

Prisoners' treatment: Relevance of international standards

By Beth Midgley

According to the United Nations Human Rights Committee (HRC), persons deprived of their liberty should not be 'subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'¹

Despite this clear directive from the HRC, Australia has a disappointing track record when it comes to guaranteeing the human rights of persons detained in its prisons and immigration detention centres.

This article provides an overview of the right to humane treatment for people in detention under international law, as set out in Article 10 of the International Covenant on Civil and Political Rights (ICCPR)² and the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).³ It concludes with some brief comments on how this international law right is relevant and applicable to domestic law in Australia.

THE ICCPR AND THE RIGHTS OF PERSONS IN DETENTION

The ICCPR, which came into force in 1976, enshrines a number of fundamental human rights. Australia ratified the Covenant in 1980, and is one of 160 countries that are parties to the ICCPR.⁴

Although those in detention necessarily have some limitations on their rights (such as, for example, their right to freedom of movement), most rights protected by the ICCPR also apply to detained persons. A number of ICCPR rights are of particular relevance to persons in detention, including the right to be free from arbitrary detention (Article 9) and the right to a fair trial (Article 14). Importantly, Article 10 of the ICCPR specifically provides the right for persons in detention to be treated with humanity and dignity.

Article 10 provides:

Paragraph 1

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Paragraph 2

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

Paragraph 3

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.⁵

When Australia ratified the ICCPR in 1980, it maintained a reservation to Article 10 in relation to paragraph 2 and the second sentence of paragraph 3. Australia indicated that it would 'progressively realise' its obligation to segregate convicted and unconvicted prisoners, and that it would segregate adults and juveniles only where 'such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults'. It is both concerning and disappointing that Australia continues to maintain this reservation 27 years later.⁶

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This article focuses on the meaning and scope of Article 10, paragraph 1, a relatively short provision, but one that has been interpreted to give rise to a broad range of rights for persons in detention.

ARTICLE 10, PARAGRAPH 1 OF THE ICCPR, AND THE STANDARD MINIMUM RULES

Paragraph 1 of Article 10 applies to 'all persons deprived of their liberty', which includes prisoners (convicted and unconvicted) as well as involuntary patients in hospitals and persons in immigration detention centres.⁶

Paragraph 1 has been held to apply equally to state-run and privately-run institutions,⁷ which is important in the Australian context where the management of prison and detention facilities is often contracted out to private companies.

The HRC has adopted an expansive approach to interpreting paragraph 1, due in part at least to the use of the Standard Minimum Rules as an interpretative tool.

The Standard Minimum Rules contain prescriptive guidelines for the treatment of prisoners. A register of prisoners must be kept; different categories of prisoners should be segregated (taking into account sex, age, criminal record and the legal reasons for their detention); and prisoners must have access to medical services. The Rules also set out minimum standards for prisoners in relation to accommodation, personal hygiene, clothing and bedding, food, exercise, appropriate discipline and punishment, access to information and complaint mechanisms, and contact with the outside world, among other things.⁸

When the ICCPR was drafted in the 1950s, there was some debate about whether the Standard Minimum Rules should form part of Article 10, paragraph 1. Some state parties were of the view that:

'while the [Standard Minimum Rules] were not referred to in Article 10 they should be taken into account in the application of Article 10 by States parties to the Covenant and that nothing in the Article should prejudice the application of the Rules.'⁹

The HRC has confirmed in its General Comment on Article 10, and in jurisprudence, that the Standard Minimum Rules are relevant to the determination of the content of Article 10.¹⁰

With regard to the Standard Minimum Rules, the following types of treatment of detained persons have been held by the HRC to amount to a breach of Article 10(1):

- being held in incommunicado detention;¹¹
- being exposed to physical, psychological and verbal abuse from prison officers or other fellow detainees;¹²

- being denied adequate medical (including mental health) care and dental care;¹³
- being exposed to unsanitary living conditions;¹⁴
- being exposed to periods of isolation¹⁵ or overcrowding;¹⁶
- being provided with inadequate or insufficient food;¹⁷
- being denied adequate bedding;¹⁸
- being denied adequate exercise;¹⁹
- being detained without natural light;²⁰
- being denied educational opportunities or work;²¹ and
- being denied access to information and documents.²²

AUSTRALIA'S TRACK RECORD

These minimum standards are not always being met in Australian prisons.

