

# SECTION 10

## PROTECTION FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

### Section 10

A person must not be –

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 10?**

Section 10 prohibits torture; cruel, inhuman or degrading treatment; and involuntary medical experimentation or treatment.

#### **Torture and cruel, inhuman and degrading treatment:**

You will need to consider s. 10 in assessing legislation, a policy or a program where it:

- affects the physical or mental well-being of a person in a manner that may:
  - cause serious physical or mental pain or suffering, or
  - humiliate or debase a person (albeit non-intentionally);
- creates new powers or increases existing powers of police, inspectors or authorised officers or other persons;
- removes the right to complain of mistreatment by a public authority or limits access by those with a role of independent scrutiny (for example, the Ombudsman) to places of detention;
- affects the operation of detention facilities and conditions under which individuals may be detained (including access to goods and services, such as medical treatment, while in detention);

- creates new types of penalties for offences or dramatically increases the size and/or range of penalties for offences or introduces minimum mandatory sentences;
- authorises changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals;
- introduces or permits corporal punishment by a public authority;
- authorises a person to be searched or puts in place procedures for conducting searches;
- regulates the treatment of persons located at any site for which a public authority is responsible, including, for example, a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service;
- allows for prolonged periods of solitary confinement or other particularly harsh prison regimes;
- involves crisis or crisis-incident intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint and/or physical restraint.

### Consent to medical experimentation or treatment

You will need to consider s. 10 in assessing legislation, a policy or a program where it:

- defines and regulates procedures for obtaining consent to medical treatment and experiments (especially procedures relating to a requirement of full disclosure of information about the treatment or experiment, and procedures for obtaining consent from or on behalf of children and other vulnerable people);
- regulates medical treatment of persons without their consent;
- regulates the conduct of medical or scientific research;
- allows for the approval of forms of medical experimentation or treatment that will involve the trialling of new medical or scientific techniques.

These policy triggers are not comprehensive.

### DISCUSSION

The prohibition on torture and inhuman and degrading treatment is primarily a negative obligation, that is, it requires public officials to refrain from torture. It does, however, include some positive elements that require governments to take steps to prevent the occurrence of torture and inhuman and degrading treatment, and to make appropriate inquiries into claims that it has occurred. Some suggestions as to the types of steps that need to be taken to fulfil the positive obligation are outlined below in the section on Measures to Improve Compliance.

### What is torture?

At the international level, torture is defined in the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)* in the following terms:

‘...the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

As this definition makes clear, for an act to amount to torture, not only must there be a certain *severity in pain and suffering*; the treatment must also be *intentionally inflicted* for a *prohibited purpose* such as to obtain a confession, and must be inflicted ‘by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*’ to amount to torture.<sup>63</sup>

The purpose requirement is interpreted broadly – under most circumstances a public authority will be prohibited from inflicting severe pain or suffering on people. The few exceptions to this rule will generally involve the administration of medical or emergency treatment (for example, administering a very painful medical procedure or rescue carried out in difficult and dangerous circumstances, in which the pain is inflicted for the benefit of the person on whom it is inflicted). When the patient is capable of giving consent, the rules relevant to consent (see page 68) also apply to such treatment.

63 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987) article 1.

Importantly, the assessment of whether an act amounts to torture is relative, and depends on factors including the duration of the treatment, its physical or mental effects, and the age, sex, vulnerability and state of health of the victim.<sup>64</sup>

In international jurisprudence, any evidence obtained through torture has been held to be inadmissible in court, even if that evidence was obtained in another jurisdiction without the complicity of the local government authorities.<sup>65</sup>

### What is the difference between torture and 'cruel, inhuman or degrading treatment'?

In international human rights law there is a difference between conduct amounting to torture and conduct amounting to 'cruel, inhuman or degrading treatment'.<sup>66</sup>

Although any form of 'cruel, inhuman or degrading treatment' will violate s. 10, the special stigma of torture attaches only to deliberate ill treatment causing very serious physical or mental pain or suffering. In other words, the threshold of severity for torture is extremely high.<sup>67</sup> Conduct not meeting this threshold may, however, amount to 'cruel, inhuman or degrading treatment' and breach human rights.

### What is cruel, inhuman or degrading treatment or punishment?

No specific definitions of 'cruel, inhuman or degrading' treatment or punishment are present in either the ICCPR or the Torture Convention. However, the following principles have been established through international jurisprudence regarding the scope of this prohibition:

- This prohibition is directed at less severe forms of ill treatment than acts amounting to torture.
- Degrading treatment is treatment that humiliates or debases a person. In other words, it is treatment that shows a lack of respect for a person, or diminishes a person's dignity and causes feelings of fear, anguish or inferiority capable of breaking a person's moral and physical resistance.
- Ill treatment may involve both physical and mental pain or suffering, however there is no specific requirement that severe pain be inflicted.<sup>68</sup>
- It is not necessary for the harm to be intentionally inflicted.
- To be within the scope of the prohibition, the harm must be carried out by a public official or other person acting in an official capacity; however, the purpose for which it was carried out is immaterial.

