The Charter of Human Rights and Responsibilities

Section 22 – Right to humane treatment when deprived of liberty

Scope of the right
Section 22 requires all public authorities (including police and correctional staff) to treat persons in detention with humanity and dignity. It also requires the segregation of persons accused of offences from persons who have already been convicted of offences.

The purpose of the right to humane treatment when deprived of liberty is to recognise the particular vulnerability of persons in detention and to ensure that they are treated with consideration of their rights and dignity as human beings.

This right complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment under section 10 of the Charter. However, it is engaged by less serious mistreatment or punishment than under section 10.

In the context of international human rights law, the UN Human Rights Committee has observed that this right applies not just to persons detained under the criminal law, but also to persons detained elsewhere (for example, in an approved mental health service) under the laws and authority of the government (see the Committee’s General Comment 21).

The Committee has made it clear that this right applies to all detention facilities within a state’s jurisdiction. It also applies to anyone detained, whether he or she is an adult or a child.

The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint in addition to that resulting from the deprivation of liberty. The Human Rights Committee has emphasised that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment.

Some rights are unavoidably restricted in a closed environment, for example: a person’s freedom of movement; elements of freedom of expression and some elements of privacy; and interference with family life are inevitably affected.

The UN Standard Minimum Rules for the Treatment of Prisoners establish minimum standards on a range of matters, including conditions of: accommodation; food of adequate quality; facilities for personal hygiene; standard of clothing and bedding; opportunities for exercise and availability of medical services; contacts with the outside world; access to books and regulation of methods and procedures for discipline and punishment (including the prohibition of certain forms of punishment).

These rules are now complemented by a treaty Australia is currently considering ratifying – the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – which obliges States Parties to set up preventive monitoring mechanisms to maintain detention standards.

Section 22 grants additional 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: a detainee who has not yet been tried is entitled to a different treatment regime than convicted detainees.

In particular, accused persons are entitled to be segregated from those serving their sentences. Section 21(2) provides, however, that the right applies ‘except where reasonably necessary’ – for example where separate facilities are unavailable.

The Supreme Court of Victoria noted in Castles v Secretary to the Department of Justice [2010] VSC 210 that the right to humane treatment in section 22 of the Charter ought not to be conflated with section 10(b) of the Charter:

Section 22(1) is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct. Section 10(b) prohibits ‘bad conduct’ towards any person; s 22(1) mandates ‘good conduct’ towards people who are detained.
Case examples

A detainee's right to be treated humanely has been held to be violated in cases before the UN Human Rights Committee where detainees were:

- held in ‘incommunicado’ detention for any length of time (*Caldas v Uruguay*, UN Document Reference CCPR/C/19/D/43/1979)
- refused medical attention or there was a failure to address deteriorating mental health (*Mpandanjila v Zaire*, CCPR/C/27/D/138/1983)
- subjected to ridicule (*Francis v Jamaica*, CCPR/C/54/D/606/1994)
- denied reading facilities and not allowed to listen to the radio (*Nieto v Uruguay*, CCPR/C/19/D/92/1998)
- confined to a cell for an unreasonably long period of time (*Cabreira v Uruguay*, CCPR/C/19/D/105/1981)
- required to prepare prison food in unsanitary conditions (*Matthews v Trinidad and Tobago*, CCPR/C/62/D/569/1993)
- subject to restricted correspondence with family (*Espinoza de Polay v Peru*, CCPR/C/61/D/577/1994)
- prevented from being present at the birth of a child (*Madafferi v Australia*, CCPR/C/81/D/1011/2001)

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 20 could be engaged by activities that:

- enable a public authority to detain individuals or relates to the conditions under which a person may be detained for example, in prisons, mental health services, prison transportation facilities
- concern standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to 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 those individuals detained in custody or detainee visitors.

Section 22 of the *Charter of Human Rights and Responsibilities Act 2006* 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.

This right to humane treatment when deprived of liberty is modelled on Article 10 of the *International Covenant on Civil and Political Rights*, a treaty to which Australia became a party in 1980.

Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.