Protection from Torture and Cruel, Inhuman or Degrading Treatment

Human Rights Act 2004, section 10
(1) No-one may be
   (a) tortured; or
   (b) treated or punished in a cruel, inhuman or degrading way.

(2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

CONTENTS

INTRODUCTION  
SECTION 10(1)  
The prohibition on torture and related maltreatment is absolute  
Overlap between humane treatment in detention and the prohibition on torture  
Torture contrasted with cruel, inhuman, degrading treatment or punishment  
Sexual violence  
Corporal punishment  
Health care in detention  
Mental Harm  
Positive obligations  
SECTION 10(2)  
Medical or scientific experimentation or treatment  
Incompetent patients  
Children  
OPCAT  
APPLICATION TO WORK OF THE COMMISSION  
What are the rights protected in the Human Rights Act 2004?
Introduction

The right to protection from torture and cruel, inhuman or degrading treatment under s.10 of the ACT Human Rights Act 2004 (the HR Act) is derived from Article 7 of the International Covenant of Civil and Political Rights (ICCPR). This right is closely related to the right to humane treatment when deprived of liberty (s.19 of the HR Act).

In relation to all human rights protection, the obligations on Governments are generally to protect, respect and fulfil. Respect means to refrain from engaging in prohibited conduct. Protect means to prevent others from engaging in such conduct and fulfil means to set up mechanisms for monitoring. In relation to the obligation to fulfil, this is detailed for torture under the Optional Protocol against Torture (OPCAT) discussed below.

SECTION 10(1)

The prohibition on torture and related maltreatment is absolute

The right to protection from torture and cruel, inhuman or degrading treatment is of fundamental importance in upholding the physical and mental integrity of the person and provides absolute protection against treatment falling within its scope. General Comment No. 20 of the UN Human Rights Committee (1992) states:

Even in situations of public emergency ...no derogation from the provision of [the right to protection from torture and cruel, inhuman or degrading treatment] is allowed and its provisions must remain in force. Likewise ... no justification or extenuating circumstances may be invoked to excuse a violation of [the right to protection from torture and cruel, inhuman or degrading treatment] for any reasons, including those based on an order from a superior officer or public authority.

Overlap between humane treatment in detention and the prohibition on torture

Section 19 of the HR Act specifically concerns conditions for people in detention – in prison or under mental health laws, particularly if a person who is ill is subject to excessive punishment or restraint. Detaining a severely disabled person in seriously inadequate prison conditions for a single night has been held to constitute inhuman and degrading treatment.

Evidence that a person has been mistreated whilst in state custody imposes a positive obligation on the public authority to investigate the circumstances of mistreatment.

1 Tomasi v France (1993) 15 EHRR 1, [114-115]; Ireland v United Kingdom (1979-80) 2 EHRR 25, [163].
2 Human Rights Committee General Comment No. 20, Compilation of general comments and general recommendations adopted by human rights treaty bodies (Art 7), (1994), [3].
Australia has been found in violation of Article 7 and Article 10 of the ICCPR on a number of occasions. Three cases where violations occurred involved persons held in immigration detention. In one case, the Committee found a violation of Article 7 to have occurred. Two other cases have involved detention in correctional facilities. In *Cabal and Pasini v Australia*, the UN Human Rights Committee found that detention of two prisoners in a triangular cage for an hour was a violation of Article 10(1) of the ICCPR. The Committee found that ‘a failure to have a cell sufficient adequately to hold two persons is insufficient explanation for requiring two prisoners to alternately stand and sit, even if only for an hour, within such an enclosure.’ In *Brough v Australia*, the Committee considered a case in which a 16 year old Aboriginal young person with an intellectual disability was placed in a cell alone. The Committee found that:

the extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal.

The Committee did not accept the argument that the treatment of this young person was justified for reasons of self-harm of security or order, and found Australia in violation of Article 10 of the ICCPR.

Locally, the death of an Aboriginal man in 2008 while in the back of a prison van demonstrates the overlap between sections 10 and 19 of the HR Act. The prisoner, Mr W, died of heatstroke while being driven 360km across the desert to face a drink-driving charge. The van’s air conditioning and emergency alarm were not working. In citing Articles 7 and 10 of the ICCPR, the Coroner Inquest found that his treatment was inhumane,

I agree with the submissions on behalf of the Human Rights and Equal Opportunity Commission to the effect that the purpose of Article 10(1) is to impose on states a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.

