

SECTION 25(2)

MINIMUM GUARANTEES IN CRIMINAL PROCEEDINGS

Section 25

- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
 - (c) to be tried without unreasonable delay; and
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the **Legal Aid Act 1978**; and
 - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
 - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
 - (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
 - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
 - (k) not to be compelled to testify against himself or herself or to confess guilt.

POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(2)?

You will need to consider s. 25(2) in assessing legislation, a policy or a program where it:

- amends the procedures for filing, issuing or serving charges, presentments or indictments;
- amends the content of charge sheets, presentments or indictments or otherwise varies the requirements regarding information to be given at the time of charge;
- relates to access by a self-represented accused (including an accused in custody) to witnesses and to legal and research materials;
- establishes conditions restricting access to information and material to be used as evidence in criminal proceedings;
- regulates storage and destruction of evidence before and after the conclusion of criminal proceedings;
- establishes timetables for the prosecution and defence to prepare for trial or appeal;
- establishes time limits on the lodging of applications or appeals;
- amends the law relating to adjournments of hearings;
- amends the law relating to pre-hearing disclosure;

- regulates the procedures for investigation and prosecution of offences;
- affects the resources available to investigators, prosecutors, forensic services and others involved in preparing prosecutions for trial and appeal;
- affects the caseload of the courts and the capacity of the courts to hear matters;
- establishes procedures for giving persons charged with criminal offences notice of hearings;
- amends the eligibility criteria for legal aid;
- amends any guidelines or procedures that enable an accused to represent himself or herself personally or restricts the right of an accused to choose the legal representative or advisor of his or her choice;
- amends the law of evidence including the examination and cross-examination of witnesses, the admissibility of hearsay evidence and the evidence of a co-accused;
- establishes or amends procedures protecting prosecution witnesses, for example, the use of protective screens in the court room or video testimony;
- establishes or amends guidelines or procedures for the provision and use of facilities in police interviews and the court room, for example, assistive hearing devices;
- establishes guidelines or procedures for the provision of assistants, translators and interpreters in police interviews and the court room;
- amends the law relating to self-incrimination;
- amends the procedures for and law about obtaining evidence, including confessions.

These policy triggers are not comprehensive.

DISCUSSION

Section 25(2) is concerned with rights in criminal proceedings.

The minimum guarantees are modelled on article 14(3) of the ICCPR. Section 25(2) modifies article 14(3) in three respects:

- Paragraph (j) is additional to article 14(3) to reflect the fact that some people charged with a criminal offence will need, and should be entitled to, specialised communication tools and technology in order to understand the nature of and the reason for the criminal charge and to participate in the judicial process.
- Paragraphs (d), (e) and (f) of s. 25(2) modify article 14(3) (d) to include references to the *Victorian Legal Aid Act 1978*. This is designed to ensure consistency with current Victorian law and practice within Victoria Legal Aid.
- Paragraph (g) of s. 25(2) reflects paragraph (e) of article 14(3) but includes in addition the words 'unless otherwise provided by law'. This qualification was considered by the Human Rights Consultation Committee to be necessary to ensure that the special rules in relation to the cross-examination of children or victims of sexual assault would continue to apply.²²⁹

When do these minimum guarantees apply?

Section 25(2) covers persons charged with both indictable and summary offences. It applies before and at trial, and (where relevant) on appeal.

In Victoria, typically a person is charged with an offence when the charge is filed in the Magistrates' Court on a charge sheet that alleges the person has committed an indictable or summary offence. A person will be arrested and charged, or a summons to answer the charge will be issued. The infringement notice system (discussed on page 164) provides an alternative means of dealing with allegations.

²²⁹ Human Rights Consultation Committee (Victoria) *Rights, Responsibilities and Respect* (2005) 44.

Infringement notices

The infringement notice system provides for penalisation without prosecution.

When an infringement notice is issued, if the person pays the set penalty within the prescribed period, no further proceedings are taken in respect of the infringement. Alternatively, the person may elect to defend proceedings in court. When a person elects to go to court, he or she then receives a charge and summons and the infringement notice is withdrawn.

