



HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Factsheet

Right to Protection of the Family (s.11(1))

Section 11(1) of the *Human Rights Act 2004* says that:

The family is the natural and basic ground unit of society and is entitled to be protected by society.

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

An explanatory note under section 11 of the *Human Rights Act* says that the term ‘family’ has a broad meaning that recognises the many different types of families that live in the Australian Capital Territory, all of whom are entitled to protection.

The term ‘family’ should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of ‘family’ in Australian society. For example, a ‘family’ could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term ‘family’ could also include extended family in some circumstances: for example, where there are kinship ties to extended family, or where someone’s culture or ethnicity gives their extended family unit particular significance for them.

Protection of families

The *HRA* says that families must be protected by society and the State.

This right is also supported by the right to privacy in section 12 of the Act which prohibits a public authority from unlawfully or arbitrarily interfering with a person’s family or home.

Legislative provisions that allow a child to be removed from a family unit need to be considered in light of sections 11(1), 11(2) and 12 of the *HRA*. While family unity is an important part of human rights, different rights may need to be taken into account. For example, subsection 11(1) may be qualified by the right to protection of children in subsection 11(2), if a child needs to be removed from a situation of family violence.

Examples:

Promoting flexible decision-making for the elderly and vulnerable (Victoria)

A woman who was the sole carer for her elderly parents (one of whom had recently suffered a stroke and the other had dementia) was issued with a notice from the local council that the accommodation she had arranged for her parents was contrary to planning approvals. The woman’s legal representative wrote to the council asking them to consider the right to privacy and family life. The council granted the woman extra time to make alternative arrangements for her parents.

A number of European Cases have further elucidated the scope of the right to protection of the family:

- In *Hoffmann v Austria* (23 June 1993) the European Court of Human Rights held that the withdrawal of parental rights from the applicant after she divorced the father of their two children, because she was a Jehovah's Witness violated the right to the protection of family life and the prohibition of discrimination.
- In *Keegan v Ireland* (26 May 1994) the European Court of Human Rights found that placing a child up for adoption without the knowledge or consent of the father was a violation of the right to the protection of the family. Further, the Court held that as Irish law did not afford the applicant a right to be appointed guardian or permit him access to a court in respect of proceedings before the Adoption Board, his right to a fair trial had been violated.
- In *Konstantin Markin v Russia* (22 March 2012) the European Court of Human Rights held that refusal by Russian authorities to grant the applicant, a divorced radio intelligence operator in the armed forces, parental leave, violated the right to protection of the family and the prohibition of discrimination.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 11 could be engaged by activities that:

- Affect the law regarding close or enduring personal relationships or fail to give legal recognition to these relationships;
- Affect any aspect of care of children, including children cared for by parents, guardians, informal carers, children in out-of-home care, children with a disability, parents or carers with a disability;
- Relate to treatment of children in the criminal process;
- Relate to family violence;
- Affect adoption or surrogacy;
- Regulate the obligations of family members towards each other, including parents and guardians towards children;
- Provide for the separation and removal of children from parents or guardians or other adults responsible for their care;
- Regulate family contact for those in the care of public authorities or enables intervention orders to be granted between family members;
- Affect the welfare of children within the family or state care;
- Regulate family contact of prisoners or others in involuntary state care;
- Create a regime for giving children access to information about biological parents when the child has been adopted or born using assisted reproductive technology;
- Deal with the division of estates on intestacy.



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