**Torture contrasted with cruel, inhuman, degrading treatment or punishment**

The threshold for torture is higher than that of cruel, inhuman or degrading treatment or punishment. The distinction is also made in the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. Australia is a party to this convention, as well as the ICCPR.

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6 See C v Australia, ibid. In *Madafferi v Australia*, the Committee did not go on to find a violation of Article 7, but explicitly said that it did not need to given the finding that Article 10 had been violated. *Madafferi v Australia*, ibid, at [9.3].


8 Ibid, [8.3].


10 Ibid, at [9.4].

11 WA Coroner, Inquest into the death of Mr W, Ref 9/09, pg.129.
The Human Rights Committee has said that it does not ‘consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.’

According to the European Court of Human Rights, the line between ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’ depends on the intensity and cruelty of the pain and suffering inflicted, which may vary according to the victim, in light of factors such as age or sex or health status.

In Price v United Kingdom, the Court held that, ‘to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3.’

In an early case heard by the European Court, interrogation techniques used by British security forces in Northern Ireland were held not to meet the higher threshold of torture, since they ‘did not occasion the particular intensity and cruelty implied by the word torture’. Instead, the Court held that hooding, sleep-and-light-deprivation, noise-exposure, wall-standing, and the deprivation of food and drink, when applied in combination and for extended periods of time, constituted degrading and inhuman treatment for the purposes of ECHR article 3.

However, if faced with such practices again, it is possible that the Court would rule that these constituted torture. In Selmouni v France, the European Court said that:

... Having regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’, the Court considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future.

The United States’ attempts to classify various techniques of interrogation in Guantánamo Bay as cruel, inhuman or degrading treatment or punishment, rather than torture, have been subjected to close scrutiny by various bodies within the United Nations human rights system. For example, five of the special mechanisms of the former UN Commission on Human Rights stated that:

The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of article 7 of ICCPR and article 16 of the Convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention. Furthermore, the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of

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12 Human Rights Committee General Comment No. 20, Compilation of general comments and general recommendations adopted by human rights treaty bodies (Art 7), (1994), [4].
13 See Ireland v United Kingdom, note 1 above, at [162]. The position with respect to Article 10 (s.19 HR Act) is similar. For example, in Brough v Australia, the Human Rights Committee said that ‘… treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.’ Brough, note 9 above, at [9.2].
15 Ireland v the United Kingdom, note 1 above, [167].
16 Ibid.
17 (2000) 29 EHRR 403, [101].
detainees under article 10 (1) of ICCPR to be treated with humanity and with respect for the inherent dignity of the human person.\textsuperscript{18}

\textbf{Sexual violence}

Sexual violence may constitute torture. In \textit{Aydin v Turkey} the European Court of Human Rights (ECtHR) held that the repeated rape and other physical and mental humiliation of an adolescent detainee by an official or officials constituted torture.\textsuperscript{19} The \textit{ad hoc} international criminal tribunal for the former Yugoslavia has also found rape to constitute torture on a number of occasions.\textsuperscript{20}

\textbf{Corporal punishment}

Corporal punishment is considered cruel, inhuman or degrading punishment.\textsuperscript{21} Very harsh forms of corporal punishment could constitute torture. The jurisprudence of the UN Human Rights Committee, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, as well as the Committee on the Rights of the Child supports the complete prohibition of corporal punishment of children.\textsuperscript{22} Australia is bound by the 1989 Convention on the Rights of the Child, and this Convention is relevant to the interpretation of the HR Act, by virtue of s. 31 of the Act.

\textbf{Health care in detention}

An inadequate level of health care provision in detention may also amount to ‘cruel or inhuman and degrading treatment’. For example, in \textit{Rouse v the Philippines}, the UN Human Rights Committee noted the obligation on detaining authorities to provide medical care consistently with the Standard Minimum Rules for the Treatment of Prisoners and found that Mr Rouse had suffered severe pain for a considerable period of time because of a failure by the authorities to

\textsuperscript{18} See ‘Situation of detainees at Guantánamo Bay’, Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, 15 February 2006, UN Doc. E/CN.4/2006/120, at [87].