An infringement notice is not itself a charge under Victorian law. This means that infringement notices are not captured by s. 25, nor do they attract the protection of the minimum guarantees.

Nevertheless, when reviewing relevant legislation or amendments to current legislation, we recommend that legislative policy officers should bear in mind the desirability of ensuring that infringement notices satisfy, or continue to satisfy, the requirements in s. 25(2)(a). For example, an infringement notice should always be sufficiently clear and detailed to inform the person of the nature and reason for it being issued, and persons issued with such notices should always be informed of their option to elect to defend proceedings in court.

What do the minimum guarantees mean?

The minimum guarantees are minimal guarantees that apply in relation to the processing of a criminal charge against a person.

The minimum guarantees must be provided to all persons charged with a criminal offence 'without discrimination'. Discrimination is defined in s. 3 of the Charter. This means that people must be treated equally in the provision of the minimum guarantees and additional measures may be needed in certain cases to ensure that a person's rights under s. 25(2) are met.

The right to be informed of the charge

Paragraph (a) of s. 25(2) establishes an accused's right to be informed promptly of the charge. This right is relevant to the information required to be given, and the mode in which it is given, at the time the charge is laid, rather than the disclosure of evidence necessary to enable an accused to prepare for trial.

The purpose of s. 25(2)(a) is to enable the accused to make a full answer and defence to any charge.

If the charges are subsequently varied, the accused should be promptly notified about the specific variations.²³⁰

'Promptly'

The person must be notified of the charge 'promptly'. In international law, this means the person who is charged must be informed of the nature of the charge once the enforcement authorities have decided to lay the charge.²³¹

An unreasonable delay in notifying the person of the charge may result in a breach of s. 25(2)(a). Factors relevant to whether the delay was unreasonable are whether the person contributed to the delay or whether the delay can be attributed to the conduct of the enforcement officers; the resources that were available for finding the person; and the prejudice experienced by the person as a result of the delay.²³²

'Informed'

The specific requirements of sub-paragraph 2(a) of s. 25(2) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts (but not the evidence) on which the charge is based. The person should be informed of each specific offence with which he or she is being charged. If the charges are complex, the person may need to be given additional information.

230 *R v. E* (1999) 17 CRNZ 40.

231 *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [8].

232 *R v. Delaronde* [1997] 1 SCR 213.

If the person does not speak or understand English, the information must be communicated in a language he or she understands.

If the person has communication or speech difficulties and requires assistance, he or she has the right to be informed of the nature of the charge by a type of communication that the person understands (for example, Auslan).

The right to adequate time and facilities

Paragraph (b) of s. 25(2) guarantees the right to adequate time and facilities to prepare a defence and the right to adequate time and facilities to communicate with a lawyer or advisor of the accused's choice. It applies to all stages following the laying of the charge, including the preparation to meet each procedural step.

The purpose of s. 25(2)(b) is to enable the accused to have his or her interests properly and adequately represented so that the accused can make informed decisions relating to the preparation of his or her defence. The aim is to put the accused on an equal footing with the prosecution.

'Time'

What time period will be 'adequate' will depend upon an assessment of the circumstances of each case, and will vary depending upon the stage of the proceedings (for example, whether the proceedings are at an interlocutory or preliminary stage, or at the stage of a contested trial, or whether the matter has gone on appeal); the complexity of the case; the accused's access to evidence and access to his or her lawyer; and the time limits prescribed by law.²³³ It is well established in international human rights law that if a defence lawyer is to be appointed,

he or she should be appointed in sufficient time to allow proper preparation of the defence to take place.²³⁴ For example, adequate time to trace key witnesses should be provided for.²³⁵

'Facilities'

An accused must be given access to documents and other evidence required for the preparation of his or her case. This may include access to earlier case law, to witnesses, and to prosecution files, all subject to reasonable restrictions.²³⁶ The adequacy of facilities depends on the complexity of the case; whether the accused is represented by a lawyer or is self-represented; and the type of evidence required to make a full defence. This does not mean an accused must have the same access to facilities as the prosecution has.

