

Complaint Procedures under Article 22 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

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A significant implication of the Commonwealth's implementation of Recommendation 333 of the *Final Report of the Royal Commission into Aboriginal Deaths in Custody* is that prisoners in Australian gaols now have the right to lodge a complaint with the United Nations if they are subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Recommendation 333 stated that:

... while noting that in no case did the Commission find a breach of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, it is recommended that the Commonwealth Government should make a declaration under Article 22 of the Convention ... in order to provide a right of individual petition to the *Committee Against Torture*. ...¹

The Commonwealth has fully complied with this Recommendation and on 28 January 1993,² Australia lodged a declaration with the United Nations accepting the optional complaint procedures under Articles 21 and 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('the Convention').³ The declaration recognised the competence of the *Committee Against Torture* ('the Committee') to receive and consider communications from individuals within the jurisdiction of Australian law who claim to have had their rights as set out in the Convention violated.

The Convention came into force in Australia on 7 September 1989. It has four procedures available for implementation, namely, reporting (Article 19), inquiry

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1 *Implementation of the Commonwealth Government's Response to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody: First Annual Report 1992-93 Volume 2* (1993) AGPS Canberra, 430.

2 *Declaration by Australia Recognising the Competence of the Committee Against Torture Under Article 21 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* United Nations Document C.N.57.1993-TREATIES-1 (Depository Notification) 6 May 1993.

3 [1989] ATS 21. The text of this Convention appears in a schedule to the *Crimes (Torture) Act 1988* (Cth).

(Article 20), State versus State complaints (Article 21),⁴ and individual petition to the Committee (Article 22).

The Committee is established under Article 17(1) of the Convention, and consists of 10 experts of "high moral standing" who are elected by State parties to the Convention (Article 17(2)). The Committee normally holds two regular sessions each year at the United Nations Office in Geneva, Switzerland (Rules 2 and 4).⁵ It will consider a communication if the matter has not been examined by another procedure for international investigation or settlement (Article 22(5)(a) and Rule 107(1)(e)),⁶ or if the complainant has exhausted all domestic remedies. The latter rule does not apply where the application of remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention (Article 22(5)(b) and Rule 107(1)(f)).

The views of the Committee, or any of the other Committees established under the auspices of the United Nations to consider complaints from individuals alleging a violation of their human rights, are not binding. However, The Committees' views do however have considerable moral force, because recalcitrant States are likely to come under considerable international and domestic pressure to make their laws and practices comply with the Committees' views.⁷ The High Court has confirmed the use of the external affairs powers under Section 51(xxix) of the Constitution to support legislation that implements recommendations made by international bodies.⁸ For example, in *R v Burgess; ex parte Henry*,⁹ Evatt and McTiernan JJ speculated that the power could extend to legislation for:

... the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.¹⁰

It should be noted that these comments were made prior to the formation of the United Nations. Nevertheless, in *Commonwealth v Tasmania* (*Tasmanian Dams*

4 Part XVII of the Committee's *Rules of Procedure* (Rules 86 to 95) deal with the procedures for communications received under Article 21 whereby State parties agree to accept complaints lodged by other State parties for violations of the Convention.

5 All further reference to Rules are from the *Rules of Procedure of the Committee Against Torture*, United Nations Document, CAT/C/2/Rev.1, 29 August 1989.

6 For example, the *First Optional Protocol to the International Convention on Civil and Political and Rights* [1991] ATS 39 also permits complaints to the United Nations *Human Rights Committee* for a breach of Article 7 of the *International Covenant on Civil and Political Rights* [1980] ATS 23 which guarantees that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment..."

7 See also N Lofgren 'Complaint Procedures Under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination' (1994) 3 (67) *Aboriginal Law Bulletin* 11-13 and C Chinkin 'Using the Optional Protocol: The Practical Issues' (1993) 3 (64) *Aboriginal Law Bulletin* 6-9.

8 For a comprehensive overview of the extent of the external affairs power see D Rothwell 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits' (1993) 15 *Adelaide Law Review* 209.

9 (1936) 55 CLR 608.

10 (1936) 55 CLR 608 at 687.

Case'),¹¹ Murphy J suggested that the external affairs power extends to the implementation of "... any recommendation or request of the United Nations organisation or [its] subsidiary organisations ...",¹² and Deane J agreed that "... compliance with recommendations of international agencies ..." would fall within the conduct of Australia's external affairs.¹³

Obligations Specified in the Convention

The term "torture" is defined in Article 1 as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition is without prejudice to any international instrument, or national legislation which may contain a provision of wider application (Article 1(2)), and neither exceptional circumstances (Article 2(2)), or the order from a superior officer may be used to justify an act of torture (Article 1(3)).

Article 4(1) imposes an obligation on each State party to ensure that all acts of torture, attempts to commit torture, and complicity and participation in torture are offences under the criminal law. Article 14 obliges each State party to ensure that the victims of torture are entitled to obtain redress and have an enforceable right to fair and adequate compensation, including the means for full rehabilitation, and in the event that the victim dies, his or her dependants are entitled to compensation.

