic gain. However, in order for such activities to be cultural, they must be 'an essential element in the culture of an ethnic community'.¹⁵⁸

'Religion'

Section 19(1) protects the right of persons with a particular religious background to declare or practise their religion. Any religion practised in Victoria is likely to be covered by this section. If you are unsure about whether a particular collection of ideas or practices can be characterised as a 'religion', you should consult Australian law on the subject.¹⁵⁹ As mentioned above in the context of s. 14 (freedom of thought, conscience, religion and belief), in Australia a broad interpretation of what constitutes a 'religion' has been adopted by the High Court.¹⁶⁰

¹⁵⁷ *Ibid* [3.2].

¹⁵⁸ *Kitok v. Sweden*, Human Rights Committee, Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985 (10 August 1988) [9.2].

¹⁵⁹ See, for example, Butterworths, *Halsbury's Laws of Australia*, 21 Human Rights, 4 'Civil and Political Rights' [81]; *Church of New Faith v. Commissioner of Payroll Tax (Vic.)* (1983) 154 CLR 120.

¹⁶⁰ *Church of New Faith v. Commissioner of Payroll Tax (Vic.)* (1983) 154 CLR 120.

The right of persons with a particular religious background to declare and practise their religion will be subject to many of the same considerations as those set out in relation to s. 14; however, the focus of s. 14 is on the right of individuals *as individuals* to practise their religion. By contrast, the focus of s. 19(1) is on the right of the individual to practise their religion *in community with others*.

'Race'

The term 'race' has a broad meaning which may include colour, descent or ancestry, nationality or national origin, and ethnicity or ethnic origin.¹⁶¹

'Language'

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

Individual or collective rights?

Section 19(1) states that 'all persons ... must not be denied the right, *in community* with other persons of that background...'. [emphasis added]. The inclusion of the words 'in community' raises the issue of the nature of the rights conferred in s. 19(1): are they individual rights or collective rights of persons with a particular background?

The UN Human Rights Committee has clarified that the rights in article 27 of the ICCPR (on which s. 19(1) is modelled) are conferred on individuals, not on a community. This means that an individual can exercise the rights in s. 19(1) on his or her own. It would also be possible for an individual to exercise these rights together with other persons with the same background.

REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s. 19(1) may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

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

MEASURES TO IMPROVE COMPLIANCE

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

RELATED RIGHTS AND FREEDOMS

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

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

HISTORY OF THE SECTION

Section 19(1) was modelled on article 27 of the ICCPR and incorporates ideas from s. 4 of the *Multicultural Victoria Act 2004*.

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

BIBLIOGRAPHY

Case Law

1. *Church of New Faith v. Commissioner of Payroll Tax (Vic.)* (1983) 154 CLR 120.

Legislation

2. *Equal Opportunity Act 1995* (Vic.), s. 4.

Other Sources

3. Butterworths, *Halsbury's Laws of Australia*, 21 Human Rights, 4 'Civil and Political Rights', [81].
4. *UN Human Rights Committee, General Comment 23*, Article 27 (Fiftieth session, 1994), UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 158 (2003).