'Lawyer or advisor'

The accused should have the opportunity to engage and communicate with a lawyer. If the accused does not request a lawyer or advisor, the accused should have the opportunity later to request a lawyer or advisor in the event of a change of mind. The communications with the lawyer should occur in conditions that allow for confidentiality and there should be no restrictions, pressures or undue interference with that lawyer or advisor or those counsel chosen to represent the accused.²³⁷

Incommunicado detention, which makes it impossible to access legal assistance, will be likely to breach s. 25(2)(b).

²³³ *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [9].

²³⁴ *X and Y v. Austria* 15 DR 160 (1978); *Goddi v. Italy* (1984) 76 Eur Court HR (ser A); (1984) 6 EHRR 457.

²³⁵ *Smith v. Jamaica*, Human Rights Committee, Communication No. 282/1988, UN Doc. CCPR/C/47/D/282/1988 (12 May 1993).

²³⁶ *Haase v. Federal Republic of Germany*, (1977) 11 Eur Comm HR 78.

²³⁷ *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [9].

The right to be tried without unreasonable delay

Paragraph (c) of s. 25(2) is the right to be tried without unreasonable delay. This right reflects the common law principle that justice delayed is justice denied. Section 25(2)(c) is intended to protect the right of an accused to examine the evidence led against them while the evidence can still be tested, and it reflects the public interest in having someone charged with a criminal offence brought before the court expeditiously. This right also seeks to preserve public confidence in the administration of justice.

The UN Human Rights Committee has observed that this right relates not only to the time by which a trial should commence, but also the time by which it should end and judgment is given – all stages must take place without unreasonable delay.²³⁸

As with all rights under the Charter, the right to trial without unreasonable delay is not an absolute right. Whether delay is 'unreasonable' will depend on the nature of the case and a range of other factors such as whether the accused is held in custody; the length of the delay; the complexity of the case (including the number of witnesses, the number of other parties (if any), and the need to obtain expert evidence); the conduct of the parties; the seriousness of the offence; and the prejudice to the accused. Where the delay is attributable to the accused, there is likely to be no breach of s. 25(2)(c).

The right to be tried in person

Paragraph (d) of s. 25(2) is the right to be tried in person. The accused has the right to be tried and to defend himself or herself in person, or through legal assistance of his or her choice, or, if eligible, through legal aid.

Where an accused has been provided with a Legal Aid lawyer, and cannot otherwise afford a lawyer, s. 25(2)(d) does not entitle the accused to a choice of lawyer.²³⁹ It does entitle an accused to defend himself or herself in person.²⁴⁰

If there are exceptional circumstances and it is in the interests of justice, trials may be held in the absence of the accused (*in absentia*), but there should nevertheless be strict observance of the rights of the defence.²⁴¹ *In absentia* hearings are permissible in international human rights law only when the accused has been given ample notice and opportunity to attend the hearing but has failed to do so.

Legal Aid

Paragraph (e) of s. 25(2) establishes a right to be told about the right to legal aid under the Legal Aid Act. This right applies only if an accused does not already have legal assistance and he or she must be told that the right to legal aid is only available if the person is eligible for legal aid.

Paragraph (f) of s. 25(2) establishes a right to be provided with legal aid in certain circumstances. The obligation to provide legal aid is confined to cases where the 'interests of justice' require it and the person is eligible for legal aid. The eligibility criteria are set out in the Legal Aid Act. The application of the 'interests of justice' criterion in international decisions has shown that this criterion will take account of the complexity of the proceedings; the capacity of an accused to represent himself or herself; and the severity of the potential sentence.²⁴² Whether the 'interests of justice' require legal aid to be provided is ultimately a legal question, not solely an operational or administrative one.

239 *Pratt and Morgan v. Jamaica*, Human Rights Committee, Communications Nos 210/1986 & 225/1987, UN Doc. CCPR/C/35/D/210/1987 (7 April 1989) [13.2].

240 *Hill and Hill v. Spain*, Human Rights Committee, Communication No. 526/93, UN Doc. CCPR/C/59/D/526/1993 (23 June 1997).

