

# SECTION 25(3)

## RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS

### Section 25

(3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(3)?**

You will need to consider s. 25(3) in assessing legislation, a policy or a program where it:

- creates or amends procedures applicable to children charged with criminal offences in the investigation and prosecution of those offences;
- creates or amends court procedures applicable to children charged with criminal offences;
- creates or amends the law of evidence applicable to children charged with criminal offences;
- creates or amends laws relating to the detention and custody of children charged with criminal offences;
- creates an additional jurisdiction or judicial forum in relation to matters involving children or amends the law relating to the existing Children's Court of Victoria;
- creates or amends offences for actions likely to be performed by children;
- alters the definitions of 'child' and 'young offender' (for example, by reducing the age of criminal responsibility);

- amends the law relating to adjournments of hearings involving children;
- establishes or amends guidelines for sentencing children.

These policy triggers are not comprehensive.

#### **DISCUSSION**

Sub-section (3) of s. 25 recognises the need for special procedures for children charged with criminal offences. It provides that a child has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. This protection is a widely recognised civil and political right. Sub-section (3) of s. 25 reflects article 14(4) of the ICCPR.

#### **When does s. 25(3) apply?**

Sub-section (3) of s. 25 applies where a child has been charged with a criminal offence. It applies to children charged with either an indictable offence or a summary offence. This right applies at all stages of the proceedings, from the time of the charge, to the trial, to the determination of a final appeal.

A 'child' is defined in s. 3 as being a person under the age of 18. Under Victorian law, children under the age of 10 are presumed to be incapable of any criminal offence.<sup>257</sup> Children between 10 and 14 years old are presumed to lack the necessary level of mental culpability and the prosecution must prove that the accused child knew that his or her conduct was wrong before the child can be found to be capable of committing the offence.<sup>258</sup>

International human rights law does not recognise any particular age as the optimal minimum age for the imposition of criminal responsibility but the chosen age should take account of the emotional, mental and intellectual immaturity of children.<sup>259</sup>

#### What does it mean?

Children charged with a criminal offence are entitled to the same guarantees and protections as are accorded to adults under s. 25. However, under this sub-section, children are entitled to additional special protection. The additional protection is directed at ensuring that age-appropriate procedures are in place and that an emphasis is placed on the rehabilitation of the child. Children charged with a criminal offence must be dealt with in special and appropriate ways that take account of age, maturity, and intellectual and emotional capacities.<sup>260</sup>

Where possible, courts should be established specifically to try offences committed by children, and the relevant laws and court processes should take account of the special needs and capacities of children. Where children are involved in the criminal justice system, steps should be taken and adult trial procedures modified to promote a child's ability to understand the nature of the charge and the proceeding and to participate in the proceedings. In Victoria, this role is performed by the Children's

Court of Victoria.

The right to additional protection means that special procedures should be applicable to child defendants at the investigation stage. For example, special measures may need to be adopted to ensure that an age-appropriate explanation about the nature of the charge is given to a child accused so that he or she understands what is being alleged. Interviews should be conducted in the presence of a parent or guardian or other support person in a manner that is sensitive to the child's age, level of maturity and emotional state. In Victoria, special procedures are incorporated into the Victoria Police Manual and s. 464E of the *Crimes Act 1958*.

Similarly, special procedures should be put in place to provide age-appropriate support during hearings. For example, a policy or program should seek to ensure that processes are put in place so that:

- children are supported by a parent or guardian or other support person at all stages of the criminal process;
- children have the court procedures explained to them, in a manner that they understand;
- adjournments can be obtained if it is in the child's best interests.

Procedures should be developed to ensure that a child's privacy is fully respected at all stages of the proceedings to avoid psychological harm due to publicity or the process of labelling or stigmatising.<sup>261</sup> This may mean that the trial is conducted in a closed court. In Victoria, such procedures are outlined in s.19 of the *Children and Young Persons Act 1989*.<sup>262</sup>

257 See section 344 of the *Children, Youth and Families Act 2005 (Vic)*.

258 See *R (A Child) v. Whitty* (1993) 66 A Crim R 462; section 7.2 of the *Criminal Code (Cth)*.

259 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985) rule 4.