The assessment of whether an act amounts to 'cruel, inhuman or degrading treatment' or punishment is relative. The leading case from the EctHR is *Ireland v. UK*, in which the Court held:

'... ill treatment must attain a minimum level of severity if it is to fall within the scope of [the right]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.'<sup>69</sup>

64 Ibid.

65 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2005] 2 AC 68; *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71.

66 Note though that within some jurisprudence, acts that were in the past characterised as cruel, inhuman or degrading treatment have been reclassified as torture. See for example *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71 [53].

67 See for example the decision of the European Court of Human Rights in *Ireland v. United Kingdom* (1978) 25 Eur Court HR (ser A); (1979–80) 2 EHRR 25.

68 *Report of the Special Rapporteur on the question of Torture to the Commission on Human Rights*, UN Doc E/CN.4/2006/6 (23 December 2005) [35].

69 *Ireland v. United Kingdom* (1978) 25 Eur Court HR (ser A) [162]; (1979–80) 2 EHRR 25 [162].

International courts have adopted a low threshold for the necessary minimum in the case of individuals who are assaulted while in detention.

Examples of 'cruel, inhuman or degrading treatment' may include:

- acts carried out pursuant to a disproportionate exercise of powers by police, inspectors or authorised officers, such as an unnecessary and unjustified physical assault;
- inhuman detention conditions (such as prolonged indefinite detention that causes mental illness<sup>70</sup>);
- a penalty (normally criminal, but potentially extending also to regulatory offences) that is arbitrary, excessive or inhuman; and
- corporal punishment.

### Punishment

Section 10 also prohibits 'cruel, inhuman or degrading' punishment.

A form of punishment will generally breach this provision if it entails a degree of humiliation and debasement that attains a particular level above any usual level of humiliation involved in punishment.

Once again the assessment is relative and depends on all the circumstances of the case. In particular, it depends on the nature and context of the punishment itself and the manner and method of its execution.

### Medical and scientific treatment and experimentation

The Charter prohibits medical and scientific experimentation and treatment without consent. This means that patients who are competent to give consent must be allowed to refuse medical treatment or refuse to participate in a medical experiment. Medical treatment should not be given unless consent is obtained. This requirement broadly reflects the current legal position in Victoria, where the duty to treat a patient does not extend to patients who refuse treatment.<sup>71</sup>

The meaning of consent is discussed immediately below. It must be 'full, free and informed'. It must allow the patient to withdraw during the course of the experiment or treatment.

### What is 'full, free and informed consent'?

Section 10 imposes a requirement that any consent to medical or scientific experimentation or treatment must be full, free and informed.

Under international human rights law, the requirement for consent is usually expressed as needing to be 'free'. For example, Article 7 of the ICCPR requires that a person must not be subjected to medical or scientific experimentation 'without his free consent'. In respect of experimentation, the UN Human Rights Committee has observed that vulnerable persons, such as prisoners and persons in detention, should not be subject to *any* medical or scientific experimentation that may be detrimental to their health, as such persons may not be capable of giving valid consent.<sup>72</sup>

70 *C v. Australia*, Human Rights Committee, Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (13 November 2002).

71 *Medical Treatment Act 1988; Re BWV; Ex parte Gardner* (2003) 7 VR 487.

72 *United Nations Human Rights Committee, General Comment 20, Article 7* (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), [7].

The Charter however requires that consent be ‘full, free and informed’. The requirements for ‘full’ and ‘informed’ consent were inserted into the Charter to reflect the present requirements for consent outlined in section 5(1) of the *Medical Treatment Act 1988* (Vic.).

The Charter requirements mean that consent must be voluntary and the person concerned must have been given sufficient information for an informed decision to be made. This would include information such as the nature of the person’s condition and the treatment options available, including explanations of possible risks, side-effects and benefits of the treatment.

In certain circumstances, patients will be unable to consent. For example, a person who is rendered unconscious in a car accident may need urgent medical attention and will not be able to consent to medical treatment. Undertaking emergency medical treatment in such circumstances is not a breach of the Charter.

Note that the prohibition on medical treatment without consent is unique to Victoria, the ACT and New Zealand human rights legislation. It is not a right contained in the ICCPR and might not be regarded as a human right in international law.

If you are vetting legislation or developing a policy or program that provides for medical or scientific treatment to be administered without consent, you will need to review it against s. 7 of the Charter. You should consult Part 2 of these Charter Guidelines for more guidance on s. 7.

