

SECTION 21

RIGHT TO LIBERTY AND SECURITY OF PERSON

Section 21

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
- (5) A person who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear—
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 21?

You will need to consider s. 21 in assessing legislation, a policy or a program particularly where it:

- permits any public authority to detain an individual, whether or not he or she is suspected of committing an offence, for a period that is more than transitory;
- authorises a person with a mental illness to be detained for treatment in a mental health facility;
- allows the detention of a person in order to prevent the spread of a contagious disease;
- allows the detention of a person in order for the person to 'sober up';
- makes it an offence for a person to fail to remain at a place (for example, for further questioning or to conduct a search or test by a police officer or other official);
- allows a public authority to cordon an area and control movement within that area;
- relates to the management of security of persons within correctional facilities;
- grants a power of arrest.

DISCUSSION OF SECTION 21

Section 21 achieves two main purposes. It protects an individual's right to liberty and security. It also sets out the minimum rights of individuals who are arrested or detained to minimise the risk of arbitrary or unlawful deprivation of liberty by restricting the valid reasons for detention. It also ensures that detained persons are provided with information about the reason for the detention and told that they have opportunities to challenge the lawfulness of their detention.

This section does not confer a right to compensation for any breach of s. 21. Nor is s. 21 intended to extend to such matters as a right to bodily integrity or personal autonomy, or a right to access medical procedures.

In summary, the rights protected by s. 21 are:

- the right to liberty and the right not to be subjected to arbitrary arrest or detention;
- the right to security;
- the right to be informed of the reasons for arrest and any charges;
- the right to be brought promptly before a court;
- the right to be tried within a reasonable time or to be released from detention;
- the right to be released pending trial, subject to certain guarantees;
- the right to challenge the lawfulness of the detention;
- the right not to be detained for the failure to fulfil a contractual obligation.

As with all of the human rights in the Charter, the rights protected in s. 21 may be subject under law to reasonable limitations in accordance with s. 7 of the Charter.

More information on each of these rights is outlined below.

Right to liberty

When does it apply?

The right to liberty may be interfered with by all forms of detention including detention for the purpose of criminal justice, medical or psychiatric treatment, and treatment of contagious diseases.¹⁶⁸

Any detention that is more than transitory will be covered under this section.¹⁶⁹

Under Victorian law, a person may be detained for a range of purposes and durations.¹⁷⁰

To detain a person means to keep that person in custody. Lawful arrest is one of the ways a person may be lawfully detained. Arrest is lawful where it is made under a warrant, by infringement warrant or by court order. At common law, a person is considered to be under arrest when it has been made plain by what is said or done by a police officer that the person is no longer a free person.¹⁷¹

Some other examples of lawful detention are where a statute authorises:

- a person to be held for questioning by an investigating official;
- a person to be held in a prison, police gaol, youth training centre or residential centre;
- an intellectually disabled person to be held as a security resident in a residential institution;
- a mentally ill person to be held as an involuntary or security patient in an approved mental health service;
- a young person to be apprehended and detained to prevent self-harm from inhaling

168 *UN Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 130 (2003) [1].*

169 *Austin & Anor v. Commissioner of Police for the Metropolis* [2005] EWHC 480 (QB) citing *R (Gillan) v. Commissioner of the Police of the Metropolis* [2004] 3 WLR 1144.

170 One such purpose may be to protect the community. For example, legislation may provide for the granting of an extended supervision order to protect the community from a risk of further harm by certain convicted offenders. In 2007, the Sentencing Advisory Council released a discussion paper titled '*High Risk Offenders: Post-Sentence Supervision and Detention*'. The Victorian Government has made a commitment to address the issues outlined in that paper.

171 *R v. O'Donoghue* (1988) 34 A Crim R 397.

a volatile substance.

As these examples illustrate, a person may be detained for punitive purposes (for example, in prison) and non-punitive purposes (for example, a mentally ill person), and either for lengthy periods of time (for example, in prison) or for short periods of time for a limited purpose (for example, in detention by an inspector to obtain a person's name and address).

What does it mean?

