The Charter of Human Rights and Responsibilities

> Section 23 – Rights of children in the criminal process

Scope of the right

‘Child’, according to section 3 of the Charter, means a person under 18 years of age.

Right to be segregated from all detained adults

Any child who is deprived of his or her liberty must be segregated from 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 22(2)).

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, along with their ability to reintegrate into society and avoid becoming involved in further criminal activity. That is why there must be separate facilities for children – including distinct, child-centred staff, personnel, policies and practices – to cater for the developmental needs of children.

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 which may 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 that applying to all people (recognised in sections 21(5) and 25(2)(c) of the Charter), but is more onerous, reinforcing the critical nature of timing when a child is kept in detention.

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 expedition of criminal charges involving children.

Right to be treated in a way that is appropriate to his or her age

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

Article 40(1) of the Convention on the Rights of the Child provides guidance in this area, stating that all criminal processes involving children must promote their rehabilitation and their ability to take on a constructive role in society.

Case examples

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 non-compliant 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 adequately 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 – Perovic v CW, ACT Children's Court, Unreported (1 June 2006)

In this case, the court decided that under the ACT equivalent of section 23(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.

Examples of when this right could be relevant in practice

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

Section 23 could be engaged by activities 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
• amend the law relating to children in criminal proceedings, including bail, adjournments and sentencing.

Section 23 of the Charter of Human Rights and Responsibilities Act 2006 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; and
(3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

These rights are modelled on Articles 37 and 40 of the Convention on the Rights of the Child, a treaty to which Australia became a party in 1990.

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.

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