

SECTION 9

RIGHT TO LIFE

Section 9

Every person has the right to life and has the right not to be arbitrarily deprived of life.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 9?

You will need to consider s. 9 in assessing legislation, a policy or a program where it:

- amends the law on withdrawal of medical treatment, including the processes and procedures in place for an enduring power of attorney;
- creates or amends policy or practices permitting law enforcement officers to use force, including the use of weapons in the course of their duties;
- amends the laws in relation to the use of deadly force and in particular the defences to homicide, or alters the operation of those laws;
- affects the delivery of medical resources for patients;
- impacts on the way in which essential medical or welfare services are provided to members of vulnerable groups within the community, including parental control over children's lifesaving medical treatment;

- establishes procedures for the management of individuals held in state care;
- amends the law on suicide or euthanasia;
- establishes or amends the law on coronial inquests.

These policy triggers are not comprehensive.

DISCUSSION

The right to life is concerned with the protection and preservation of life. This is one of the most fundamental of all human rights. Under the Charter this right can be limited so long as the requirements of s. 7 have been complied with; however, it remains one of the most fundamental of all human rights.

In international human rights law, the right to life not only imposes a negative duty on states to refrain from the arbitrary deprivation of life, but in certain well-defined circumstances can also give rise to a positive obligation on a state. The scope of this positive duty is discussed immediately below.

The UN Human Rights Committee has taken the view that the right to life should not be interpreted narrowly.⁴⁹

⁴⁹ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General*.

The positive duty

The right to life (together with s. 38) imposes certain positive obligations on public authorities.

One of these obligations is to protect the lives of persons in their care. For example, there may be a breach of the right to life where a person dies in a state care facility, in prison or while in the custody of the police, unless the state can prove that it had no responsibility for the death. The extent of this obligation will depend on the facts of the case, the role of the particular public authority and the level of knowledge reasonably expected of that public authority. For example, police are at risk of breaching the right if they fail to take adequate care of a person whose life is known to be at a particular risk,⁵⁰ and prison authorities need to take adequate measures to guard against detainee suicides.⁵¹

Other aspects of the positive duty are examined below.

- Effective criminal law provisions and law enforcement

In international human rights law, the right to life requires a government to refrain not only from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

This means that the government is required to put in place a system for the administration of criminal law that aims to deter the commission of offences against the person. This must be supported by law enforcement machinery for the prevention and punishment of breaches of the criminal law. More specifically, the government has an obligation to take action where it is aware that someone's life may be at risk.

According to the European Court of Human Rights, the scope of these obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the government, '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.'⁵²

A two-stage test has been formulated by the European Court of Human Rights in relation to the positive obligation to protect the right to life. The leading case is *Osman v. United Kingdom* in which the court said:

'[I]t 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.'⁵³

In other words, a public authority must take action to prevent a person's death if it is aware, or it reasonably should be aware, that the person's life is at risk.

Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1 Rev.1 at 6 (1994).

50 *Osman v. United Kingdom* (1998) VIII Eur Court HR 3124; (1989) 29 EHRR 245. See also *Carmichele v. Minister of Safety and Security* (2001) 12 BHRC 60.

51 *Keenan v. United Kingdom* (2001) III Eur Court HR 93; (2001) 33 EHRR 38.

52 *Kiliç v. Turkey* (2000) III Eur Court HR 75 [63]; (2001) 33 EHRR 58 [63]. See also *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].

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

- Effective official investigation into circumstances of death

The right to life has been interpreted in some international judgments as encompassing a positive, procedural obligation to undertake an 'effective, official investigation' into the circumstances of a death in certain circumstances.⁵⁴ In international human rights law an investigation is required:

- where there is an allegation of use of lethal force by government authorities or (in some circumstances) by a private party;⁵⁵
- where a person dies in circumstances in which there was an obligation on a public authority to protect the person's life (for example, where a person was in state custody or because the state knew or should have known that a person's life was at risk); and
- where a person dies in circumstances in which government authorities are alleged to have been negligent.