The offence of torture has not been incorporated into Australian legislation, with the exception of the *Crimes (Torture) Act 1988* (Cth), and the *Crimes Act 1900* (NSW). It should be noted in passing, that under Australian common law an international treaty to which Australia is a party does not give rise to rights under domestic law in the absence of legislation carrying the treaty into effect.¹⁴ In this context, the aforementioned statutes merely incorporate the definition contained in Article 1 of the Convention, for application in the extra-territorial jurisdiction of the Commonwealth, and the Australian Capital Territory, and do not provide statutory protection of the other obligations mentioned in the Convention.

11 (1983) 158 CLR 1.

12 (1983) 158 CLR 1 at 171.

13 (1983) 158 CLR 1 at 258-259.

14 *Simsek v Macphree* (1982) 148 CLR 636; *Dietrich v The Queen* (1992) 177 CLR 292; *Coe v The Commonwealth* (1993) 118 ALR 193.

Cruel, Inhuman, or Degrading Treatment or Punishment

Article 16 imposes a specific obligation on each State party "... to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Article 1). However, the Convention does not oblige State parties to ensure that such acts are offences under the criminal law, and the associated question of compensation for individuals and their dependants is also not addressed.

Nevertheless, the obligations of this provision have profound implications for prisoners' rights in Australia. For example, no Australian jurisdiction lets prisoners possess condoms as an HIV/AIDS preventative measure. This matter was recently the subject of a Supreme Court action on behalf of over 50 unnamed male prisoners. The petition was lodged on their behalf by the New South Wales Aboriginal Legal Service. Mr Bernard Gross QC, counsel for the plaintiffs, argued before Dunford J that the court had a responsibility to correct any conditions "that imposed intolerable conditions such as cruel or unusual punishment on the prisoners".¹⁵ In reply, the Solicitor-General of New South Wales, Mr Keith Mason QC stated that these arguments should be determined by political rather than judicial processes.¹⁶ It is submitted that given the profound health risks incumbent upon those in incarceration, the denial of HIV/AIDS preventative measures violates Australia's obligations under Article 16 of the Convention. This is perhaps a fit situation where a complaint may be lodged with the Committee for a violation of the Convention, should the courts uphold the Government's position.

Procedures Under Article 22

Part XIX of the Committee's *Rules of Procedure* specifically deal with the procedures for consideration that apply to communications received under Article 22 of the Convention. The Committee's method of work allow for decisions by consensus, but in the event that this is not possible a majority opinion may be given (Rule 50). The Committee cannot receive any communication if it concerns a State which has not made a declaration under Article 22(1) of the Convention (Rule 97(3)). All meetings of the Committee considering communications under Article 22 of the Convention are closed (Rule 101(1) and Article 22(6)).

Admissibility

The Committee is obliged as soon as possible after receiving a communication, to determine its admissibility under Article 22 of the Convention (Rule 105(1)). The Committee may also decide to join the consideration of the

15 J Scott 'Inmates Seek Condom Rights' *The Weekend Australian* 11-12 June 1994, 10.

16 For further details see G Tremelling 'Prisoners Sue for the Right to Condoms' (1994) 5(1) *HIV/AIDS Legal Link* 1, 11-12; G Bloom 'Condoms Case Update' (1994) 5(2) *HIV/AIDS Legal Link* 12.

question of admissibility of a communication with a consideration of the communication on its merits (Rule 105(4)). Amongst the conditions for admissibility of a communication which the Committee is obliged to ascertain, are:

- That the communication is not anonymous, and that it emanates from a person within the jurisdiction of a State which has recognised the competence of the Committee to consider communications under Article 22 of the Convention (Rule 107(1)(a) and Article 22(1)). This means that a complaint may be lodged for violations of the Convention which occurred after 28 January 1993, which is the date that Australia made a declaration under Article 22 of the Convention.
- That the individual claims to be a victim of a violation by a State party (that is, Australia) of a provision of the Convention (Rule 107(1)(b)).
- The communication must also be submitted by the individual him or herself or his or her relatives or designated representatives, or by others on behalf of an alleged victim if it appears that the victim is unable to submit the communication, and, the complainant justifies acting on the victim's behalf (Rule 107(1)(b)).
- The communication does not abuse the right to submit a communication under Article 22 of the Convention (Rule 107(1)(c)). Under Article 22(2) of the Convention, the Committee will consider inadmissible any communication which is anonymous or which is an abuse of the right of submission provided by the Convention.
- That the communication is not incompatible with the provisions of the Convention (Rule 107(1)(d) and Article 22(2)).
- That the same matter is not being considered under another procedure of international investigation or settlement (Rule 107(1)(e) and Article 22(5)(a)).
- That the individual has exhausted all domestic remedies. Amongst the broad range of remedies which may need to be examined before communicating with the Committee are the parliaments, the judiciary, anti-discrimination tribunals established under Commonwealth and State jurisdiction, the Ombudsmen, the Administrative Appeals Tribunals and similar institutions, the Commonwealth Constitution, and the common law.¹⁷ However, this rule does not apply where the application of remedies is unreasonably prolonged or is unlikely to bring effective relief to the victim of a violation of the Convention (Rule 107(1)(f) and Article 22(5)(b)).

