

FACT SHEET:

Right to protection from torture and cruel, inhuman or degrading treatment

Section 17 of the *Human Rights Act 2019*

Section 17 of the *Human Rights Act 2019* says that:

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 the person's full, free and informed consent.

The Human Rights Act states that a person must not be tortured or treated in a way that is cruel, inhuman or degrading. This includes not being subjected to medical or scientific treatment unless the person has given their full, free and informed consent.

Torture is a crime in Australia under the Commonwealth Criminal Code Act 1995 (Division 274). Some instances of torture and cruel or inhuman treatment may also be crimes under the Queensland Criminal Code.

Section 17 is based on Article 7 of the International Covenant on Civil and Political Rights. Australia ratified treaty in 1980.

Scope of the right

Like all rights in the Act, the right to protection from torture and cruel, inhuman or degrading can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

However, the right to protection against torture cannot be limited under international law. Torture is also prohibited under Queensland law. It is therefore very unlikely that any limitation to the right to protection against torture would be justifiable.

Torture

Torture is an act that intentionally inflicts severe physical or mental pain or suffering.

In Victoria, where the same right is protected in the Victorian Charter of Rights and Responsibilities Act 2006, it has been clarified that this right may also give rise to positive obligations, including, for example, obligating public authorities to take steps to prevent deliberate acts of torture.

Cruel, inhuman or degrading treatment or punishment

Cruel, inhuman or degrading treatment or punishment is a broader concept than torture. It often refers to treatment that is less severe than torture or that does not meet the definition of torture. It still involves abuse or humiliation. It does not necessarily have to be intentionally inflicted or physical pain, although most cases will involve some deliberate imposition of severe suffering or intent to harm, humiliate or debase a victim. The purpose of the conduct will be at least a factor to take into account. It can include acts that cause mental suffering, debases a person, causes fear, anguish or a sense of inferiority.

Both the right in section 17, and the right to humane treatment when deprived of liberty in section 30, may be relevant to the treatment of people in detention. The Queensland Supreme Court has suggested that section 17 prohibits bad conduct towards any person (imprisoned or not) while the right to humane treatment mandates good conduct towards people who are incarcerated.

Medical or scientific experimentation or treatment

This right protected in the Human Rights Act expands on Article 7 of the International Covenant on Civil and Political Rights by providing that informed consent must be given for medical treatment.

When this right could be relevant

Section 17 could be relevant to laws, policies, acts or decisions that:

- cause a person serious physical or mental pain or suffering, or humiliate them;
- create new powers, or change or increase existing powers of police, inspectors or authorised officers;
- affect the operation of detention facilities and conditions attached to all forms of state care and detention (including access to goods and services, such as medical treatment, while in detention);
- create new types of penalties (including mandatory minimum sentences, and limits to or denial of a service);
- authorise 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;
- introduce or permit corporal punishment by a public entity;
- involve procedures relating to conducting searches;
- regulate the treatment of people at any site for which a public entity is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, or a supported residential service;
- allow for prolonged periods of segregation or other particularly harsh prison regimes;
- involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint;
- define and regulate procedures for obtaining consent to medical treatment and experiments;
- regulate medical treatment of people without their consent; or
- regulate the conduct of medical or scientific research.

Examples

There are no case examples from Queensland yet which involve this right. There are some from other jurisdictions below.

PROLONGED SOLITARY CONFINEMENT

(Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273)

Section 17 was considered by the Queensland Supreme Court in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273. The case concerned the prolonged solitary confinement of a prisoner. Justice Martin suggested the following factors will be relevant to assessing if treatment or punishment is cruel, inhuman or degrading:

- (a) the scope of the right contained in s 17(b) is conditioned by a minimum standard or threshold of severity or intensity that can manifest in bodily injury or physical or mental suffering,
- (b) the combination of the adjectives – cruel, inhuman or degrading – define the prohibited treatment or punishment,
- (c) the assessment of the minimum threshold is relative, and it depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim,
- (d) most cases of breach will involve on the part of the decision-maker deliberate imposition of severe suffering or intentional conduct to harm, humiliate or debase a victim, and
- (e) the purpose of the decision-maker's conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right.

In that case, the applicant led insufficient evidence to demonstrate s 17 was engaged. However, the court did find the right to humane treatment when deprived of liberty was limited.

CRUEL AND DEGRADING TREATMENT OF PEOPLE WITH DISABILITY A BREACH OF HUMAN RIGHTS

(Davies v State of Victoria [2012] VSC 343 (15 August 2012))

This case involved the treatment of a person with disabilities. While living at a Community Residential Unit, the person was dragged naked along a hallway. This caused bruising and grazing. The Supreme Court of Victoria found that the treatment of the resident constituted cruel, inhumane and degrading treatment.

ENSURING CHILDREN IN DETENTION ARE KEPT SAFELY AND HUMANELY

(Certain Children (No 1) [2016] VSC 796 [169]; contra Certain Children (No 2) [2017] VSC 251 [241], [256] – [258]).

This case related to the detention of children at the Barwon Prison. It was found that the treatment children were being subjected to collectively amounted to cruel, inhuman and degrading treatment. The treatment included:

- very long periods of solitary confinements;
- uncertainty as to the length of lockdowns;
- fear and threats by staff;
- the use of control dogs;
- the use of handcuffs when moving children to an outdoor area;
- the noise of loud banging or screaming;
- the failure to advise children of their rights or the centre's rules;
- lack of space and amenities;
- limited opportunity for education; and
- the absence of family or religious visits.

COMPULSORY MEDICAL TREATMENT NOT SEVERE ENOUGH TO BE CRUEL, INHUMAN OR DEGRADING TREATMENT

(Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009))

In this case, Mr Kracke was subject to compulsory medical treatment prescribed by a psychiatrist. The Medical Health Review Board was required to review the psychiatrist's orders within a certain time period, but failed to do so. Mr Kracke argued that the orders therefore became invalid, and his treatment amounted to a breach of the Human Rights Charter, which prohibits medical treatment without consent. The Tribunal held that, since Mr Kracke was in medical need, the law allowing involuntary treatment was a reasonable limit on his rights. It also held that, in this case, the right to be free from torture and ill-treatment was not engaged because the treatment was not severe enough.

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