\textsuperscript{19} \textit{Aydin v Turkey} 23178/94 [1997] ECHR 75; (1998) 25 EHRR 251.

\textsuperscript{20} The first decision in which this finding was made was in the case involving the Čelebići prison camp: Prosecutor v Delalić, ICTY Case No. IT-96-21-T, Judgment of Trial Chamber, 16 November 1998, [475] – [497].

\textsuperscript{21} The Human Rights Committee’s jurisprudence is consistent on this point. See for example, \textit{Boodlal Sooklat v Trinidad and Tobago} (928/2000), UN Doc No. CCPR/C/73/D/928/200 (25 October 2001).

\textsuperscript{22} In addition to prohibiting torture and related forms of harm in Article 37(a), Article 19 of the Convention on the Rights of the Child guarantees children protection from all ‘physical or mental violence.’ In General Comment No. 8 (2006), the Committee on the Rights of the Child has made clear that the traditional common law defence of ‘reasonable’ or ‘moderate’ chastisement is unacceptable and contrary to the Convention. Committee on the Rights of the Child, \textit{General Comment No. 8} (2006), ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment’, [26] and [31]. Contrary case law from the European Court of Human Rights should therefore be distinguished. The European Court of Human Rights has found that a birching of a young person by two policemen reached the required level of severity to violate Article 3 of the ECHR, but the ‘slippering’ of a small boy in a private school did not. Contrast \textit{Tyer v United Kingdom} [1979-80] 2 EHRR 1, with Costello-Roberts \textit{v United Kingdom} (1995) 19 EHRR 112. The Court has not resiled from the position it took in \textit{Costello-Roberts} in subsequent cases. See, for example, \textit{A v United Kingdom}, (1999) 27 EHRR 611. It should be noted that the Committee on the Rights of the Child has said that in minor instances, prosecution of parents is not necessarily the best strategy: \textit{General Comment No. 8, op cit} [40-41].
treat his kidney stones, in violation of the prohibition on cruel and inhuman treatment.\textsuperscript{23} In the case of \textit{McGlinchey and Others v United Kingdom}, the ECtHR established a breach of the right to protection from inhuman and degrading treatment on the basis of inadequate health care.\textsuperscript{24}

\textbf{Mental Harm}

The prohibition on torture encompasses mental as well as physical harm.\textsuperscript{25} Similarly, the prohibition on degrading treatment or punishment goes beyond physical harm and encompasses mental harm. For example, to punish, by the termination of employment, an individual for refusing to take a test for HIV/AIDS as a prerequisite to that employment has been held to breach the right by the Industrial Court of Botswana.\textsuperscript{26} The Court’s decision in this respect was based on the ‘freedom of individuals to rebuff attempts at subjecting their bodies to any treatment or test, without being punished for exercising such freedom or right.’\textsuperscript{27} The Court also had regard to the ‘stigma, paranoia, prejudice and ignorance that surrounds HIV/AIDS.’\textsuperscript{28} In exceptional cases, arbitrary and gross acts of discrimination may amount to a breach, even if the case before the court involves no actual physical or mental harm.\textsuperscript{29} The ACT Supreme Court considered the issue of Griffith remand in \textit{Taysaving v Mazlin}. Griffith remand is a sentencing option in which the Court grants an adjournment during sentencing to give the defendant an opportunity to demonstrate their prospects of rehabilitation before passing final sentence. The Court speculated that if an accused person was released on a Griffith remand and complied with its terms, it could amount to inhuman and degrading treatment to then give the accused a custodial sentence, having created the expectation of a community order.\textsuperscript{30}

\textbf{Positive obligations}

There is a positive obligation on governments to safeguard persons within its jurisdiction from torture or cruel, inhuman or degrading treatment or punishment.\textsuperscript{31} This means that courts and

\textsuperscript{23} Rouse v. The Philippines (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123, [7.8]. See also, European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) \textit{The CPT Standards} (CPT/InfE (2002) 1 Rev 2006), at [30].