This duty has also been held to apply in a case where no government agent was involved in the death but where there was reason to believe that an individual had sustained life-threatening injuries in suspicious circumstances.⁵⁶

The European Court of Human Rights has said that to be effective, each investigation must have the following characteristics:

- the persons responsible for carrying out the investigation must be independent from those implicated in the events;

- the investigation must be effective in the sense that it is capable of leading to a determination of whether the death was or was not justified and to the identification and punishment of those responsible. Where there has been a use of lethal force, an investigation should determine whether the use of lethal force was justified in the circumstances. Where it was not justified, the investigation should lead to the identification and punishment of those responsible;
- the investigation should be prompt; and
- the investigation should be open to public scrutiny and accessible to the victim's family.⁵⁷

Note that the obligation to carry out an effective investigation is largely regarded as procedural. In other words, it is a requirement to carry out a procedure that has the characteristics listed above. International cases in which this obligation was breached typically involved numerous errors and inadequacies in relation to the investigation process undertaken.⁵⁸ The effectiveness requirement does not require, for example, that a finding of the cause of death is made in every case; it rather requires that the process undertaken is sufficiently effective so as to enable such a determination to be made in an appropriate case.

The negative duty

When is there an 'arbitrary deprivation of life'?

A decision to deprive someone of life is never to be made 'arbitrarily', that is, based on a decision unrelated to any test laid down by law or recognised at law (for example, not made in self-defence).

54 *Semse Onen v. Turkey* Application No. 22876/93, (Unreported, European Court of Human Rights, Second Section, 14 May 2002); *Menson v. United Kingdom* (2003) v. Eur Court HR 363; (2003) 37 EHRR CD 220. See also *R (Amin) v. Secretary of State for the Home Department* [2003] 3 WLR 1169.

55 See for example *Finucane v. United Kingdom* (2003) VIII Eur Court HR 1; (2003) 37 EHRR 656, where the European Court of Human Rights found there to be a failure to provide a prompt and effective investigation into the allegations of collusion by security personnel.

56 *Menson v. United Kingdom* (2003) v. Eur Court HR 363; (2003) 37 EHRR CD 220.

57 *Jordan v. United Kingdom*, Application No 24746/94 (Unreported, European Court of Human Rights, Third Section, 4 May 2001); (2001) 37 EHRR 52.

58 See for example, *Jordan v. United Kingdom*, Application No 24746/94 (Unreported, European Court of Human Rights, Third Section, 4 May 2001); (2001) 37 EHRR 52 where there was a failure to exercise control over the scene of the investigation and a failure to seek follow-up information from persons present at the scene of the incident).

In international human rights law, the right to be free from an arbitrary deprivation of life may not be suspended under any circumstances, including an armed conflict or other state of emergency.

However, there are a limited number of circumstances where the use of force which may result in the deprivation of life is permitted; in those circumstances, the deprivation of life is not considered 'arbitrary'.

The formulation of the test by the European Court of Human Rights is that a lawful use of force by, for example, the police in self-defence does not violate the right to life if the force is no more than 'absolutely necessary' to protect a police officer or other person from imminent threat of death or serious injury.

The right to life: particular issues

- Euthanasia and assisted suicide

The right to life has not been recognised as including (as a corollary) a right to die with the assistance of a third person or public authority.⁵⁹

In jurisdictions with a comparable human rights instrument protecting the right to life, the right to life has not led to the legal recognition of assisted suicide by either a person or medical practitioner.⁶⁰

- Rights of the unborn child: do foetuses and embryos have a right to life?

The Charter includes a savings provision which states that the Charter does not affect the law in relation to the offences of abortion or child destruction.

Section 48 reads:

'Nothing in this Charter affects any law applicable to abortion or child destruction, whether made before or after the commencement of Part 2.'

As a result, it will not be necessary to vet legislation, or a policy or program on abortion or child destruction, for compliance with the Charter.

Section 6 of the Charter states that '[a]ll persons have the human rights set out in Part 2.' Person is defined in section 3 as 'a human being.' However, the Charter does not say whether 'human being' includes embryos or foetuses.

The Charter's silence on whether the right to life extends to foetuses and embryos is consistent with the government's policy position that the Charter should not make any statement about when life begins.

- Medical treatment and access to therapeutic drugs

The right to life has particular relevance in the area of medical treatment, especially relating to the medical treatment of terminally ill patients.

Legal and policy officers should take care when developing policies regarding access to therapeutic drugs and other medical treatment.

