

# SECTION 22

## HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY

### Section 22

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 22?**

You will need to consider s. 22 in assessing legislation, a policy or a program where it:

- enables a public or private authority to detain individuals;
- relates to the conditions under which an individual may be detained;
- concerns standards and procedures for treatment of individuals who are detained, including the range of custody and supervision services (for example, use of force, dietary choice, access to private shower and toilet facilities);
- permits the enforcement authorities to hold individuals for any length of time;
- authorises enforcement officers to hold individuals in a place with limited facilities or services for the care and safety of detainees;
- enables enforcement officers to undertake personal searches of individuals detained in custody or detainee visitors. (Enforcement officers include law enforcement officers but also officers, commonly known as 'inspectors' and 'authorised officers', who are appointed and authorised to exercise powers of entry, investigation, search, inspection, monitoring, detention, seizure, confiscation and the issuing of notices.);

These policy triggers are not comprehensive.

#### **DISCUSSION OF SECTION 22**

Section 22 requires a public authority to treat all persons in detention with humanity and dignity. The clause also requires the segregation of persons accused of offences from persons who have been convicted of offences.

This clause is essentially concerned with ensuring that the conditions under which people are detained in Victoria conform to internationally accepted standards. International standards on the conditions for detention are set out in a number of human rights instruments which are discussed below. A detention does not include every restraint on liberty; for example, intervention orders restraining a person from contacting others or visiting certain places would be unlikely to be considered 'detention'. The New Zealand Court of Appeal has defined detention as 'a substantial intrusion on personal liberty'.<sup>186</sup>

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186 *Police v. Smith and Herewini* [1994] 2 NZLR 306.

## Section 22 (1): Right to humane treatment

The right to humane treatment when deprived of liberty is a universally accepted human right. Its purpose is to recognise the particular vulnerability of persons in detention and to ensure that they are treated humanely.

This right complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment. However, it is engaged by much less serious (mis)treatment or punishment than torture.<sup>187</sup>

### When does it apply?

In the context of international human rights law, the UN Human Rights Committee has observed that this right applies not just to persons detained under the criminal law, but also to persons detained elsewhere (for example, in an approved mental health service) under the laws and authority of the government.<sup>188</sup>

Under Victorian law, a person may be detained for a range of purposes and durations. For example, a person may be detained as punishment for committing an offence, for a brief period for a limited purpose (for example, detention by an inspector to obtain a person's name and address) or for non-punitive purposes, (for example, for mental health treatment).

In respect of criminal detention, the right applies to pre-trial detention as well as detention after conviction. The UN Human Rights Committee has made clear that this right applies to all detention facilities within a state's jurisdiction.<sup>189</sup> The definition of a 'public authority' in the Charter means that the right to humane treatment when deprived of liberty will be likely to apply in respect of privately contracted detention facilities operating in Victoria.

This right applies to anyone detained, whether he or she is an adult or child.

### What does it require?

The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint in addition to that resulting from the deprivation of liberty.<sup>190</sup> (Additional hardship imposed as part of an internal disciplinary measure within a prison would need to meet the requirements of s. 7 as a permissible limitation or restriction upon the right.) The UN Human Rights Committee has emphasised that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment.<sup>191</sup>

Some rights are unavoidably restricted in a closed environment. For example, a person's freedom of movement, elements of freedom of expression and communication, and some elements of privacy are inevitably restricted in a closed environment. Family life is also necessarily interfered with for those in detention as detention requires separation from family members and renders detainees inevitably incapable of carrying on family life in a normal manner. Mindful of this, international human rights law requires that to the extent that family life can be maintained (for example, through letters and regular visits by family members) it should be. Measures that may interfere in the maintenance of a family relationship that are undertaken as a form of punishment, or for administrative convenience, (for example, denying a prisoner communication with his or her family members) should be avoided.

187 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, 186.

188 *UN Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 153 (2003) [2].

189 *Ibid.*

190 *Ibid* [3].

191 *Ibid.*

Individuals who are detained must be provided with services that will satisfy their essential needs. The UN Standard Minimum Rules for the Treatment of Prisoners establish minimum standards on a range of matters, including conditions of accommodation; food of adequate quality; facilities for personal hygiene; standard of clothing and bedding; opportunities for exercise and availability of medical services; contacts with the outside world; access to books and regulation of methods and procedures for discipline and punishment (including the prohibition of certain forms of punishment).<sup>192</sup> All these matters were taken into consideration by the ACT Human Rights Commissioner when she conducted an audit of Quamby Youth Detention Centre during the first year of operation of the ACT *Human Rights Act*.<sup>193</sup>

In considering whether legislation, a policy or a program provides for humane detention, attention should be given to the conditions, circumstances and purpose of the detention. The purpose and duration of the detention will be relevant. For example, humane treatment in the context of detention in a correctional facility will require, among other things, the provision of appropriate food. But clearly such a requirement is not necessary if someone is detained only for a very short period of time.