## REASONABLE LIMITS

As with all of the human rights protected in the Charter, the rights protected in s. 10 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 guidelines for further information on s. 7. However, it will be extremely difficult to justify reasonable limitations on the right not to be subjected to torture, as this right is regarded as absolute in international human rights law. An absolute right is one that in international human rights law must be respected at all times and cannot be limited.

Victorian law currently provides for medical treatment to occur without consent in a number of situations. For example:

- consent provided by a substitute decision-maker such as a medical practitioner, where there is an emergency or where a person is incapable of giving consent (for example, administering a blood transfusion to a child without the consent of a parent under s.24 of the *Human Tissue Act 1982* (Vic.));
- procedures permitted without consent in accordance with Divisions 4 and 6 of Part 4A of the *Guardianship and Administration Act 1986* (Vic.);
- involuntary treatment of people with a mental illness under the *Mental Health Act 1986* (Vic.).

Legal and policy officers reviewing policy proposals that provide for medical treatment without consent should ensure that the legislation meets the standard for acceptable limitations in s. 7.

### KEY POINTS TO REMEMBER

- Section 10 protects an individual's bodily and psychological integrity from:
  - torture;
  - 'cruel, inhuman or degrading' treatment;
  - 'cruel, inhuman or degrading' punishment;
  - medical or scientific experimentation without consent; and
  - medical or scientific treatment without consent.
- **Torture** is an act by which severe pain or suffering is inflicted by a public authority for a prohibited purpose.
- The threshold of the severity of conduct amounting to torture is extremely high. Less severe forms of ill treatment may amount to '**cruel, inhuman or degrading**' treatment.
- The assessment of whether an act falls foul of this section is relative. It will depend on factors including the duration of the treatment; its physical or mental effects and the age, sex, vulnerability and state of health of the victim.
- A punishment involving a high level of humiliation and debasement may breach s. 10.
- Public authorities must not subject persons to **medical and scientific experimentation or treatment** without their consent. Consent must be 'full, free and informed'. This means that consent must be both voluntary and that the person must have been given sufficient information for an informed decision to be made.
- Torture is regarded as absolute in international human rights law, and therefore non-derogable.
- The other rights protected in s. 10 may be subject under law to reasonable limitations in accordance with s. 7 of the Charter.

### MEASURES TO IMPROVE COMPLIANCE

- Limit the range of persons who can exercise coercive powers to those classes of individuals who possess the required skills, training, experience and authority to exercise the powers.
- Ensure that searches (particularly intrusive methods such as strip-searches and cavity searches) are only carried out in circumstances of necessity and with due respect for the dignity of the person being searched.
- Have procedures in place to monitor the treatment of those being held in detention.
- Ensure that the legislation, policy or program provides for the needs and individual circumstances of persons under the control of a public authority so that some individuals are not more seriously affected or disadvantaged by a policy.
- Institute clear practices and procedures for obtaining and recording consent to experimentation and treatment.
- Review legislation that authorises treatment without consent to determine whether it meets the standard required by s. 7.
- Ensure that there is an appropriate mechanism in place for receiving and dealing with complaints about ill treatment by public authorities.

### Offences and penalties:

- Consider whether the offence and level of penalty are proportionate.
- Tailor the penalty level to the type of conduct that you are seeking to prohibit.

## RELATED RIGHTS AND FREEDOMS

When considering whether legislation or policy gives rise to an issue under s. 10, you should also consider whether it places restrictions on the following rights and freedoms:

- the right to life (s. 9);
- the right to privacy and reputation (s. 13);
- the right to liberty and security (s. 21);
- the right to humane treatment when deprived of liberty (s. 22);
- rights in criminal proceedings (s. 25).

## HISTORY OF THE SECTION

This section was modelled on article 7 of the ICCPR. This section modifies the ICCPR provision by providing additional requirements in relation to consent.

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

## BIBLIOGRAPHY

### Case Law

1. *A v. Secretary of State for the Home Department* [2006] 2 AC 221.
2. *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2005] 2 AC 68.
3. *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* [2005] UKHL 71.
4. *Ireland v. United Kingdom* (1978) 25 Eur Court HR (ser A).
5. *Medical Treatment Act 1988; Re BWV; Ex parte Gardner* (2003) 7 VR 487.

### Treaties

6. *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987).

### United Nations Human Rights Committee Jurisprudence

7. *C v. Australia*, Human Rights Committee, Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (13 November 2002).

### Other Sources

8. *United Nations Human Rights Committee, General Comment 20*, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994).
9. *Report of the Special Rapporteur on the question of torture to the Commission on Human Rights*, UN Doc. E/CN.4/2006/6 (23 December 2005).