The first three sub-sections of s. 21 all relate to the right to liberty. These rights, which were modelled on article 9(1) of the ICCPR, are all expressions of the same basic principle: every person has a right to physical liberty and should not be arrested or detained unless, first, the law provides that he or she may be so arrested or detained and, second, those administering the law do so in accordance with established procedures.

Thus, a breach of s. 21 will only occur if someone has been arrested or is detained and either or both of these conditions have not been met.

Legality

An arrest or detention will be in breach of the Charter when it is not 'on grounds and in accordance with procedures, established by law'. This means that arrest and subsequent detention ought to be specifically authorised and sufficiently circumscribed by law. Secondly, the law itself and the enforcement of that law must not be arbitrary.

The expression 'on grounds ... established by law' refers to domestic law. The United Nations Human Rights Committee has said that domestic law should conform with international human rights standards to meet the requirements of article 9(1) (s. 21(1)–(3)).¹⁷²

Legal and policy officers should ensure that they are familiar with current Victorian law on when an arrest will be lawful.

¹⁷² *Kenmache v. France* (No.3) (1994) 296C Eur Court HR (ser A).

'Arbitrary'

An arrest or detention that is unlawful is likely also to be arbitrary. However, the converse is not true. An arrest or detention may be arbitrary even though it is lawful; this may be so if the law is vague, over-broad, or is in violation of other fundamental standards such as the right to freedom of expression.

The term 'arbitrary' does not only mean that a detention is 'against the law'. Arbitrariness includes elements of inappropriateness, injustice and lack of predictability.¹⁷³

Detention that initially complies with s. 21 may become arbitrary if it continues without being justified.¹⁷⁴ (It is therefore necessary that a detained person be able to challenge the lawfulness of their detention, not just at the outset, but at regular intervals throughout any extended period of detention.)

In the context of remand in custody, the UN Human Rights Committee has said:

' ... remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence.'¹⁷⁵

Arbitrary detention has also arisen before the UN Human Rights Committee in the context of immigration detention. In a series of cases, the committee has found the Australian Government's policy of indefinite detention of asylum seekers is a breach of article 9 of the ICCPR.¹⁷⁶

¹⁷³ *Van Alphen v. The Netherlands*, Human Rights Committee, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (15 August 1990) [5.8].

¹⁷⁴ *Spakmo v. Norway*, Human Rights Committee, Communication No. 631/1995, UN Doc. CCPR/C/67/D/631/1995 (11 November 1999) [6.3].

¹⁷⁵ *A v. Australia*, Human Rights Committee, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) [9.2]. Another example of where remand in custody may be necessary is to prevent a breach of the peace.

¹⁷⁶ The most recent decision is the case of *D & E v. Australia*, Human Rights Committee, Communication No. 1050/2002, UN Doc. CCPR/C/14/D/27/1977 (9 August 2006).

For the purposes of these Charter Guidelines, these decisions are useful in respect of the comments made by the committee about the meaning of 'arbitrary detention'. The committee has said that for detention to avoid being characterised as 'arbitrary':

- it should **not continue** beyond the period for which a state party can provide appropriate justification;
- where a person is initially detained for a limited period for a specific purpose, there must be an **appropriate justification** to continue to detain him or her after this purpose no longer applies;
- where there are **less intrusive measures** that can achieve the same end they should be used, for example, the imposition of reporting obligations, sureties or other conditions.

Similar principles could apply to Victorian laws providing for detention or the enforcement of those laws.

Some additional examples of what might constitute arbitrary arrest or detention are the following:

- Where an arrest is made in order to achieve an unlawful purpose, the resulting detention may be arbitrary.
- An arrest or form of detention may be unlawful (and thereby arbitrary) even though it is carried out in consequence of a statutory power.
- The exercise of a statutory power may be considered unlawful (and thereby arbitrary) where it is carried out pursuant to a mandatory requirement without regard to the merits of the case.
- Where law enforcement officers carry out an arrest that is unwarranted in the individual circumstances (for example, where there is no cause to do so), the arrest or detention will be unlawful and may also be arbitrary because the decision to arrest was without a rational foundation.