A detainee's right to be treated humanely has been held to be violated in cases before the UN Human Rights Committee (generally in cases not involving Australia) where the detainee was:

- held in 'incommunicado' detention for any length of time (an aggravated form of detention where a person is denied access to family, friends and others);<sup>194</sup>
- refused medical attention or there was a failure to address deteriorating mental health;<sup>195</sup>
- subjected to ridicule;<sup>196</sup>
- denied reading facilities and not allowed to listen to the radio;<sup>197</sup>
- confined to his or her cell for an unreasonably long period of time;<sup>198</sup>
- required to prepare prison food in unsanitary conditions;<sup>199</sup>
- subject to restricted correspondence with family;<sup>200</sup>
- prevented from being present at the birth of a child;<sup>201</sup>
- held in a small cage awaiting court appearance.<sup>202</sup>

192 While these rules are not formally binding on signatory states they have most often been used when interpreting the application of article 10 of the ICCPR, which pertains to humane treatment.

193 Human Rights Office (ACT), *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005 (see more generally ACT Department of Justice and Community Safety *Human Rights Act 2004*, Twelve-Month Review – Report, June 2006).

194 *Caldas v. Uruguay*, Human Rights Committee, Communication No. 43/1979, UN Doc. CCPR/C/19/D/43/1979 (21 July 1983) [13.3].

195 *Mpandanjila v. Zaire*, Human Rights Committee, Communication No. 138/1983, UN Doc. CCPR/C/27/D/138/1983 (26 March 1986) [8.2]; *Madafferi v. Australia*, Human Rights Committee, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001 (26 August 2004) [9.3].

196 *Francis v. Jamaica*, Human Rights Committee, Communication No. 606/1994, UN Doc. CCPR/C/54/D/606/1994 (3 August 1995) [9.2].

197 *Nieto v. Uruguay*, Human Rights Committee, Communication No. 92/1981, UN Doc. CCPR/C/19/D/92/1981 (25 July 1983) [1.7], [10.4].

198 *Cabreira v. Uruguay*, Human Rights Committee, Communication No. 105/1981, UN Doc. CCPR/C/19/D/105/1981 (21 July 1983) [9.1]–[10.2].

199 *Matthews v. Trinidad and Tobago*, Human Rights Committee, Communication No. 569/1993, UN Doc. CCPR/C/62/D/569/1993 (29 May 1998) [5.4], [7.3] [8].

200 *Espinoza de Polay v. Peru*, Human Rights Committee, Communication No. 577/1994, UN Doc. CCPR/C/61/D/577/1994 (9 January 1998) [8.6].

201 *Madafferi v. Australia*, Human Rights Committee, Communication No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001 (26 August 2004) [9.4].

202 *Cabal & Passini v. Australia*, Human Rights Committee, Communication No. 1020/2001, UN Doc. CCPR/C/78/D/1020/2001 (19 September 2003) [8.3].

### Sections 22(2) and (3): Additional rights of certain detainees

Paragraphs (2) and (3) of s. 22 grant the following additional rights to 'an accused person who is detained' and a 'person detained without charge':

- to be segregated during detention from persons convicted of an offence, except where reasonably necessary; and
- to be treated in a way that is appropriate for a person who has not been convicted.

These rights follow from the principle of the presumption of innocence in criminal law: a detainee who has not yet been tried is entitled to a different treatment regime than convicted detainees.<sup>203</sup>

#### Right to segregation

The Charter provides a right to segregation. The right is for an accused person who is detained, or a person detained without charge, to be segregated from convicted persons. Section 21(2) provides, however, that the right applies 'except where reasonably necessary'.

#### What does 'except where reasonably necessary' mean?

The phrase 'except where reasonably necessary' does not appear in the equivalent ICCPR right (article 10).

In the ICCPR, the right to be segregated applies 'save in exceptional circumstances'.

It might be reasonably necessary not to segregate an accused from a convicted prisoner where, for example, convicted prisoners work as food servers or cleaners in a remand unit in which accused persons are held.<sup>204</sup>

Note also that the requirement for segregation does not necessarily require that the two groups of detainees (accused persons and convicted persons) are housed in separate buildings, provided that contact between the two groups of detainees is kept to a strict minimum.<sup>205</sup>

In respect of children, you should refer to the section of these Charter Guidelines on s. 23. (Accused children, or children detained without charge, are to be separated from adult detainees. However, this right does not apply to convicted children.)