\textsuperscript{24} The case involved a woman with a history of drug-abuse who was given an inadequate initial medical assessment upon arrival in detention, and who was not examined by a doctor over a period of two days due to a lapse in staffing procedures. As a result, the Court held that the prison authorities had breached her human rights by failing to provide her with more effective treatment, including admitting her to hospital: \textit{McGlinchey and Others v United Kingdom}, 50390/99 [2003] ECHR 211; (2003) 37 EHRR 41.

\textsuperscript{25} See the definition of torture contained in Article 1, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

\textsuperscript{26} Diau v Botswana Building Society, Industrial Court 50/2003 (J 992) 19 December 2003.

\textsuperscript{27} Ibid, at 41.

\textsuperscript{28} Ibid.

\textsuperscript{29} East African Asians v United Kingdom (European Commission on Human Rights) (1981) EHRR 76.

\textsuperscript{30} Taysaving v Mazlin [2006] ACTSC 41.

\textsuperscript{31} In the case of torture, Article 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment imposes specific obligations to take measures to prevent the occurrence of torture. Article 12 provides that ‘each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.’ Article 13 of the Convention imposes a specific obligation to ensure that individuals may have allegations of torture investigated. Article 16 imposes obligations to prevent cruel, inhuman or degrading treatment or punishment. In the case of Hajrizi Dzemajl et al v Serbia & Montenegro (161/2000), UN Doc. CAT A/58/44 (21 November 2002), the Committee against Torture found a violation of Article 16 where police had failed to intervene in racially motivated violence (including torching of houses), (at [9.2]). All rights contained in the International Covenant on Civil and Political Rights must be ‘respected and ensured’ by the states parties. This requires states parties to ensure that private individuals do not violate these rights, and this in turn requires legislation and other positive measures.
social services must use their powers to protect children and vulnerable adults from abuse, at least where they are aware of their ill-treatment. In *Z and Others v United Kingdom*, the ECtHR held that the public authority had failed in its responsibility to prevent physical abuse of four children living with their parents. The court stated that the obligation under the right to life and the right to protection from degrading treatment requires:

States to take measures designed to ensure that individuals... are not subjected to torture or inhuman or degrading treatment... [which measures should]... provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.  

**SECTION 10(2)**

**Medical or scientific experimentation or treatment**

The second limb of HRA s.10 (2) prohibits medical or scientific experimentation or treatment without free consent. This is particularly relevant for the protection of human dignity and autonomy of those not legally capable of consenting to such procedures, including persons in a state of unconsciousness, minors, people with intellectual disabilities, or mental health problems.

Other than in an emergency (for example, where the patient is unconscious), consent will be required for treatment. A legally competent person is free to refuse general medical treatment, even if that will lead to his or her death.

Free consent means voluntary and informed consent, viewed as a process rather than a one-off event. There should be full and effective communication to the person in question about the nature of the procedure. A person’s competence to consent to, or to refuse, medical treatment or experimentation includes their ability to comprehend and retain the information material to the decision, and their ability to use and weigh that information as part of the process of arriving at the decision.

In a case before the UN Committee on the Elimination of all forms of Discrimination against Women that involved the sterilisation of a Roma woman, the Committee

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32 See, for example, the decision of the European Court of Human Rights in *Z and others v United Kingdom* 29392/95 [2001] ECHR 333.

33 *Z and Others v United Kingdom* 29392/95 [2001] ECHR 333, [73].

34 The impetus for the equivalent ICCPR article 7 can be found in the atrocities carried out in the Nazi concentration camps. See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1st ed, 1993) 140.

35 Article 7 does not refer to medical treatment, but issues concerning consent to medical treatment would engage the right to privacy under Article 17.

36 Ibid.

found that informed consent had not been given. The woman, who needed a caesarean section, was admitted to hospital when she was dizzy, bleeding heavily and in a state of shock. She was asked to sign a consent form that was barely legible and in which the Latin term for sterilisation was used. In the space of 17 minutes a baby was delivered by caesarean section and then the patient was sterilised.