260 See *T v. United Kingdom* (1999) 7 BHRC 659.

261 See *T v. United Kingdom* (16/12/99) ECHRR; 7 BHRC 659.

262 Note that the *Children and Young Persons Act* will be repealed upon the commencement of the *Children, Youth and Families Act 2005 (Vic)*.

Procedures that promote a child's rehabilitation may include those that:

- minimise harmful publicity;
- ensure that a restriction on the personal liberty of a child is imposed only after careful consideration;
- ensure that detention or imprisonment is used as a measure of last resort and for the shortest appropriate period of time;
- provide treatment, education or other assistance either in conjunction with detention or imprisonment or as part of a non-custodial order.

There are a number of international human rights instruments that relate to the rights of children, some of which give general guidance on the sort of protection children may require in the criminal process. See in particular the UN Convention on the Rights of the Child 1989<sup>263</sup> and UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).<sup>264</sup>

### REASONABLE LIMITS ON RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS

As with all of the human rights protected by the Charter, the rights of children in criminal proceedings 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(3) applies to children who have been charged with a criminal offence.
- Where possible, courts should be established specifically to try offences committed by children and the relevant laws and court processes should take account of the special needs and capacities of children.
- Special procedures should be followed at all stages of a proceeding to take account of a child's age and maturity.
- Children should be supported by a parent or guardian or other support person at all stages of the proceeding.
- Where there is a risk of psychological harm to the child due to publicity, hearings (including the trial) may need to be conducted in closed court.
- Alternatives to imprisonment should be available and imprisonment should be a last resort.

### MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(3):

- ensure that the relevant laws and court processes take account of the special needs and capacities of children;
- ensure that age-appropriate procedures are in place that will assist a child accused to understand the charges against him or her;
- ensure that procedures are in place so that a child defendant has the opportunity to be accompanied by a parent or guardian or other support person at the various steps in the proceeding;

263 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990. See particularly articles 3, 37 and 40.

264 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985). See articles 8 and 17.

- ensure that the applicable court and court-related procedures and processes accommodate a child defendant's age, maturity, and intellectual and emotional capacities;
- ensure that law enforcement officers, court personnel and judges have adequate training in dealing sensitively with children;
- ensure that policy or legislation that will impact on children makes special provision for the fact that children will be affected by these arrangements;
- ensure that any guidelines for the sentencing of children promote the rehabilitation of the child as a core goal;
- where necessary, consult with persons who have knowledge or expertise on child and youth issues about the impact on children of legislation, a policy proposal or a program.

## RELATED RIGHTS AND FREEDOMS

When considering whether legislation, a policy or a program might give rise to an issue under s. 25(3), you should also consider the following additional rights and freedoms:

- the right to be protected from torture and cruel, inhuman or degrading treatment (s. 10);
- protection of families and children (s. 17);
- 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 the criminal process (s. 23);
- the right to a fair hearing (s. 24).

## HISTORY OF THE SECTION

Section 25(3) is modelled on article 14(4) of the ICCPR.

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

## BIBLIOGRAPHY

### Case Law

1. *R (A Child) v. Whitty* (1993) 66 A Crim R 462.
2. *T v. United Kingdom*, Application No 24724/1994 (Unreported, European Court of Human Rights, Grand Chamber, 16 December 1999).

### Legislation

3. *Children and Young Persons Act 1989* (Vic.).
4. *Children, Youth and Families Act 2005* (Vic.).
5. *Criminal Code 1995* (Cth).

### Treaties

6. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

### Other Sources

7. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') G.A. Res. 40/33, annex, 40 UN GAOR Supp. (No. 53), UN Doc. A/40/53 (1985).