#### Right to humane treatment

You should refer to the discussion on page 141 for what is meant by humane treatment.

### REASONABLE LIMITS ON THE RIGHTS IN SECTION 22

As with all of the human rights protected in the Charter, the rights in s. 22 may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. Note that lack of material resources or financial difficulties have not been considered to be a justification for inhuman treatment. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

<sup>203</sup> *UN Human Rights Committee, General Comment 9, Article 10 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 131 (2003) [4] and UN Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 153 (2003) [9].*

<sup>204</sup> These facts arose in the case of *Pinkney v. Canada*, Human Rights Committee, Communication No. 27/1977, UN Doc. CCPR/C/14/D/27/1977 (29 October 1981). The UN Human Rights Committee found that the arrangements were not a breach of article 10(2)(a) of the ICCPR.

<sup>205</sup> *Pinkney v. Canada*, Human Rights Committee, Communication No. 27/1977, UN Doc. CCPR/C/14/D/27/1977 (29 October 1981) [30].

### KEY POINTS TO REMEMBER

- A public authority must treat all persons in detention with humanity and dignity.
- The conditions under which people are detained in Victoria should conform to internationally accepted standards. These standards are discussed on page 142.
- The right to humane treatment applies to all persons (children and adults) under detention. It requires that individuals who are detained ought not to be subject to any hardship or constraint other than that resulting from the deprivation of liberty.
- Persons detained ought to be provided with services that will satisfy their essential needs.
- An accused person who is detained is entitled to a different treatment regime than a convicted detainee. This includes segregation from convicted prisoners while in detention, except where it is reasonably necessary not to segregate. Convicted detainees are nonetheless entitled to the full enjoyment of the rights in the Charter, subject to any reasonable limitations on these rights under section 7.
- Refer to s. 23 for the rights of children in the criminal process.

### MEASURES TO IMPROVE COMPLIANCE

If you are developing legislation or a policy or a program that involves detention, you should refer to the conditions and circumstances of detention outlined in the international standards of detention. The international standards are part of international law and may be used when interpreting human rights under s. 32(2) of the Charter.

These international standards are set out in the following instruments:

- UN Standard Minimum Rules for the Treatment of Prisoners;
- UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment;

- UN Code of Conduct for Law Enforcement Officials;
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- UN Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment;
- UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

Various international human rights instruments also set out minimum requirements in relation to child detainees. This is discussed in relation to s. 23 of the Charter.

These instruments are all available on the Internet.<sup>206</sup>

You will also need to consider whether training is required to enable staff to comply with the legislation, policy or program you are reviewing or developing.

If you are reviewing a policy, a program or legislation that creates an exception to the requirements for segregation of prisoners ensure that any exception is 'reasonably necessary'.

### RELATED RIGHTS AND FREEDOMS

Section 22 is closely related to the following sections of the Charter:

- Protection from torture and cruel, inhuman or degrading treatment (s. 10);
- Right to liberty (s. 21);
- Children in the criminal process (s. 23).

<sup>206</sup> These documents are all available at <<http://www.ohchr.org/>>, which is the website of the United Nations Office of the High Commissioner for Human Rights.

The following additional rights should be checked if your policy or legislation raises an issue under s. 22:

- the right to life (s. 9);
- the protection of families and children (s. 17).

## HISTORY OF THE SECTION

Section 22 is modelled on article 10 of the ICCPR. Sections 22(2) and 22(3) of the Charter broaden article 10 of the ICCPR by extending the protections to *persons who have been detained without charge*. Section 22(2) also modifies article 10 of the ICCPR by requiring that an accused is segregated *except where reasonably necessary*. The ICCPR requires an accused to be segregated *unless in exceptional circumstances*.

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

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3. ACT Department of Justice and Community Safety *Human Rights Act 2004*, Twelve-Month Review, June 2006.

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4. *Cabal & Passini v. Australia*, Human Rights Committee, Communication No. 1020/2001, UN Doc. CCPR/C/78/D/1020/2001 (19 September 2003).
5. *Cabreira v. Uruguay*, Human Rights Committee, Communication No. 105/1981, UN Doc. CCPR/C/19/D/105/1981 (21 July 1983).
6. *Caldas v. Uruguay*, Human Rights Committee, Communication No. 43/1979, UN Doc. CCPR/C/19/D/43/1979 (21 July 1983).
7. *Espinoza de Polay v. Peru*, Human Rights Committee, Communication No. 577/1994, UN Doc. CCPR/C/61/D/577/1994 (9 January 1998).
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14. *UN Human Rights Committee, General Comment 9*, Article 10 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 131 (2003).
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16. <http://www.ohchr.org>