17 See P Thompson 'Using the Optional Protocol: The Practical Issues' published in Centre for Comparative Constitutional Studies *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992) University of Melbourne Law School 30.

The Committee may also request from the State party concerned, or the complainant, additional written information, clarification or observations which are relevant to the question of admissibility of the communication (Rule 108(1)). Any such requests addressed to State parties should be accompanied by the text of the communication (Rule 108(2)). It follows that a communication cannot be declared admissible unless the State party concerned has received the text of the communication, and been given an opportunity to provide information or observations relating to admissibility, including information relating to the exhaustion of domestic remedies (Rule 108(3)).

The Committee may also impose a time-limit for the submission of additional information or clarification, in order to avoid undue delay (Rule 108(5)). If the State party concerned, or the complainant, does not respect this time-limit, the Committee may decide to consider the admissibility of the communication in the light of all available information (Rule 108(6)). Should the State party concerned dispute that the complainant has exhausted all available domestic remedies, the State party must give the Committee details of effective remedies available to alleged victims of the particular circumstances of the case, in accordance with Article 22(5)(b) of the Convention (Rule 108(7)).

Within the time-limit imposed by the Committee the State party or the complainant also has the opportunity to comment on any submission received from the opposite party, and the non-receipt of any comments, as a rule, will not delay the consideration of the admissibility of the communication (Rule 108(8)). During the course of considering the question of admissibility, the Committee may also request the State party to take steps to avoid possible irreparable damage to those who claim to be victims of the alleged violation, and such requests do not imply that a decision has been reached on the question of admissibility (Rule 108(9)). The Committee is also obliged to inform the complainant as soon as possible of its decision (Rule 109(1)).

Inadmissible Communications and Appeal Procedures

Any communication which has been declared inadmissible under Article 22(5) of the Convention may be reviewed at a later date on receipt of a written request by, or on behalf of the complainant (Rule 109(2)). Such written requests must contain documentary evidence that the reasons for inadmissibility under Article 22(5) of the Convention no longer apply (Rule 109(2)). When the Committee has ruled that a communication is inadmissible, it will forward a copy of the text of its decision, together with any submissions received from the complainant (which have not already been forwarded to the State party concerned) (Rule 110(1)), and the Committee will also inform the complainant of its decision (Rule 110(1)).

The Committee's Decisions

Within six months of the decision, the State party concerned is obliged to submit to the Committee a written explanation clarifying the case under consideration, and the remedy, if any, that has been taken (Rule 110(2)). The Committee may also inform the State party concerned, of the desirability, of taking interim measures to avoid possible irreparable damage to the person who claims to be a victim of the alleged violation (Rule 110(3)). The Committee is also obliged to inform the State party concerned that such interim measures do not pre-judge its final views on the merits of the communication (Rule 110(3)). Any explanation or statements submitted by a State party are also forwarded to the complainant, who may submit any additional written information or observations within a time-limit prescribed by the Committee (Rule 110(4)).

Each party may also be invited to be present at a specified closed meeting of the Committee, in order to provide further clarifications, or to answer questions on the merits of the communication (Rule 110(5)).

The Committee may also revoke its decision on the admissibility of a communication in light of explanations or statements submitted by the State party concerned (Rule 110(6)). However, before any such revocation occurs, the explanations or statements concerned must be forwarded to the complainant to allow for submission of additional information or observations within a time-limit set by the Committee (Rule 110(6)).

Admissible communications are considered by the Committee in the light of all information made available to it by the complainant and the State party concerned (Rule 111(1)). The Committee also has the opportunity to have access to "any documentation that may assist the disposal of the case from United Nations bodies or specialised agencies" (Rule 111(2)). After final consideration of a communication the Committee formulates its views, and forwards a written copy of it to the complainant and the State party concerned (Rule 111(3) and Article 22(7)). Individual members of the Committee also have the opportunity to append their own dissenting views to the Committee's majority view (Rule 111(4)). The State party concerned is invited to inform the Committee, in due course, of the action it has taken to conform with the Committee's views (Rule 111(5)). A summary of the Committee's views are also included in an annual report of communications examined, along with a summary of any explanations or statements made by the State parties concerned (Rule 112(1)).

Conclusion

Prisoners and their advocates would be well advised to take account of the optional complaint procedures to the Committee as a means of promoting the human rights of all those incarcerated in Australian institutions. One can only speculate as to how broad "cruel, inhuman, or degrading treatment or punishment" is in the context of prisoners' rights. Nevertheless, the possibility of

international attention being drawn to Australia's human rights violations are likely to prompt all Australian governments to address breaches of the impressive range of human rights instruments that Australia has ratified.