

RIGHT TO HUMANE TREATMENT IN DETENTION: HOW DO VICTORIAN PRISONS RATE?

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The knowledge that Cecilia and I have acquired about the right to humane treatment in detention is a result of the work that we have done on two particular cases with the Human Rights Law Resource Centre. In both of those cases, we undertook research into what international law has to say about the rights of prisoners and right to humane treatment in detention. In our presentation today we want to share with you some of what we have learnt.

I am going to start out by providing an overview of the right to humane treatment in detention at international law, and look at precisely what the right entails. Cecilia will discuss how international law rights can be related back to the domestic context and applied to and realised in Australia, Victoria and Victorian prisons.

PART 1 – RIGHT TO HUMANE TREATMENT AT INTERNATIONAL LAW

1. INTERNATIONAL LAW

Before discussing what international law has to say about the rights of persons in detention, I want to make a few preliminary comments about international human rights law.

The phrase "international human rights law" often gives rise to connotations of something that is foreign, distant, high level, maybe quite complex or detailed, and not necessarily easily related back to Australia.

But human rights are really just basic, universally accepted norms and standards about the way that all people should be treated and the types of rights and freedoms that all people should have. Principles of international human rights law should not be foreign, distant, far away, and they are not overly complex; rather they are the kinds of core standards and principles that I think most of us here would intuitively think should be realised and recognised in Australia.

Unfortunately this is not always the case, not least because at the federal level Australia does not have any comprehensive and authoritative statement of human rights, such as a Bill of Rights. As many of you will know the ACT and Victoria have taken some steps to alleviate this with the introduction of *Human Rights Act 2004* in the ACT and the *Charter of Human Rights and Responsibilities 2006* in Victoria. However, there is still not a developed human rights jurisprudence in Australia, and so we need to turn to international law to inform our own legal system about these basic human rights.

2. **ICCPR AND THE HUMAN RIGHTS COMMITTEE**

The international law treaty that contains an express right to humane treatment in detention is the International Covenant on Civil and Political Rights (**ICCPR**). The ICCPR entered into force in 1976 and today 116 countries are States party to the ICCPR. The ICCPR enshrines a large number of fundamental rights and, importantly, there is significant jurisprudence and commentary about the ICCPR rights that we can look to for assistance when trying to interpret and apply the ICCPR.

This jurisprudence has been developed by the Human Rights Committee (**HRC**), which is the treaty monitoring body of the ICCPR. The HRC keeps a track of how states party to the ICCPR are going in terms of are meeting their obligations under the ICCPR, and where they are falling down.

The HRC can also consider complaints (or communications) from individuals alleging violations of their ICCPR rights by State parties where the State party in question has signed on to the Optional Protocol to the ICCPR (a further treaty which authorises this complaints mechanism for the ICCPR).

Australia signed the ICCPR on 13 November 1980. It signed the Optional Protocol in 1991.

2.1 **ARTICLE 10 AND THE RIGHT TO HUMANE TREATMENT IN DETENTION**

The right to humane treatment for prisoners is enshrined under article 10 of the ICCPR.

Article 10 provides:

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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.

The meaning of paragraphs (2) and (3) and the rights afforded by those paragraphs is fairly clear on the face of the provisions. This presentation will focus on art 10(1) – the right to be treated with humanity and dignity in detention – and look at exactly what it means and what minimum standard it sets.

3. **WHO DOES ARTICLE 10 (1) APPLY TO?**

Article 10 paragraph 1 applies to all persons deprived of their liberty. This includes people in prison. It also extends to involuntary patients in hospitals and persons in immigration detention camps.

Further article 10 paragraph 1 applies not only to State-run detention institutions, but also to privately run facilities. This is particularly relevant to Australia, where many of our prisons are managed by private companies.

