

# SECTION 23

## CHILDREN IN THE CRIMINAL PROCESS

### Section 23

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

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#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 23?**

Note that a 'child' is defined under s. 3 of the Charter as a person under 18 years of age. You will need to consider s. 23 in assessing legislation, a policy or a program particularly where it:

- enables a public or private authority to detain children;
- permits enforcement authorities to hold children for any length of time;
- authorises enforcement authorities to hold children in amenities that have limited facilities or services for the care and safety of detainees;
- enables enforcement authorities to undertake personal searches of a convicted child in detention;
- impacts on the design of detention centres or relates to the conditions under which children are detained in a public or private institution, either before or after conviction;
- provides for the sentencing of children;
- provides for sentencing of offenders which may impact on detained children (such as the place where an adult prisoner is detained);
- affects the speed at which a child may be brought to trial (such as alteration to practices or internal procedures for case management in the Office of Public Prosecutions or the courts);

- relates to remand or bail;
- establishes or alters programs in prisons, youth training centres or residential centres;
- otherwise regulates the custodial care of children.

These policy triggers are not comprehensive.

#### **DISCUSSION OF SECTION 23**

As previously noted, s. 22 of the Charter requires persons deprived of liberty (irrespective of the purpose of that deprivation) to be treated with humanity and respect for the inherent dignity of the human person. Section 22 also makes requirements with respect to segregation and appropriate treatment for accused persons and persons detained without charge.

As human beings, children are entitled to all of the rights in the Charter (unless the right includes an eligibility condition which they do not meet, for example, the right to vote under s. 18(2) of the Charter), including the right outlined in s. 22.

Section 23 specifies additional requirements for the humane treatment of children who are detained in the criminal process. These rights apply to children who are detained in the criminal process, unlike s. 22, which applies to a person detained regardless of the purpose of the detention.

The additional requirements imposed by s. 23 are:

- Non-convicted children must be segregated from adults in detention, whether or not the adults have been charged.
- Children accused of an offence must be brought to trial 'as quickly as possible'.
- Children found guilty of an offence must be treated in an age-appropriate manner.

The purpose of these forms of protection is to recognise and address the particular vulnerability of children in the criminal process.

### Section 23(1): Segregation

The Charter imposes requirements in respect of segregation (in relation to both adults and children) during the criminal process.

In summary, with respect to the segregation of *children*, any accused child (who is not convicted) or any child detained without charge must:

- be segregated from adults in detention: **s. 23(1)**;
- be segregated in detention from other children who have been convicted of offences, 'except where reasonably necessary': **s. 22(2)**. You should refer to s. 22 of these Charter Guidelines for the meaning of this phrase.

In relation to a child who is accused, note also s. 21(6) of the Charter, which provides a right to be released pending trial. Children ought not usually be detained before trial unless there is a good reason for doing so. The right to release pending trial is discussed further under s. 21(6) of these Charter Guidelines.

The Charter does not expressly require convicted children to be segregated from convicted adults. The equivalent ICCPR provision (in Article 10(3)) was omitted so that a practice by which convicted young adults (aged 18–21) are detained in correctional facilities with convicted children rather than with adults will not contravene the Charter. This omission was recommended by the Human Rights Consultation Committee:

'on the basis that the current system for the punishment of young offenders in Victoria represents the best practice. The Committee was concerned that the inclusion of the provision [that juvenile offenders shall be segregated from adults] may have the unintended consequence of requiring the automatic removal of offenders, who were under 18 when the crimes were committed, to adult prisons when they turn 18.'<sup>207</sup>

### Section 23(2): Right of an accused child to be brought to trial 'as quickly as possible'

The purpose of s. 23(2) is to recognise that a child should be detained for only the shortest appropriate time.<sup>208</sup>

There is no prescribed time limit for what will amount to being brought to trial 'as quickly as possible'. However, it is likely to be a period of time that is shorter than the time permitted under s. 21(5), which requires a person to be brought to trial 'without unreasonable delay'.

<sup>207</sup> Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 43.

<sup>208</sup> See for example *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, article 37(b)).

In the case of *Philis v Greece* the following test was used to consider the period of delay:

‘the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and ... in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.’<sup>209</sup>

**Section 23(3): Right of a convicted child to be treated in a way that is appropriate for his or her age**

The Charter requires a convicted child to be treated in a way that is appropriate for the child’s age.

In addition to the standards on detention that are referred to under s. 22 (which apply to both adults and children) the United Nations has developed special standards on the detention of children.

To comply with this section, it is recommended that you examine these standards and seek to ensure that they are complied with.