The European Court of Human Rights has recognised that a public authority may be in breach of the right to life if it has undertaken to provide a particular form of treatment generally and has limited treatment on an arbitrary or discriminatory basis, putting an individual's life at risk.⁶¹

59 In *Victoria*, assisted suicide is an offence pursuant to s. 6B (1A) of the *Crimes Act 1958*.

60 *Washington v. Glucksberg* (1997) 521 US 702; *Vacco v. Quill* 521 US 793 (1997); *Rodriguez v. Attorney General of British Columbia* [1993] 3 SCR 519; *Pretty v. United Kingdom* (2002) III Eur Court HR 155; (2002) 35 EHRR 1.

61 *Nitecki v. Poland*, Application No. 65653/01 (Unreported, European Court of Human Rights, Grand Chamber, 21 March 2002; *Pentiacova v. Moldova* (2005) I Eur Court. See also *R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another* [2006] EWCA Civ 392.

In a recent UK case, the Court of Appeal held that the policy of the National Health Service (NHS) Primary Care Trust to fund a particular unlicensed drug treatment for early stage breast cancer only where 'exceptional' personal or clinical circumstances could be shown was irrational and unlawful. The court ordered the trust to reformulate its policy regarding the provision of the drug, but did not order it to be provided.⁶²

These cases illustrate that the right to life does not require a public authority to provide treatment that may preserve life in all instances, but that there should be clear and transparent criteria in the allocation of medical treatment.

REASONABLE LIMITS

Like all of the human rights protected in the Charter, the right to life 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

- The right to life has been interpreted broadly in international human rights law. It places both a positive and negative duty on public authorities. The scope of these duties may change over time.
- Presently, the positive duty requires public authorities to:
 - put in place a system for the administration of the criminal law aimed at safeguarding the lives of persons in Victoria supported by adequate law enforcement machinery;
 - undertake effective official investigations into the circumstances of some deaths;
 - protect the lives of persons in their care.
- The negative duty requires public authorities to refrain from the arbitrary deprivation of life. However, in some circumstances the use of force that may result in the deprivation of life is permitted.
- The right to life is also relevant in the context of access to medical treatment and therapeutic drugs.
- Pursuant to s. 48 of the Charter, it will not be necessary to vet legislation on abortion or child destruction for compliance with the Charter.
- The right to life has not been interpreted as including a right to die with the assistance of a third person or public authority.

62 *R (on the application of Rogers) v. Swindon NHS Primary Care Trust and another* [2006] EWCA Civ 392.

MEASURES TO IMPROVE COMPLIANCE

Ensure that an effective official investigation takes place:

- where there is an allegation of the use of lethal force by government authorities or (in some circumstances) by a private party;
- where a person dies in circumstances that imposed an obligation on a public authority to protect the person's life (for example, where a person was in state custody or because the state knew or should have known that a person's life was at risk); and
- where a person dies in circumstances in which government authorities are alleged to have been negligent.

Refer to the discussion for what is required for there to be an 'effective' investigation.

When developing policy about law enforcement, provide:

- the appropriate level of training required to ensure only adequately trained and qualified law enforcement officers are authorised to use force that is appropriate for their powers;
- the type of training that is necessary to ensure that law enforcement officers are aware of a number of techniques that minimise the risk to another individual;
- clear procedural safeguards outlining to law enforcement officers what steps they are required to take before using lethal force.

If you are developing policies or programs relating to the management of persons in state care, establish:

- best practice guidelines that promote the health and safety of individuals in the care of state agencies, including best practice guidelines that will enable a timely response to medical emergencies;

- procedures that enable those responsible for the care of individuals to be able to respond to concerns about the health and safety of individuals promptly;
- clear procedural safeguards to ensure that decisions about the health and safety of individuals are made by staff at an appropriate level and that there is sufficient oversight of those decisions;
- regular reviews of these procedures.

When developing policy regarding access to medical treatment ensure that:

- the criteria for determining whether individual patients are able to access certain treatment are based on sound clinical reasons.

To comply with the Charter obligations specifically regarding the withdrawal of medical treatment, ensure that:

- there are non-arbitrary procedures in place regarding any decision to withdraw medical treatment;
- there are clear procedural safeguards to ensure that any decision to withdraw medical treatment is made at an appropriate level and that there is sufficient oversight of those decisions;
- there are safeguards to ensure that individuals and families affected by a decision to withdraw medical treatment are adequately informed and consulted over the decision.

RELATED RIGHTS AND FREEDOMS

When considering whether a policy proposal or program might give rise to an issue under s. 9, you should also consider whether it places restrictions on the following rights:

- protection 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).

HISTORY OF THE SECTION

Section 9 is based on article 6(1) of the ICCPR.

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

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