There are therefore a number of ways in which an otherwise valid power of arrest or detention, or its exercise, may be considered arbitrary:

- **Continuation of detention:** Although the initial power to detain a person may be valid, the detention may become arbitrary if there is no sufficient reason for continuing to detain the person. An individual should not be kept in detention as a matter of convenience.
- **Improper exercise of power:** Although law enforcement officials may have a statutory power to detain a person, the detention may be arbitrary if it is not carried out for a valid reason (for example, if the ostensible reason is a sham) or where there is insufficient cause to detain an individual (for example, the detaining officer may not genuinely or reasonably hold the belief that a crime is imminent, which may be required under the legislation).
- **Lack of procedural safeguards:** Detention may become arbitrary where there is a lack of procedural safeguards which protect against it becoming arbitrary.

Right to security

Section 21 protects the right to security. This right applies independently to the right to liberty, which is also protected under s. 21.

When does it apply?

The right to security applies to persons inside and outside detention. For example, it is likely to be invoked where a correctional facility fails to protect a prisoner against an attack by a dangerous prisoner or where the police fail to act on complaints of domestic violence or fail to act on death threats.

Scope of the obligation

The scope of this obligation remains unsettled in international human rights law.

It would appear to require a person's physical security to be protected by a public authority in circumstances where the public authority is aware that the person's physical security may be under threat.¹⁷⁷

¹⁷⁷ *Delgado Paez v. Colombia*, Human Rights Committee, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (23 August 1990).

The threat may arise from a public authority itself, or from a private actor.

The level of awareness required to trigger this right is not clear. The UN Human Rights Committee has said:

'It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them.'¹⁷⁸

Some guidance may be found in the commentary in these Charter Guidelines on the positive obligation of a public authority to safeguard the right to life. You may wish to refer to the discussion in s. 9 of these Charter Guidelines in relation to that obligation.

In relation to the right to life, the European Court of Human Rights has said the following about the level of awareness required to trigger the positive obligation to protect the right to life:

'It must be established that the authorities knew or ought to have known at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which, judged *reasonably*, might have been expected to avoid that risk.'¹⁷⁹

The European Court of Human Rights has also noted that the scope of the obligation to protect a person's life must be interpreted in a way that does not impose an impossible or disproportionate burden on the state, 'bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.'¹⁸⁰

¹⁷⁸ Ibid [5.5].

¹⁷⁹ *Osman v United Kingdom* (1998) VIII Eur Court HR 3124 [116]; (1989) 29 EHRR 245 [116].

¹⁸⁰ *Kiliç v. Turkey* (2000) III Eur Court HR 75 [63]; (2001) 33 EHRR 58 [63]. See also *Mahmut Kaya v. Turkey Mahmut Kaya v. Turkey* (2000) III Eur Court HR 149 [86] and *Osman v. United Kingdom* (1998) VIII Eur Court HR 3124 [116]; (1989) 29 EHRR 245 [116].

Applying this reasoning to the right to security, if a public authority is aware that there is a real and serious threat to a person's physical security (which is a broader concept than a person's life), they should do everything that they can reasonably and practically do, within their resources, to protect that person from the threat.

Information to be provided upon arrest or detention

Section 21(4) imposes certain informational requirements in respect of persons arrested or detained.

This sub-section modifies the equivalent ICCPR right under article 9(2) by extending the requirement to a person who is *detained*. Article 9(2) of the ICCPR applies only to a person who is arrested. The significance of this modification is that even if a person is only detained (and not arrested), in Victoria they must still be told why they are being detained. This should happen at the time he or she is first detained. If there are to be any proceedings to be brought against a person detained, a public authority must 'promptly' inform the person of them.

The information to be provided is twofold:

- the reason for the arrest or detention, even if those grounds would be obvious to the person (for example, if he or she were caught 'red-handed'); and
- any proceedings to be brought against him or her.

The requirement in the Charter that there be no arbitrary detention will mean that a public authority must have information evidencing a reasonable suspicion to support the detention.¹⁸¹ This right (in s. 21(4)) requires the public authority to provide this information to the person detained.