241 *Mbenge v. Zaire*, Human Rights Committee, Communication No. 16/1977, UN Doc. CCPR/C/18/D/16/1977 (25 March 1983).

242 *Quaranta v. Switzerland* (1991) 205 Eur Court HR (ser A).

238 *Ibid.*

Witness attendance

Paragraph (g) of s. 25(2) protects the right of an accused to examine, or to have examined, prosecution witnesses unless the law provides otherwise. Paragraph (h) of s. 25(2) establishes the right of the accused to obtain the attendance and examination of witnesses on his or her own behalf under the same conditions as the prosecution.

The UN Human Rights Committee has said that these rights 'guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.'²⁴³

The term 'witness' has been interpreted in international decisions as including a person whose statements are produced as evidence before a court, even if he or she is not called to give oral evidence.²⁴⁴ It also includes a co-accused.

Prosecution witnesses

An accused should be given an adequate opportunity to challenge and question a witness who will give or has given evidence against him or her, either at the time the witness was making a statement or at some later stage of the proceedings.²⁴⁵ This means that the prosecution must give the accused adequate notice of the witnesses that the prosecution intends to call so that the accused is able to prepare his or her defence including accessing evidence that will challenge the prosecution's evidence.

For the right to cross-examine the prosecution witnesses to be effective, the evidence must usually be given orally in the presence of the accused in court so that its reliability as well as the credibility of the witness can be tested. For this reason, reliance on hearsay evidence may amount to a breach of this right. In international law, a conviction that was based on the evidence of witnesses whom the accused had no opportunity to cross-examine was found to have breached the right to a fair trial.²⁴⁶ Similarly, reliance on statements of anonymous witnesses may offend this right.²⁴⁷

However, if there are good reasons for a witness not to appear and the accused can still test the reliability and credibility of the evidence given by means of written statements, then evidence from unexamined witnesses will probably not interfere with these rights (or will be justifiable under s. 7). Nor is it likely that reliance on written evidence that can be independently corroborated will amount to a breach of this right (that is, such reliance is unlikely to amount to an interference with the right that cannot be justified as a reasonable limit).

Vulnerable witnesses

The right of an accused to examine prosecution witnesses is qualified by the words 'unless otherwise provided by law'. This qualification ensures that rules which restrict the cross-examination of children or victims of sexual assault would continue to apply. This qualification may well go further than the recognition given in international law to the need for protective measures to be instituted to protect the interests of witnesses.²⁴⁸

²⁴³ *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [12].

²⁴⁴ *Kostovski v. Netherlands* (1989) 166 Eur Court HR (ser A); (1990) 12 EHRR 434.

²⁴⁵ *Ibid.*

²⁴⁶ *Lucà v. Italy* (2001) II Eur Court HR 167; (2003) 36 EHRR 46. See also *Unterpertinger v. Austria* (1987) 110 Eur Court HR (ser A); (1991) 13 EHRR 175.

²⁴⁷ *Kostovski v. Netherlands* (1989) 166 Eur Court HR (ser A); (1990) 12 EHRR 434.

²⁴⁸ *Doorson v. The Netherlands* (1996) II Eur Court HR 470 [70]; (1990) 22 EHRR 330 [70].

In international law, these protective measures must be limited to what is strictly necessary to protect the witness. It is for the prosecution to establish the need for any special measures and there must be a proper assessment of any alleged threat to a witness. Special measures may include:²⁴⁹

- giving evidence by closed circuit television link or video recordings for child witnesses in proceedings concerning sexual abuse;
- the use of special protective screens to protect a witness's identity; or
- the use of written statements.

Although the terms of s. 25(2)(g) mean that the right is unlikely to be breached when legislation authorises these kinds of special measures, attention should be given in developing such legislation to whether the special measures chosen are strictly necessary or are disproportionate to the aim.