The UN standards are contained in the following documents:

- UN Rules for the Protection of Juveniles Deprived of their Liberty;
- UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

These documents can be accessed on the internet.<sup>210</sup>

These standards are founded on the premise that ‘the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles.’<sup>211</sup> The standards relate to a range of subject matters. Some of these that may be relevant under s. 23(3) are:

- children should be provided with opportunities to continue education while in detention;
- children should be provided with access to vocational training in occupations likely to prepare the child for future employment;
- children should have access to leisure activities;
- children should be able to use their own clothing in detention, to the extent possible;
- as far as possible, children should be detained in ‘open facilities’ with minimal security measures and the facilities should be small so as to facilitate access and contact between detainees and their families.<sup>212</sup>

The standards establish conditions in respect of each of these matters. For example, in relation to education they impose requirements in respect of the type, location and content of education.

209 *Philis v. Greece (No 2)* (1997) IV Eur Court HR 1074; (1998) 25 EHRR 417.

210 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.

211 *UN Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. res. 45/113, annex, 45 UN GAOR Supp. (No. 49A) at 205, UN Doc. A/45/49 (1990) s. 1.

212 These are just some of the matters covered by the standards. If you are examining legislation or developing a new policy relating to the imprisonment of children, you should obtain copies of the UN standards and review them in full.

These include the requirement that where possible, education of children of compulsory school age should take place outside the place of detention in community schools by qualified teachers. Children with learning disabilities should be provided with access to special education programs.

As discussed on page 147, the segregation of children who are convicted offenders from adult prisoners is another way in which children may be treated in an age-appropriate manner.

### REASONABLE LIMITS ON THE RIGHTS IN SECTION 23

As with all of the human rights protected in the Charter, the rights in s. 23 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 Charter recognises that children are particularly vulnerable in the criminal process.
- In addition to the general guarantees in s. 22, additional guarantees in relation to children in the criminal process are contained in s. 23.
- Whereas s. 22 applies to all persons detained, s. 23 applies only to children detained *in the criminal process*.
- Section 23 requires:
  - accused children or children detained without charge should be segregated from adults in detention;
  - children should be brought to trial as quickly as possible;
  - children should be treated in a way that is appropriate for their age. Guidance on what this may require is provided on page 148.
- All of these rights are subject to reasonable limitations that can be demonstrably justified in a democratic and free society.

### MEASURES TO IMPROVE COMPLIANCE

1. If you are developing legislation or a policy or program regarding detention or imprisonment of children, ensure that:
  - the legislation provides for the segregation of children in accordance with the requirements in ss. 22(2) and 23(1) of the Charter;
  - the conditions and circumstances of detention or imprisonment are in accordance with:
    - the international standards of detention set out in the instruments outlined under the commentary on s. 22 in these Charter Guidelines; and
    - the international standards that apply specifically to children who are detained in the criminal justice context.

The standards on children are discussed on page 148. They relate to matters such as education and training of children in detention, children's access to leisure facilities and the size of the facility in which children are detained, etc. The standards on detention generally are discussed under s. 22. The international standards are part of international law and may be used when interpreting human rights under s. 32(2) of the Charter.

2. Review pre-trial criminal procedures that apply to children and ensure that they do not create unnecessary delay in bringing a child to trial as quickly as possible.
3. Review sentencing laws and guidelines covering children to ensure that they provide for age-appropriate treatment.

### RELATED RIGHTS AND FREEDOMS

Section 23 is closely related to the right to humane treatment when deprived of liberty (s. 22). It is also related to the following additional rights:

- Right to liberty and security of person (s. 21);
- Rights in criminal proceedings (s. 25, particularly sub-section (3));
- Protection of families and children (s. 17)

### HISTORY OF THE SECTION

This provision is modeled on article 10(2)(b) and partly on article 10(3) of the ICCPR. The rights protected in ss. 22 and 23 of the Charter are protected in one provision of the ICCPR, namely article 10.

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

### BIBLIOGRAPHY

#### Report

1. Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005).

#### Case Law

1. *Perovic v. CW* No. CH 05/1046, Unreported decision of Magistrate Somes, 1 June 2006.
2. *Philis v. Greece (No 2)* (1997) IV Eur Court HR 1074.

#### Treaties

3. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

#### Other Sources

4. *UN Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. res. 45/113, annex, 45 UN GAOR Supp. (No. 49A) at 205, UN Doc. A/45/49 (1990).
5. <<http://www.ohchr.org>. United Nations Office of the High Commissioner for Human Rights.