¹⁸¹ *O'Hara v. United Kingdom* (2001) X Eur Court HR 121; (2002) 34 EHRR 32.

'Prompt' presentation and pre-trial detention

Section 21(5) requires that a person who is arrested or detained on a criminal charge must be promptly brought before a court, brought to trial without unreasonable delay, and released if neither requirement is met.

What is 'prompt presentation'?

In the context of international human rights law, the UN Human Rights Committee has said that time-limits for 'prompt' presentation of persons under this provision are a matter of domestic law; however, delays in presenting a detained person before a court should not exceed a few days.¹⁸²

The European Commission on Human Rights has taken the view that the period of time should not ordinarily be longer than four days.¹⁸³

What is 'unreasonable delay'?

The Charter requires that a person be brought to trial without unreasonable delay.

This right overlaps considerably with s. 25(2)(c) of the Charter, which seeks to ensure that a person accused of criminal charges is tried without unreasonable delay. The distinction between the two rights is that s. 21(5) regulates the length of pre-trial *detention*, whereas s. 25(2)(c) regulates the total length of time that passes before a person's trial, whether or not he or she is detained on remand or has been granted bail.

In international human rights law, there is no fixed time limit for when detention can be viewed as occurring 'without unreasonable delay'.

Whether a period of pre-trial detention meets the requirements in s. 21 will depend on a range of factors:

- the seriousness of the alleged offence;
- the nature and severity of the possible penalties;

- the danger that the accused will abscond if released;
- whether the authorities have been diligent in the conduct of the proceedings, considering the complexity and special characteristics of the investigation; and
- whether delays are due to the conduct of the accused or are due to the prosecution.

Right to release pending trial

Sub-section 6 of s. 21 provides that a person awaiting trial must not be automatically detained in custody. Rather, the person has a right to be released on bail subject to giving a guarantee to appear for trial, and at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

You will need to consider this provision if you are vetting the *Bail Act 1977* (Vic.) or preparing any subsequent amendment to that Act, or assisting in the development of a policy or program that seeks to give effect to the Bail Act.

Section 21(6) will be engaged by a provision that establishes a presumption against bail for a particular category of offence or offender. It will also be engaged by a provision that precludes bail for a particular category of offence or offender.

Note however that the right to be released pending trial may be limited under s. 7 of the Charter. Pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, at any other stage of the judicial proceeding or for execution of judgment. It may also be necessary to avert interference with witnesses and other evidence, or to avert the commission of other offences.¹⁸⁴

182 *UN Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 130 (2003) [2].*

183 *Brogan v. United Kingdom* (1988) 145 Eur Court HR (ser B) (55); (1989) 11 EHRR 117.

184 *WBE v. The Netherlands*, Human Rights Committee, Communication No. 432/1990, UN Doc. CCPR/C/46/D/432/1990 (23 October 1992) [6.3].

Judicial review of the legality of detention

Section 21(7) provides that a person who is deprived of liberty by arrest or detention, for whatever reason, has the right to challenge the lawfulness of his or her detention.

The section requires a court to make a decision on such an application without delay and to order the person's release if it finds that the detention is unlawful. Executive review of the legality of detention (for example, by a Minister) will not be sufficient to comply with this right.¹⁸⁵

The right to challenge the legality of detention encompasses the principle of *habeas corpus*, which is well established in the common law. It applies regardless of whether the deprivation of liberty is actually lawful.

In international human rights law it has been recognised that the substance of the right in article 9(4) of the ICCPR cannot be realised without access to a lawyer.

Although the right under s. 21(7), as with all the rights in the Charter, can be subject to reasonable limits, it seems unlikely that any provision that absolutely excluded review by the courts (or rendered it practically impossible) would be reasonable or, perhaps, lawful.

Imprisonment for failure to perform a contractual obligation

Section 21(8) establishes a freedom from imprisonment for inability to fulfil a contractual obligation. This provision was primarily designed to address so-called 'debtors' prisons.

The term 'contractual obligation' includes monetary debts arising from private civil law obligations. It will probably not include infringement notices such as public transport fines.

