



FACT SHEET:

Right to humane treatment when deprived of liberty

Section 30 of the *Human Rights Act 2019*

Section 30 of the *Human Rights Act 2019* says that:

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.

The Human Rights Act states that everyone must be treated with respect when deprived of liberty. It also says that people who have been charged but not convicted of an offence should be held separately to people who have been convicted, unless it is necessary.

This right is based on Articles 10(1) and 10(2) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980. It expands on Article 10 by requiring specific treatment of an accused person or a person who is detained without charge.

This right is complementary to the right to be free from torture and cruel, inhuman and degrading treatment (section 17 of the Act). The Queensland Supreme Court has suggested that section 17 prohibits bad conduct towards any person (imprisoned or not) while the right in s 30 to humane treatment mandates good conduct towards people who are incarcerated.

Scope of the right

Section 30 ensures that minimum standards of treatment apply for people who are deprived of their liberty. The underlying principle is that a person's rights should only be limited by the confinement itself, not additional factors.

People are deprived of liberty when they are held, for example, in prisons, psychiatric hospitals or correctional institutions. Facilities of this kind which are run by private commercial organisations may fall within the definition of public entity.

Section 30 grants extra rights to 'an accused person who is detained' and a 'person detained without charge'. These rights follow from the principle of the presumption of innocence in criminal law. They mean that a detainee who has not yet been tried is entitled to different treatment than convicted detainees.

The UN Standard Minimum Rules for the Treatment of Prisoners establishes standards on a range of matters. They include accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, medical services, and disciplinary procedures.

These rules are now complemented by the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia ratified this treaty in 2017. This obliges States to set up preventive monitoring mechanisms to maintain detention standards.

The right to humane treatment means that people in detention should not be subject to hardship or constraint in addition to the deprivation of liberty. However, some rights are unavoidably restricted in a closed environment, for example:

- freedom of movement;
- elements of freedom of expression and some elements of privacy; and
- family life.

In particular, accused people are entitled to be segregated from those serving their sentences. The Act states that this right applies 'except where reasonably necessary' – for example where separate facilities are unavailable.

The Human Rights Act amends the Youth Justice Act 1992 and the Corrective Services Act 2006 to clarify that other factors in addition to human rights obligations can be considered when decisions are made under these acts in relation to:

- the segregation of convicted and non-convicted prisoners; and
- the management of prisoners when it is not practicable for the prisoner to be provided with their own room.

Like all rights in the Act, the right to humane treatment when deprived of liberty can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 30 could be relevant to laws, policies, acts or decisions that:

- enable a public entity to detain individuals, or relates to the conditions under which someone may be detained (for example, in prisons, mental health services, or prison transportation facilities);
- concern standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to hygiene products, private shower and toilet facilities);
- authorise a person to be held in a place with limited facilities or services for the care and safety of detainees;
- enable enforcement officers to undertake personal searches of people detained in custody or visiting detainees.

Examples

PROLONGED SOLITARY CONFINEMENT

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

Section 30 was considered in by the Queensland Supreme Court in a case concerning a decision to prolong the solitary confinement of a prisoner for a further six months. The prisoner had already been separated from other detainees for seven years. Justice Martin found the applicant led insufficient evidence to demonstrate the right in s 17 (cruel, inhuman or degrading treatment) was engaged. However, the court did find the right to humane treatment when deprived of liberty was limited because the prisoner was subject to hardship beyond that experienced by virtue of detention. The court accepted there was a legitimate aim in separating the detainee and that there was a rationale connection to that purpose. However, the public entity did not discharge the onus on it to demonstrate the limitation was reasonable. It did not provide evidence that there were no less restrictive alternatives available and the separation of the prisoner did not strike a balance between the prisoner's risk of violence and the limitation of his rights.

IVF TREATMENTS GRANTED TO WOMAN IN PRISON

Castles v Secretary to the Department of Justice (2010) 28 VR 141; [2010] VSC 310 [113]

Kimberley Castles was convicted of social security fraud in 2009 and sentenced to three years imprisonment. She was imprisoned in a minimum-security women's prison. Before being incarcerated, Ms Castles had been receiving IVF treatment. She wanted to be able to continue to access IVF at her own cost while in prison, because by the time she was released she would be ineligible for the treatment due to her age. Her requests to access this treatment were denied by the Department of Justice. Ultimately, the Supreme Court of Victoria found that Ms Castles was entitled under s 47(1)(f) of the *Corrections Act 1986* to undergo IVF treatment. The judgement in this case gave significant consideration to the application of the right to humane treatment when deprived of liberty, which is protected in the Victorian Charter of Rights and Responsibilities Act 2006. The Court found that the right to humane treatment in detention:

"[r]equires the Secretary and other prison authorities to treat Ms Castles humanely, with respect for her dignity and with due consideration for her particular human needs."

RIGHTS OF CHILDREN IN DETENTION TO BE HELD 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. A youth justice and remand centre had been established within a high security adult prison. It was found this engaged the children's rights to humane treatment when deprived of liberty.

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