3.1 **WHAT DOES ARTICLE 10(1) MEAN?**

Decisions of the HRC have shown that the protection offered under article 10 paragraph 1 is wide-reaching. This has much to do with the fact that article 10 paragraph 1 is interpreted having regard to the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, which provide perhaps the most comprehensive commentary on the rights of prisoners, including setting minimum standards in relation to areas as diverse as

accommodation, personal hygiene, clothing, food, access to medical services, discipline and punishment and work.

By interpreting article 10 paragraph 1 of the ICCPR in line with the Standard Minimum Rules for the treatment of prisoners, the type of conditions of detention that have been held by the HRC to be in breach of article 10(1) have been found to include where a prisoner is:

- being held in incommunicado detention;
- being exposed to physical, psychological and verbal abuse from prison officers or other fellow detainees;
- being denied adequate medical (including mental health) care and dental care;
- being exposed to unsanitary food, water or living conditions, including unsanitary food or water;
- being exposed to extended periods of isolation or overcrowding;
- being provided with inadequate or insufficient food;
- being denied adequate bedding, food or exercise;
- being detained without natural light
- being denied educational opportunities; and
- being denied access to information and documents.

Looking at this list, it is clear that the rights and protections afforded to prisoners under article 10 paragraph are broad. So this relatively short and perhaps unclear provision of the ICCPR – all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person – has been interpreted and applied in a way that makes it a very powerful provision.

3.2 **BREACH OF ARTICLE 10(1) BY AUSTRALIA**

Now let's turn to look at how Australia is tracking in terms of meeting these obligations in the eyes of the HRC. Breaches of article 10 by Australia have been found in a number of instances. I will discuss briefly the two most recent cases that have concerned Australian prisons.

- (a) *Cabal and Bertran v Australia* (2003)

Mr Cabal and Mr Bertran were Mexican nationals detained in the high protection unit of Victoria's Port Philip Prison. They brought a complaint to the HRC in relation to their treatment while in Port Philip on a number of bases, including that their rights under article 10 paragraph 1 had been breached when they were detained for an hour in a "cage like" prison cell in Port Philip maximum security prison in Victoria. The cell was described as "about the size of a telephone booth, triangular in shape with two solid walls and a third made of metal with small round holes. There was a small built-in chair, but with two persons in it there was no room to sit."

The Australian government, in its response to the communication, attempted to justify this treatment on the basis that the prisoners had requested to be placed together.

The Committee concluded that a failure to have a cell adequate 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, and accordingly that article 10 paragraph 1 had been breached.

(b) *Brough v Australia* (2006)

In *Brough v Australia*, the HRC considered the position of Mr Brough, an Aboriginal Australian suffering from a mild mental disability.

Mr Brough was initially detained in a juvenile detention centre, but then transferred to an adult prison. There he was segregated from other inmates on the basis that his association with them constituted a threat to the personal safety of inmates and the security of the prison.

In the Communication, Mr Brough alleged a violation of article 10 paragraph on a number of different grounds, including his segregation and confinement for periods of up to 72 hours as punishment for his behaviour while in prison, the lack of appropriate heating, the removal of his blanket and clothing, and the use of camera surveillance and 24 hour exposure to artificial light.

Australia submitted that the author's treatment was, rather than being punitive, imposed on him to protect him from further self harm, and proportionate and consistent with articles 10.

But the Committee concluded that the treatment of Mr Brough violated article 10, stating that:

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 this status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of imprisonment was incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.

4. **CONCLUSION**

These two cases provide some support for the conclusion that Australia does not have a perfect record when it comes to prisoners rights. Certainly there is work to be done to ensure that the rights enshrined in article 10 paragraph 1 of the ICCPR are realised in Australia. One way of doing this is to draw them to the attention of the courts and judiciary and seek to have them recognised and enforced by Australian courts. Cecilia is going to discuss this in more detail.

PART 2 – REALISATION OF THE RIGHT TO HUMANE TREATMENT IN DETENTION IN THE DOMESTIC CONTEXT

5. **APPLICATION OF INTERNATIONAL LAW TO DOMESTIC LAW**

So how can all these principles assist Victorian prisoners?