REASONABLE LIMITS ON THE RIGHTS PROTECTED IN SECTION 21

As with all of the human rights protected in the Charter, the rights protected in s. 21 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 21 both protects a person's right to liberty and security, and sets out the minimum rights of individuals who are arrested or detained.
- The right to liberty applies to all forms of detention.
- Any arrest or detention must be lawful and must not be arbitrary.
- An arrest or detention that is unlawful is likely to also be arbitrary. However, an arrest or detention may be arbitrary even though it is lawful.
- For a person's arrest or detention to be lawful it must be authorised.
- To avoid arbitrary arrest or detention, enforcement officers should only arrest or detain someone in accordance with established procedures.
- The right to security applies both inside and outside detention. It means that a person's physical security must be protected in circumstances where a public authority is aware that it may be under threat.
- Any person who is arrested or detained must be told (a) the reason for the arrest or detention; and (b) about any proceedings to be brought against him or her.

¹⁸⁵ *Torres v. Finland*, Human Rights Committee, Communication No. 291/1998, UN Doc. CCPR/C/38/D/291/1988 (5 April 1990) [7.2].

- A person who is arrested or detained on a criminal charge must be promptly brought before a court, brought to trial without unreasonable delay, and released if neither requirement is met. You should consult the discussion section on these requirements if they are relevant to your policy or legislation.
- A person has a right to be released pending trial, subject to certain guarantees. These are outlined in s. 21(6) and discussed above. This right may be limited, for example, to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or avert the commission of other offences.
- Any person who has been arrested or detained has the right to challenge the lawfulness of his or her detention in court, without delay;
- A person must not be imprisoned only because he or she cannot fulfil a contractual obligation.

MEASURES TO IMPROVE COMPLIANCE

Right to liberty:

If you are developing a policy or program involving the arrest or detention of individuals, consider taking the following steps:

- Set out clearly the circumstances in which the power may be used and who may effect the arrest or detention.
- Ensure that the discretion to arrest or detain is prescribed in terms that are consistent with the objective of the policy.
- Ask yourself whether there are clearly defined, express criteria for determining when an individual can be detained.
- Consider including in the policy:
 - a provision for officers to receive training as to the circumstances when the power can be used; and
 - a mechanism by which practice guidelines are developed and disseminated for officers exercising powers of arrest or detention.

The legislation should:

- ensure that the enforcement officer gives a person who is arrested or detained (**'the detainee'**) sufficient information about the reasons for arrest or detention;
- ensure that sufficient information is provided to the detainee about any proceedings to be brought against him or her;
- ensure that a detainee may seek judicial review of the legality of the detention; and
- establish minimum standards and conditions to which the detainee may be subjected.

Assess your policy or practice against the following criteria:

- Are the grounds for arrest or detention prescribed by law?
- Will the arrest or detention be made in accordance with proper procedures?
- Is the arrest or detention necessary and reasonable in the circumstances (for example, to prevent flight or a breach of the peace, prevent a rapid spread of disease, avoid interference with evidence or prevent the recurrence of a crime)?
- Is the length of time that the person may be arrested or detained justifiable in the circumstances?

Judicial review of the legality of detention

- Include a provision in new Bills and policy proposals that provides for judicial oversight of detention and ensure that it is possible for detained persons to make an application for judicial review if there is a change in basis for, or the conditions of, their detention.

Right to security

- Ensure that you have guidelines in place for dealing with threats to a person's physical security (including persons in a custodial facility) that comply with the Charter obligations under s. 21 and s. 9.

RELATED RIGHTS AND FREEDOMS

Situations that engage s. 21 may also raise issues in relation to the following rights in the Charter:

- protection from torture and cruel, inhuman or degrading treatment (s. 10);
- humane treatment when deprived of liberty (s. 22);
- children in the criminal process (s. 23);
- fair hearing (s. 24); and
- rights in criminal proceedings (s. 25).

HISTORY OF THE SECTION

Section 21 is modelled on articles 9 and 11 of the ICCPR. However, unlike article 9 of the ICCPR, s. 21 does not confer a right to compensation for breach of the right.

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

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