In recent times, conditions in prisons and treatment of detained persons in Australia have been the subject of local and international scrutiny.

For example, a 2006 report by the Victorian Ombudsman and the Office of Police Integrity raised serious concerns about conditions in Victorian prisons.²³ In 2007, members of the judiciary in Victoria have made scathing comments about prison conditions, describing those in the Melbourne Custody Centre as an 'embarrassment'²⁴ and calling for action by the Executive 'as a matter of urgency'.²⁵

In the international arena, the HRC has found breaches by Australia of its obligation to ensure the right to humane treatment of detained persons in three recent cases.²⁶

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WHERE TO FROM HERE: CHALLENGES AND OPPORTUNITIES

Neither the ICCPR nor the Standard Minimum Rules give rise to directly enforceable rights under Australian law. However, there are a number of avenues by which these instruments can be recognised in, and applied under, Australian law.

Firstly, the ICCPR, as an international treaty ratified by Australia, can impact our law and standards in a number of ways, including by influencing the development of the common law,²⁷ as an aid to statutory interpretation where there is an ambiguity,²⁸ and as a relevant factor to take into consideration in the exercise of a discretion.²⁹

Secondly, courts have on a number of occasions been willing to consider non-treaty 'soft international law' instruments such as the Standard Minimum Rules as indicators of relevant values and standards.³⁰

Thirdly, in the ACT and Victoria, the *Human Rights Act* 2004 (ACT) and the *Charter of Rights and Responsibilities Act* 2006 (Vic) have enshrined a requirement that proposed legislation be scrutinised for compatibility with human rights; that existing laws be interpreted as far as possible in a way that is consistent with human rights; and, under the Victorian *Charter*, that public authorities discharge their responsibilities in a way that gives proper consideration to human rights.

These avenues provide mechanisms for the legal profession to seek to have the right to humane treatment in detention recognised in domestic law. This may in turn be an important step toward addressing the shortcomings in Australia's treatment of persons detained in its prisons and detention centres. ■

Notes: **1** HRC, 'General Comment No 21: Replaces General Comment 9 concerning humane treatment of persons deprived of liberty (Art 10)' (10 April 1992) [3]. **2** Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). **3** The Standard Minimum Rules were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955. They have since been endorsed and approved on numerous occasions by the UN Economic and Social Council. **4** For detailed commentary on the ICCPR, see Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights* (2004, 2nd ed). **5** This is discussed and the concern of the HRC is noted in *Cabal and Bertran v Australia*, HRC, Communication No 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (19 September 2003). In a recent case determined by the HRC, Australia chose not to rely on its reservation in relation to the segregation of adults and juveniles: *Brough v Australia*, HRC, Communication No 1184/2003, UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) [8.3]. **6** HRC, see above note 1 at [2]. **7** *Cabal and Bertran v Australia*, see above note 5 at [7.2]. **8** The Standard Minimum Rules are reproduced and commented on in Martin Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (2003) 175. **9** Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987) 233. **10** HRC, see above note 1 at [5]; *Mukong v Cameroon*, HRC, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) [9.3]. **11** See, for example, *Arutyunyan v Uzbekistan*, HRC, Communication No 917/2000, UN Doc CCPR/C/80/D/917/2000 (2004) [6.2] (the detainee's family tried unsuccessfully to obtain information about his detention from the Office of the Attorney-General). **12** See, for example, *Howell v Jamaica*, HRC, Communication No 798/1998, UN Doc CCPR/C/79/798/1998 (2003) [2.4], [2.5], [6.2] (prison warders beat prisoner and burnt his personal belongings and documents relating to his legal appeals);