It is a well settled principle of Australian law that international treaties are not directly enforceable in domestic law, unless they have been specifically enacted into statute.

In Australia, there are only two such instruments. All others, including the ICCPR, have, at best, been ratified, meaning that they have the formal sanction of the Australian government, but no legal clout.

6. **USES OF UNINCORPORATED TREATY RIGHTS**

But this doesn't leave unincorporated treaties completely without recourse in Australia: there are ways they can be invoked to influence the decisions of courts. For example:

- They have been used as a tool for statutory interpretation

- They have been referred to in the exercise of the sentencing discretion; and
- More generally, they've been shown to be influential in the development of the common law and as an indicator of contemporary values.

7. **CASE STUDIES**

So, keeping in mind everything we now know about the scope of art 10 and the role that international law can play in domestic law, let's have a look at how these principles might apply in practice. To do this, I'm going to take you through 2 cases that BDW were involved with last year. The first: Jack Thomas, the second, Michael Jones. I will consider the facts surrounding both first, and then apply the international law principles.

8. **APPLICATION TO THOMAS CASE**

Jack Thomas was the first Australian tried under the Federal Government's amended Criminal Code which created, amongst other things, new terror offences.

He was tried on 4 counts, found guilty on 2, and sentenced to 5 years imprisonment with 2 years non parole. Thomas appealed the decision on the grounds of both conviction and sentence.

Prior to the appeal, BDW was briefed by the HRLRC to prepare an "amicus curiae" application to the Court in relation to the possible human rights breaches arising under international law.

8.1 **Issues raised**

We were not short on material: this case raised a litany of human rights issues that unfortunately are beyond the scope of this presentation, except, of course, to the extent they apply to art 10.

Here our submissions focused on the failure of the prison system to afford Thomas adequate mental health care.

8.2 **Thomas' treatment in Australian prisons**

Let's have a look at the relevant facts.

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- Thomas was remanded in Port Phillip Prison in conditions which were described by a Supreme Court judge as "extremely restrictive relative to other remandees".
- Throughout his trial and subsequent to his sentence, Thomas was incarcerated in complete isolation at the Acacia High Security Unit at Barwon Prison.
- This involved being subjected to solitary confinement 23 hours per day, held in isolation from other prisoners at all times and allowed only minimal access to outside visitors. He was, in effect, treated as though he were amongst the 24 most dangerous prisoners in Victoria.
- Ultimately, and some would say unsurprisingly, Thomas suffered an emotional and mental collapse, which was attributed to the conditions in which he was being held at Barwon.
- Fortunately for Thomas (and perhaps bc of his high profile), the Court responded to his collapse by expediting his appeal and relocating him to Thomas Embling Hospital, a mental health facility for incarcerated persons. (Not all Victorian prisoners are so lucky.)

9. **MICHAEL JONES**

The second case we were involved with raised similar issues.

Michael Jones was a diagnosed chronic paranoid schizophrenic. In 2005, he was convicted on 4 counts of armed robbery, assault and kidnapping.

During the trial, the sentencing judge readily acknowledged the extent of the appellant's mental illness, finding a nexus between his mental condition and the commission of the offences. He acknowledged that Jones would be best suited to detention in a mental health facility such as Thomas Embling Hospital, but that he could "say that 'til the cows come home"; the lack of "money, facility and appropriate places to detain people who are sick" meant that Jones would still "do his time in mainstream prison".

Jones was sentenced to 6 years and 9 months prison, with a non-parole period of 4 years.

His legal representatives appealed his sentence on the ground of manifest excess. Specifically, that the sentencing judge had, in the exercise of the sentencing discretion,

placed insufficient weight on Jones' mental illness and the consequent burden that this would place on his imprisonment.