Defence witnesses

It is a matter for an accused to decide who should be called as a defence witness.²⁵⁰ If an accused calls a witness who then fails to turn up to the hearing, the hearing may need to be adjourned. Alternatively, the presiding judge may need to issue a subpoena, or a warrant, to secure the attendance of the witness in court and/or the police may be required to assist to transport the witness to court. Securing the attendance of defence witnesses is particularly important in circumstances where the penalty for the offence faced by an accused is harsh.²⁵¹

The right to an interpreter

Paragraph (i) of s. 25(2) confers a right to the free assistance of an interpreter for persons charged with a criminal offence who do not understand or speak English. It does not give a person who prefers to speak a language other than English the right to an interpreter without payment.

This right applies at all stages of the prosecution once the charge has been laid, including during police interviews and during any court hearing, (including the trial and any appeal). It is critically important that an accused who does not speak English understands that he or she has this right and the effect of it should be that he or she can participate fully and effectively in the preparation of a defence and during the trial. For the right to be meaningful and effective, the interpretation and translation provided by the interpreter must be competent and accurate.

In international human rights law, the comparable right (article 14(3)(f)) has been construed as prohibiting an accused from being ordered to pay the costs of an interpreter.²⁵² This right applies to both citizens and non-citizens.²⁵³ In international law, it includes the right to have all relevant documents translated free of charge although oral translations may sometimes be sufficient to guarantee the right (for example, where the documents are made available to the person's lawyer).²⁵⁴ However, under the Charter, free access to an interpreter does not require that the relevant documents need to be translated into writing. This is because 'interpreter' in s. 3 of the Charter is defined as relating only to the oral rendering of the meaning of the spoken word or other form of communication from one language or form of communication into another language or form of communication.

249 See *Regina (D) v. Camberwell Youth Court* [2005] UKHL 4.

250 *Peart and Peart v. Jamaica*, Human Rights Committee, Communications Nos 464/91 & 482/91, UN Doc. CCPR/C/54/D/464/1991 (24 July 1995) [11.3].

251 *Grant v. Jamaica*, Human Rights Committee, Communication No. 353/1989, UN Doc. CCPR/C/50/D/353/1989 (4 April 1994).

252 *Luedicke, Belkacem and Koc v. United Kingdom* (1978) 29 Eur Court HR (ser A); (1979–80) 2 EHRR 149.

253 *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [13].

254 *Harward v. Norway*, Human Rights Committee, Communication No. 451/1991, UN Doc. CCPR/C/51/D/451/1991 (18 August 1994).

The definition of an ‘interpreter’ in s. 3 of the Charter means an accredited interpreter (the Regulations will set out the bodies that may accredit interpreters) or, if an accredited interpreter is not readily available, a competent interpreter. This may mean that if it is not reasonably possible to access an accredited interpreter (for example, at a rural police station), a competent interpreter (for example, an adult family member who speaks both the accused’s native language and English) who is not accredited may be used.

Free assistance for persons with communication or speech difficulties

Paragraph (j) of s. 25(2) confers the right, without discrimination, to have the free assistance of assistants and specialised communication tools and technology for persons with communication or speech difficulties. This right is an aspect of the right to a fair trial as it seeks to ensure such persons can understand and participate fully and effectively in the preparation of their defence and during the trial.

Where a person has speech or hearing difficulties, proper support must be provided to ensure that the person fully understands the nature of the charges against him or her and the nature of the proceedings. Examples of such support are Auslan interpreters; braille translations of relevant documents; and communication technology such as assistive hearing devices, hearing aid loops and real-time captioning.

Self-incrimination

Paragraph (k) of s. 25(2) protects the right to be free from compulsory self-incrimination. This right means that a person charged with a criminal offence must not be compelled to testify against himself or herself or to confess guilt. The right against self-incrimination is an important element of the right to a fair trial.

At the pre-trial stage, this right includes the right not to answer self incriminating questions. However, the person can still be compelled to answer other questions. When a use immunity is provided, a person cannot be regarded to have incriminated themselves, regardless of the nature of the question. If legislation was to allow for adverse inferences to be made as a result of a person’s refusal to answer questions or his or her continuing to remain silent, it might interfere with the right against self-incrimination.²⁵⁵

At the trial stage, this right means that self-incriminating evidence which has been unfairly or improperly obtained by compulsion from a person, including confessions made under duress, should be excluded.