**Incompetent patients**

Medical professionals may treat patients who are not competent to consent provided that the treatment is in the patient’s best interests. In the ACT, substitute consent will also be sought, for example, from an attorney under the *Powers of Attorney Act 2006* or a guardian appointed under the *Guardianship and Management of Property Act 1991* (ACT). However, certain prescribed medical treatment is exempt from substitute decision making by a guardian under that Act, including contraception, electro-convulsive therapy, psychosurgery and treatment for mental illness. Such treatment may be given involuntary in other circumstances, for example as involuntary mental health treatment ordered by the ACT Civil and Administrative Tribunal under the *Mental Health (Treatment and Care) Act 1994*. Additionally, the Tribunal itself is able to give consent for procedures such as abortion, reproductive sterilisation, hysterectomy or the transplantation of non-regenerative tissue to another living person. Where a patient is detained under mental health laws, treatment given without consent and with the use of force on the basis of an established ‘medical necessity’ is unlikely to constitute inhuman and degrading treatment. In an ACT case health professionals sought an order from the Court to allow them to cease providing nutrition and hydration for a psychiatric patient who actively resisted the treatment but was not competent to make the decision to withhold consent. The Court refused the order, finding that it was not a relevant consideration that care providers found the provision of care distressing and believed it to violate the patient’s right to humane treatment.

**Children**

The most authoritative decision regarding a young person’s right to self-determination was the House of Lords decision in *Gillick v West Norfolk & Wisbech Area Health Authority* (Gillick), in which the court held that children who have sufficient understanding and intelligence to enable them to understand fully what is involved in a proposed intervention will also have the capacity to consent to that intervention. A ‘Gillick’ competent child has the right to consent to treatment on his or her behalf independent of the views of parent or guardian. In cases of incapacity, there are

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40 See s.7(3)

41 R (on the application of Wilkinson) v The Responsible Medical Officer Broadmoor Hospital and Others [2001] EWCA Civ 1545, [2002] 1 WLR 419.

42 Australian Capital Territory v JT [2009] ACTSC 105

43 [1986] AC 112. Applied in Australia in *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218

44 *Gillick v West Borfolk and Wisbech Area Health Authority* [1985] 3 All ER 402. Gillick competency refers to a child who possesses the intelligence and maturity to understand the nature and implications of the medical treatment. Gillick
certain forms of treatment that are so serious, that the High Court has taken the view that only the court, not the parents, may consent to treatment for a child.\textsuperscript{45} There are also question as to the extent to which a child’s or young person’s \textit{refusal} of treatment can be overridden. Proceeding contrary to the child’s wishes would be on the basis of ‘best interests’ principle and would need to be exercised with caution.\textsuperscript{46} Where child and parents disagree (the child refusing treatment) the doctor would need to act in the child’s best interests, taking into account that overriding a child’s wishes should be exercised ‘sparingly’.\textsuperscript{47}

**OPCAT**

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international agreement which builds on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It was adopted by the international community in 2002 and entered into force in 2006. The aim of OPCAT is to prevent the mistreatment of people in detention. Places of detention include prisons, youth detention centres, immigration detention centres, and other places where people are deprived of their liberty, such as mental health facilities and dementia units in aged care facilities.

The Australian Government signed OPCAT on 19 May 2009, but has not yet ratified the agreement. A proposal for ratifying the OPCAT is under consideration by the Australian Government. By signing OPCAT, Australia has agreed to allow inspections of places of detention by:

- an international body, the United Nations Subcommittee on the Prevention of Torture;
- a national independent authority, to be called a National Prevention Mechanism (NPM);

and

- local independent authorities based in each State and Territory, in association with the NPM.

Once the Australian Government ratifies OPCAT, the ACT Government will be required to participate in regular annual inspections or audits of places of detention including the AMC, Bimberi, Psychiatric Unit and other closed environments.

**APPLICATION TO WORK OF THE COMMISSION**

The ACT Human Rights Commissioner has the power to audit the impact of ACT laws on human rights under s.41 of the HR Act. The Commissioner has applied s.10 in a number of Human Rights Audits.

\textsuperscript{45} See Marion’s case, ibid.

\textsuperscript{46} As stated in the NSW Supreme Court case in relation to a 15-year old girl: ‘The justification for overriding her wishes is that on the evidence, her long term health and even her survival are seriously at risk unless steps are taken to give her the medical treatment she needs’. \textit{DoCS v Y} (Unreported, NSW Supreme Court, 30 June 1999) 644, at [103].

