



Right to a Fair Trial (s.21)

Section 21 of the *Human Rights Act 2004* says that:

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, the press and public may be excluded from all or part of a trial—
 - (a) To protect morals, public order or national security in a democratic society; or
 - (b) If the interest of the private lives of the parties require the exclusion; or
 - (c) If, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interests of a child requires that the judgment not be made public.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

This factsheet is not intended to be a substitute for legal advice.

Scope of the Right

The right to a fair trial under section 21 of the *HR Act* is not confined to criminal cases. Whether a person is a defendant in a criminal case or a party to civil proceedings, they have the right to a fair trial before a competent, independent and impartial court or tribunal established by law.

Section 21 provides that judgments and hearings must be public unless other laws (for example for child protection) provide otherwise.

Section 22 sets out more specific minimum guarantees in criminal trials.

This right can be relevant in areas such as:

- The creation of courts and tribunals, and the appointment of judges
- Review jurisdiction
- Rules of evidence
- Whether a court is closed for the hearing of a particular matter
- Media reporting.

Examples

No right to a judge alone trial – *R v Girvan* [2012] ACTSC 142

In this case, the ACT Supreme Court confirmed that ‘the right to elect for a trial by judge alone is not part of, nor any aspect of, the right to a fair trial within section 21 of the [*HR Act*]’. However, Refshague J held that ‘the constitution of the tribunal which hears and determines a criminal charge is a matter of

significance and importance'. Thus, a jury which has an appearance of bias will not provide a human rights compliant trial.

Delay – *Foote v Somes* [2012] ACTSC 63

In this case the appellant doctor was the subject of two separate complaints. The Medical Board of the ACT notified the appellant that a Professional Standards Panel would be established to inquire into the complaints. The investigations were however, delayed. The appellant sought a stay of proceedings, arguing that the delay breached his right to a fair trial. The Supreme Court dismissed the application, holding that some delay in bringing proceedings is inevitable. In this case the delay was not unreasonable owing to the complexity of the issues, and the fact that the appellant bore some responsibility for the delay.

The Court held further that the test for the appropriate remedy for a breach of the right to a trial without unreasonable delay is one of proportionality. That is: (1) whether any proposed hearing would be unfair; and (2) whether there would be any relevant prejudice suffered by the appellant.

Production of evidence to an accused – *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1

In this case, the Victorian Supreme Court considered whether a police officer should have to produce certain documents relevant to the defendant's trial for tax evasion. The Court discussed the principle of 'equality of arms,' which requires that the defendant must not be at a significant disadvantage compared with the prosecution in terms of access to evidence or resources if there is to be a fair hearing.

While the right to disclosure of relevant evidence is not an absolute right, and may be balanced against competing interests such as national security or the need to protect witnesses, the rights of the accused in the present case prevailed. The Court decided that the police officer had to produce the evidence requested by the defendant to ensure a fair trial.

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:

- Create or restrict review of administrative decision-making and appeals processes;
- Reverse the onus of proof;
- Regulate the rules of evidence in courts and tribunals or amends the way in which evidence is collected and presented;
- Regulate the procedures for challenging the impartiality and independence of courts and tribunals;
- Affect the way witnesses give evidence;
- Regulate the way the media may report on proceedings.

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