

**FACT SHEET:**

# Rights of children in the criminal process

## Section 33 of the *Human Rights Act 2019*

Section 33 of the *Human Rights Act 2019* says that:

1. An accused child who is detained, or a child that is 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 the child's age.

The Human Rights Act details special protections for children involved in criminal processes. It provides that an accused child must not be detained with adults and must be brought to trial as quickly as possible. It also says that a convicted child must be treated in a way that is appropriate for their age.

These rights are based on articles 10(2)(b) and 10(3) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980. They are also based on articles 37 and 40 of the Convention on the Rights of Child, which Australia ratified in 1990.

Section 33 applies only to children in the criminal process. As human beings, children are entitled to all the rights in the Act (unless those rights have an eligibility condition they don't meet, like the right to vote under section 23). Other rights protected in the Human Rights Act that apply more generally to people involved in the criminal process include:

- protection from torture and cruel, inhuman or degrading treatment or punishment (section 17);
- right to liberty and security of person (section 29);
- humane treatment when deprived of liberty (section 30);
- right to a fair hearing (section 31);
- rights in criminal proceedings (section 32);
- right not to be tried or punished more than once (section 34);
- retrospective criminal laws (section 35).

## Scope of the right

Section 33 recognises that children are entitled to special protections because of their age. It only applies to criminal process, unlike section 30 which applies to someone detained regardless of the purpose of the detention.

Like all rights in the Act, the rights of children in the criminal process can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Human Rights Act amends the *Youth Justice Act 1992* to clarify that when decisions are made under that Act in relation to the segregation of convicted and non-convicted children, the following additional factors can be considered in addition to human rights obligations:

- the safety and wellbeing of a child on remand and other detainees; and
- the chief executive's responsibilities and obligations under section 263 of that Act, which relates to the management of detention centres.

## Right to be segregated from all detained adults

Any child who is detained as part of a criminal process must be held separately to any detained adults, preferably in a separate juvenile facility. As with adults, accused children on remand must also be segregated from convicted prisoners serving their sentences (section 30(2) of the Act).

The law recognises that children, because of their age, are more vulnerable. When housed in adult prisons, or other adult facilities, children's basic safety and well-being may be compromised. So might their ability to reintegrate into society, or avoid becoming involved in further criminal activity. That is why there must be separate facilities for children, with different policies and practices, to cater for their developmental needs.

The only permitted exception to the separation of children from adults is where it is not in the child's best interests. This would only be in exceptional circumstances. For example, the child's best interest may require greater priority for family contact than for separation from detained adults. This might lead to the child being detained with a parent or close to home, even if detention is in a facility shared with adults.

## Right to be brought to trial as quickly as possible

Every child arrested and charged must be brought before a court as quickly as possible. This requirement is similar to the one which applies to everyone (sections 29(5) and 32(2)(c) of the Act), but is more onerous. This reinforces that timing can be critical when a child is kept in detention. It recognises that a child should be detained for the shortest appropriate time.

It is not sufficient to cite the absence of proper resources as reason for any delay. A prosecuting authority has a responsibility to ensure that all agencies are adequately supported, and that proper consideration is given to the speed of criminal cases involving children.

## Right to be treated in a way that is appropriate to the child's age

This right must be applied, observed and respected throughout the entire process. This means from the first contact with the child by law enforcement agencies through to the implementation of any sentence.

## When this right could be relevant

Section 33 could be relevant to laws, policies, acts or decisions that:

- enable children to be detained for any length of time;
- authorise the holding of children in amenities that have limited facilities or services for the care and safety of children;
- enable people to undertake personal searches of a detained child;
- impacts on the environmental design of detention centres or conditions under which children are detained;
- establish or alter programs in prisons, youth training centres or residential centres;

- affects the speed at which a child may be brought to trial;
- create or amend procedures and the law of evidence applicable to children charged with criminal offences, including the investigation and prosecution of offences; or
- amend the law relating to children in criminal proceedings, including bail, adjournments and sentencing.

## Examples

No examples exist yet in Queensland, but this right has been tested in Victoria.

### OMBUDSMAN'S REPORT ON THE MELBOURNE YOUTH JUSTICE PRECINCT

In 2010, Ombudsman Victoria conducted an investigation into the conditions at the Melbourne Youth Justice Precinct. This precinct consists of the Melbourne Youth Justice Centre, Melbourne Youth Residential Centre and Malmsbury Youth Justice Centre. Ombudsman Victoria found the precinct was did not comply with the human rights principles in the Charter. It found:

- there was undesirable mixing of detainees of widely varying ages and different legal situations;
- remanded detainees were being placed in units with sentenced offenders;
- 39 per cent of former and current staff legally required to have a Working with Children Check (WWCC) to work at the precinct did not have a WWCC on their personal file;
- the precinct was struggling to meet the needs of children who were seriously mentally ill, including detainees who were suicidal or displaying self-harming behaviour;
- in some instances, remanded detainees were placed in sentenced units during the day, which in one case resulted in a remanded detainee being severely assaulted by four sentenced detainees.

Ombudsman Victoria found that these were human rights violations. It recommended that the precinct be replaced with a new facility, a review be carried out of all policies and practices relating to conditions to ensure they comply with human rights principles and that the performance of all current staff be reviewed.

### DELAY IN TRIAL TOO LONG

*(Perovic v CW, ACT Children's Court, Unreported (1 June 2006))*

In this case, the court decided that under the ACT equivalent of section 33(2), a delay of 16 months between the alleged offence and trial for a child was too long, especially for a case that was not very complex. Lack of investigative resources was held to be no excuse.

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