\textsuperscript{47} Ibid.
For example, in the 2005 Review of the then Quamby Youth Detention Centre, the Commission recommended that segregation as a disciplinary measure should be used as a last resort and for the shortest time possible, with intensive work by staff to facilitate the detainee’s return to the full range of association and activities as soon as possible.

In the 2007 Audit of Corrections, the Commissioner recommended that women cease being routinely strip searched when transported to and from correctional facilities, due to a lack of accommodation. In the 2011 Review of Youth Justice 2011, the Commission recommended that the Government consider more humane methods of strip searching young people at Bimberi, utilised in youth centres in the United Kingdom.

In other systematic work, the Commissioner has also written to various Government agencies reminding them of their duties in respect to s.10 in regards to issues such as reform of mental health laws, treatment of detainees in prison and use of restraints in closed environments.
What are the rights protected in the *Human Rights Act 2004*?

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 8</td>
<td>Recognition and equality before the law</td>
</tr>
<tr>
<td>Section 9</td>
<td>Right to life</td>
</tr>
<tr>
<td>Section 10(1)</td>
<td>Prohibition against torture and cruel, inhuman or degrading treatment</td>
</tr>
<tr>
<td>Section 10(2)</td>
<td>Right to consent to medical treatment</td>
</tr>
<tr>
<td>Section 11</td>
<td>Protection of the family and children</td>
</tr>
<tr>
<td>Section 12</td>
<td>Protection of privacy and reputation</td>
</tr>
<tr>
<td>Section 13</td>
<td>Freedom of movement</td>
</tr>
<tr>
<td>Section 14</td>
<td>Freedom of thought, conscience, religion and belief</td>
</tr>
<tr>
<td>Section 15</td>
<td>Freedom of peaceful assembly and association</td>
</tr>
<tr>
<td>Section 16</td>
<td>Freedom of expression</td>
</tr>
<tr>
<td>Section 17</td>
<td>Right to participate in public life</td>
</tr>
<tr>
<td>Section 18</td>
<td>Right to liberty and security of the person</td>
</tr>
<tr>
<td>Section 19</td>
<td>Right to humane treatment when deprived of liberty</td>
</tr>
<tr>
<td>Section 20</td>
<td>Rights of children in the criminal process</td>
</tr>
<tr>
<td>Section 21</td>
<td>Right to a fair trial</td>
</tr>
<tr>
<td>Section 22</td>
<td>Rights in criminal proceedings</td>
</tr>
<tr>
<td>Section 23</td>
<td>Right to compensation for wrongful conviction</td>
</tr>
<tr>
<td>Section 24</td>
<td>Protection against double jeopardy</td>
</tr>
<tr>
<td>Section 25</td>
<td>Protection against retrospective criminal laws</td>
</tr>
<tr>
<td>Section 26</td>
<td>Freedom from forced work</td>
</tr>
<tr>
<td>Section 27</td>
<td>Rights of minorities</td>
</tr>
</tbody>
</table>
WHERE TO GO FOR FURTHER INFORMATION

HUMAN RIGHTS COMMISSION
(02) 6205 2222
TTY: (02) 6205 1666
4th floor, 12 Moore Street, Civic
GPO Box 158
Canberra ACT 2601

www.hrc.act.gov.au
human.rights@act.gov.au

Legislation and Policy Branch
ACT Department of Justice and Community Safety
12 Moore Street
GPO Box 158
Canberra
ACT 2601
Tel: 6205 3310

USEFUL WEBSITES

♦ ACT Human Rights Commission
www.hrc.act.gov.au

♦ ACT Government’s human rights website

♦ ACT Human Rights Act Research Project
http://acthra.anu.edu.au/

♦ ACT Legislation Register

USEFUL PUBLICATIONS

♦ The Human Rights Act: A Plain English Guide

♦ The Human Rights Act 2004 - Guidelines for ACT Departments: Developing Legislation and Policy

♦ Human rights: human lives – a handbook for public authorities (United Kingdom)
http://www.justice.gov.uk/guidance/humanrights.htm