In international law, obtaining evidence compulsorily from a person where the evidence has an existence independent of the will of the person, (for example documents, breath samples, blood and urine samples and bodily tissue used for the purpose of DNA testing), does not engage this right.

²⁵⁵ *UN Human Rights Committee, General Comment 13, Article 14* (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [14]; *Heaney & McGuinness v. Ireland* (2000) XII Eur Court HR 419 [57]–[59]; (2001) 33 EHRR 12 [57]–[59]. See also *Saunders v. United Kingdom* (1996) VI Eur Court HR 37; (1997) 23 EHRR 313, *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AG A17 (HL).

REASONABLE LIMITS ON THE RIGHTS IN SECTION 25(2)

As with all of the human rights protected in the Charter, the rights in section 25(2) 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 25(2) applies to persons who have been charged with a criminal offence and provides minimum guarantees, which are specific aspects of the right to a fair trial.
- The minimum guarantees must be provided to all persons charged with a criminal offence 'without discrimination'.
- A person charged with a criminal offence has the right to be informed promptly of the charge so that he or she may make a full answer and defence to that charge.
- A person charged with a criminal offence also has the right to adequate time and facilities to prepare a defence and the right to adequate time and facilities to communicate with a lawyer or advisor of the person's choice during all stages following the laying of the charge, including, for example, pre-trial procedural steps.
- Whether time and facilities are adequate depends on factors such as the nature of the proceedings and the complexity of the case.
- An accused should have the opportunity to engage and communicate with a lawyer. If the accused does not request a lawyer or advisor, the accused should have the opportunity later to request a lawyer or advisor in the event that the accused changes his or her mind.
- The right to trial without unreasonable delay relates to the time by which a trial should commence, but also the time by which it should end and judgment is given.

- Whether delay is unreasonable will depend on the nature of the case and a range of factors, such as whether the accused is in custody and the length of the delay.
- An accused has the right to be tried and to defend himself or herself in person or through legal assistance of his or her choice or if eligible, through legal aid.
- If an accused does not already have legal assistance, he or she must be told, if eligible, about the availability of legal aid.
- The obligation to provide legal aid is confined to cases where the interests of justice require it and the person is eligible for legal aid under the Legal Aid Act.
- An accused has the right to examine prosecution witnesses and also has the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as the prosecution.
- The accused should have the same powers as the prosecution to compel the attendance of witnesses and of examining or cross-examining any witness. However, the right of the accused to examine prosecution witnesses is qualified by the words 'unless otherwise provided by law'.
- An accused who does not speak or understand English has the right to the assistance of an interpreter to provide an oral translation free of charge.
- Persons with communication or speech difficulties have the right to have the free assistance of assistants and specialised communication tools and technology.
- A person charged with a criminal offence has a right not to be compelled to testify against himself or herself or to confess guilt.

MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(2)(a), ensure that the policy, program or legislation you are working on establishes procedures or processes:

- for informing people charged with a criminal offence of the necessary information relevant to the offence with which they have been charged without delay;
- for identifying when people charged with a criminal offence may require the provision of translation facilities;
- for identifying when people charged with a criminal offence may require specialised communications tools or technology due to communication difficulties or other disabilities.

To improve compliance with s. 25(2)(b):

- ensure that there are procedures to ensure that persons charged with a criminal offence are aware of their right to legal representation;
- ensure that there are procedures that enable an accused to access information and material to be used as evidence in criminal proceedings;
- ensure that there are procedures that enable a self-represented accused to access legal and research materials;
- ensure that an accused has the opportunity to engage and communicate with a lawyer under conditions that enable confidential communications;
- ensure that time limits for lodging appeals or applications and seeking adjournments allow a reasonable time for the defence to be prepared;
- ensure that documentary and other forms of evidence necessary for the preparation of the defence are disclosed within an adequate time before the relevant hearing.

To improve compliance with s. 25(2)(c):

- ensure that the policy, program or legislation you are working on will not unduly delay the investigation and prosecution of offences.