This burden was made apparent very quickly: Jones was frequently moved between prisons which negatively affected the continuity of his psychiatric treatment; he had ongoing difficulty obtaining adequate medication, and that the symptoms of his schizophrenia were regularly "managed" by placing him in 23-hour solitary confinement for up to 8 days at a time.

At the appeal, BDW and HRLRC assisted counsel for the appellant to prepare submissions that incorporated international law arguments, particularly to the extent that these bore upon the sentencing discretion.

9.1 Denial of adequate medical attention

So what arguments did we make?

Beth gave you an overview of the scope of art 10(1). We know that:

- Persons deprived of their liberty may not be "subjected to any hardship other than that resulting from the deprivation of liberty"
- We have seen that the HRC has made findings against States for violations against art 10(1) in circumstances where prisoners were
 - exposed to extended periods of isolation
 - denied adequate medical attention
- The *UN Standard Minimum Rules for the Treatment of Prisoners*, which provides a benchmark for the interpretation of art 10, states further that "punishment by close confinement shall never be inflicted unless the medical officer has examined the prisoner and certified that he is fit to sustain it".

In both the Thomas and Jones cases, we submitted that all these principles can, and should, be taken into account in a court's sentencing discretion because:

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1. international law supports the position at common law that a person imprisoned for committing a criminal offence should not suffer punishment over and above the deprivation of liberty which imprisonment entails;
2. unlike the common law, which does not expressly set standards of mental health care, international law does, setting minimum standards of care and stating that a failure to meet these should be treated as a form of punishment over and above the deprivation of liberty; and
3. international law provides that where such punishment occurs, the prisoner should be entitled to an "effective remedy" (pursuant to article 2(3) of the ICCPR), which could, amongst other things, take the form of a reduced sentence.

10. **OUTCOMES**

Unfortunately the Court of Appeal held that international law did not have a place in the determination of either of the appeals, essentially because they said that the reference to international law treaties or standards did not "enlarge the common law".

11. **LESSONS?**

These were, of course, not the outcomes we had hoped for. We were left wondering where this leaves practitioners and others who see the value in bringing IHRL arguments before the courts.

But we would suggest that it's not yet time to give up hope. It's a long road, and in the scheme of things we've only traveled a short way. This isn't to say there isn't much more that government and our courts could have done to date to facilitate the incorporation of IL into domestic law, but still, change is afoot.

Here are some of the reasons we are hopeful:

1. Last year, Justice Maxwell, President of the Court of Appeal, made an outspoken call to practitioners to "develop human rights-based arguments where relevant to a question in the proceeding", including by drawing on IHRL, and to "work together with judges" to "develop a common expertise".

2. In both the Jones and the Thomas decisions, while our submissions on international human rights law may not have been determinative, the submissions were before the court. That's 2 more cases, and 5 more judges, who have had to turn their minds to the scope and relevance of IHRL.
3. The judiciary is becoming increasingly outspoken about the conditions in Victorian prisons, particularly re the lack of access to mental health facilities.

Only last week, Bongiorno J of the Supreme Court, when sentencing a man found not guilty of murder on the grounds of mental impairment, was scathing about the fact that he would be forced to send him to mainstream prison because of bed shortages at Thomas Embling. His Honour said that: "this state of affairs is unsatisfactory and should be looked at as a matter of urgency. It is not the first time this situation has arisen and it ought to be remedied as soon as possible."

It could be said that the more the judiciary turn their minds to and are vocal about conditions in prisons, the more relevant the well established principles at international law will become.

4. And, perhaps most exciting of all is the recent enactment of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. This Charter of Rights, which will become enforceable from 1 January next year, is modelled closely on the ICCPR, including section 22 which closely mirrors art 10. It goes without saying that having these rights enshrined in statute will provide a welcome avenue for further and more effective action against future human rights breaches.

So – how do Victorian prisons rate in the context of international law? Let's just say we're getting there. And whenever a dialogue between the Court and practitioners is taking place, there is hope yet that international human rights will take their rightful place in domestic law.