Wilson v Philippines, HRC, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003) [7.3]. **13** See, for example, *Lobban v Jamaica*, HRC, Communication No 797/1998, UN Doc CCPR/C/80/D/797/1998 (2004) [8.1]-[8.2]; *Smirnova v Russian Federation*, HRC, Communication No 712/1996, UN Doc CCPR/C/81/D/712/1996 (2004) [2.6], [10.5]. **14** See, for example, *Gorji-Dinka v Cameroon*, HRC, Communication No 1145/2002, CCPR/C/83/D/1134/2002 (2005) [5.2]. **15** See, for example, *Evans v Trinidad and Tobago*, HRC, Communication No 908/2000, UN Doc CCPR/C/77/D/908/2000 (2003) [6.4] (prisoner detained in solitary confinement for five years). **16** See, for example, *Saidova v Tajikistan*, HRC, Communication No 964/2001, UN Doc CCPR/C/81/D/964/2001 (2004) [2.9], [6.4] (prisoner detained in a collective cell with 16 other detainees); *Cabal and Bertran v Australia*, see above note 5 at [8.3] (two people detained for an hour in a cage-like cell appropriate for one person). **17** See, for example, *Evans v Trinidad and Tobago*, see above note 15 at [6.4] (prisoner received wholly inadequate food which did not take into account his particular dietary requirements). **18** See, for example, *Gorji-Dinka v Cameroon*, see above note 14 at [5.2] (person detained without a bed or table). **19** See, for example, *Kurbanov v Tajikistan*, HRC, Communication No 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003) [3.7], [7.8] (prisoners allowed to leave their cell to walk for only half an hour per day). **20** See, for example, *Lobban v Jamaica*, see above note 13 at [8.1] (prisoner detained 23 hours per day in a cell without natural light). **21** *Ibid* [8.1] (prisoner not permitted to work or undertake educational programs). **22** General Comment 21 requests that states parties 'indicate in their Concluding Comments whether arrested or detained persons have access to such information and have effective legal means enabling them to ensure that those rules [regarding the treatment of detainees in accordance with Article 10] are respected' (at paragraph 7). See, further, *Minogue v Australia*, HRC, Communication No 954/2000, UN Doc CCPR/C/82/D/954/2000 (2004) (where the author claimed that he was restricted by the prison authorities during detention from accessing legal resource materials, computers and his lawyers. The HRC did not find that these claims had been substantiated because there was still scope to pursue remedial mechanisms in relation to these aspects of the complaint at the domestic level [5.3], [6.8]). **23** Ombudsman Victoria and the Office of Police Integrity, *Conditions for Persons in Custody* (2006). **24** Leo Shanahan, 'Judge slams "atrocious" holding cells', *The Age* (11 May 2007). **25** *R v White* [2007] VSC 142 (7 May 2007) (Bongiorno J). **26** *Madafferi v Australia*, HRC, Communication No 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) (breach arising from author's continued detention in Maribyrnong Immigration Detention Centre notwithstanding deterioration of mental health); *Brough v Australia*, see above note 5 (breach arising from conditions of detention at Parklea Correctional Centre, in NSW); *Cabal and Bertran v Australia*, see above note 5 (breach arising from conditions of detention at Victoria's Port Phillip Prison). **27** See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J; Mason CJ and McHugh J agreeing). **28** *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). **29** *Royal Women's Hospital v Medical Practitioner's Board of Victoria* [2006] VSCA 85 (20 April 2006) [72] (Maxwell P). See also Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108. **30** See, for example, *R v Taylor and O'Meally* [1958] VR 285 (per Smith J, dissenting) and, more recently, *MCT v McKinney* [2006] NTCA 10.

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