To improve compliance with s. 25(2)(d):

- ensure that there are procedures for informing persons charged with a criminal offence of their right to legal representation or to defend themselves in person;
- ensure that there are procedures in place so that hearings are not held in the absence of the accused unless he or she has been given adequate notice and the opportunity to attend and has failed to do so, and it is in the interests of the administration of justice that the hearing proceeds.

To improve compliance with s. 25(2)(e) and s.25(2)(f), ensure that the legislation, policy or program you are working on does not introduce arbitrary or discriminatory criteria for applying and qualifying for legal aid.

To improve compliance with s. 25(2)(g) and s.25(2)(h), ensure that the policy, program or legislation you are working on:

- preferably provides for witnesses to give evidence orally and for the accused to have the opportunity to examine the witnesses;
- gives the accused sufficient opportunity to challenge the prosecution evidence;
- where it allows for evidence to be given by vulnerable witnesses in the absence of the accused, provides proper authorisation in clearly defined circumstances for this to occur.

To improve compliance with s. 25(2)(i):

- ensure that there are procedures for informing an accused who does not speak or understand English of the right to the free assistance of an interpreter who would provide an oral translation;
- ensure that the relevant agencies are aware that competent and accurate translations of all relevant documents and interpretation of proceedings are provided to an accused who does not speak or understand English.

To improve compliance with s. 25(2)(j):

- ensure that there are procedures for informing an accused who has speech or other communication difficulties of the right to free assistance;
- ensure that there are proper processes to facilitate competent and accurate translations of all relevant documents and interpretation of proceedings including police interviews and trials;
- consult or facilitate consultation with interpretation and translation service providers to determine the best way the relevant services can be delivered;
- seek the views of the groups within the community who are representative of those who may be affected by speech and hearing communication difficulties.

To improve compliance with s. 25(2)(k), ensure the relevant legislation, policy or program you are working on:

- provides for, or recognises, that an accused should be informed of the right to remain silent and the right against self-incrimination;
- recognises that, at any stage of the prosecution, judges have the authority to consider any allegations made that the accused's right to remain silent was violated or to exclude evidence of the accused on the ground that it was obtained by compulsion;
- provides for, or recognises, that evidence that has been unfairly or improperly compelled from a person may be excluded at trial.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy, a program or legislation might give rise to an issue under s. 25(2), you should also consider the following additional rights and freedoms:

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

- the right to be protected from torture and cruel, inhuman or degrading treatment (s. 10);
- the right not to be arbitrarily arrested or detained (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- the rights of children in criminal process (s. 23);
- the right to a fair hearing (s. 24).

HISTORY OF THE SECTION

Section 25(2) is modelled on article 14(3) of the ICCPR. The Charter modifies article 14(3) by ensuring, where necessary, that people will be entitled to specialised communication tools and technology in order to understand the nature and reason for the criminal charge and to participate in the judicial process. Article 14(3) is also modified as it relates to the provision of legal assistance by making reference to the Legal Aid Act to ensure consistency with Victorian law. Also, a qualification is made in relation to the examination of witnesses to accommodate Victorian laws regarding cross-examination of certain witnesses, such as children and victims of sexual assault.

The purpose of these modifications was identified by the Human Rights Consultation Committee in this way:

‘The Charter provision modifies ICCPR article 14(3) in a number of important respects. First, the Committee has modified the provision to reflect the fact that some people charged with a criminal offence will need, and are entitled to, specialised communication tools and technology to understand the nature of and reason for the criminal charge and to participate in the judicial process. Secondly, the Committee has adapted the sub-sections dealing with the provision of legal assistance to include references to the Victorian *Legal Aid Act 1978* to ensure consistency with current Victorian law. In addition, the Charter provision qualifies the rights of a criminal accused in relation to the attendance and examination of witnesses

by including the words ‘unless otherwise provided by law’. The Committee considers that this qualification is necessary to ensure that the special rules in relation to the cross-examination of children or of victims of sexual assault would continue to apply.²⁵⁶

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

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²⁵⁶ Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 44.