Scope of the right

The right to liberty means that persons must not be subject to arrest and detention, except as provided for by law. Their arrest and the detention must also not be arbitrary.

This right applies to all forms of detention where people are deprived of their liberty, not just criminal justice processes. This can be relevant any time a person is not free to leave a place by his or her own choice.

This right differs from the freedom of movement in section 12 of the Charter, because a person must be ‘detained’ to suffer a deprivation of liberty.

The right to security requires the State to provide reasonable measures to protect a person’s physical security. The government does this, for example, through the work of the police and emergency services.

The rights in subsections 21(4)–(7) are relevant after a person has been arrested or detained. Some of these rights are also reflected in the criminal law of Victoria, such as the Crimes Act 1958 and the Bail Act 1977. In practice, these guarantees mean that when arresting a person the police must immediately inform him or her of the reason for the arrest and arrange for them to be brought before a court for a preliminary hearing (usually to determine bail). Even if someone is detained without charges being laid, this should not take more than 24 hours. This helps to ensure that no one is detained on an unfounded suspicion or for an improper purpose.

Section 21(5), which provides that a person who has been charged with an offence must be brought to trial without unreasonable delay, overlaps with section 25(2)(c) of the Charter, because it is also an essential element of a fair trial.

Case examples

The following examples have been found to violate the right to liberty and security:

- A trial which was delayed to the extent that the accused’s maximum potential sentence was less than time already served was said by the Victorian Supreme Court to be likely to breach the right to liberty (Gray v DPP [2008] VSC 4)
- When considering similar provisions under international law, the UN Human Rights Committee has found that detention of asylum-seekers under the Migration Act 1958 (Cth) can become arbitrary if it is for a prolonged period and the State will not provide reasons to justify it. A refusal to allow appeals to the courts may also result in arbitrariness (see for example, A v Australia (Communication No 560/1993) and Shams et al v Australia (Communication No 1255-88/2004)).

On the other hand, no violation of the right to liberty and security was found in the following international cases:

- A person who was ordered by a court in New Zealand to stay in hospital took his case to the UN Human Rights Committee, but the Committee found that his record of aggressive behaviour and the availability of regular review of the order meant it was a reasonable measure (A v NZ (754/1997))
- The UK House of Lords has found ‘stop and search’ powers under anti-terror legislation to be reasonable because the search stopped people only for a brief period and did not involve restraining them with handcuffs or taking them away (R (Gillan) v Commissioner of Police [2006] UKHL 12).
Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 21 could be engaged by activities that:

- Authorise a person with a mental illness to be detained for treatment in a mental health facility and facilitates review of their detention
- Provide for the interim detention of a person whether or not he or she is suspected of committing an offence (for example, to prevent the spread of a contagious disease, or enable a person to ‘sober up’)
- Provide for special powers of detention of people for purposes including national security
- Make provision for granting of bail
- Relate to the management of security of anyone in the care of public authorities, particularly those in involuntary care
- Make 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)
- Allow a public authority to cordon an area and control movement within that area
- Grant a power of arrest.

Section 21 of the Charter of Human Rights and Responsibilities Act 2006 says that:

(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 the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

The right to liberty and security of person is largely modelled on Articles 9 and 11 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.