# FINDING RIGHTS IN THE 'WRONGS' OF OUR LAW

## Bringing international law home

JOHN TOBIN

International law requires that the detention of any person, citizen or non citizen, must not be unlawful or arbitrary.[1] It also demands that all people deprived of liberty, shall have a right to judicial review[2] and to be treated with humanity and with respect for the inherent dignity of the human person,[3] including protection against torture, cruel, inhuman or degrading treatment or punishment.[4] With respect to the detention of children, it further requires that detention be a 'measure of last resort' and for the 'shortest appropriate period of time'.[5] In contrast, the *Migration Act 1958* (Cth) demands the mandatory detention of all unlawful non citizens, irrespective of whether they are children or adults, without any right to review and with the prospect of indefinite detention.[6] Moreover, the High Court of Australia has to date rejected each challenge to the various manifestations of this regime,[7] notwithstanding its 'tragic'[8] outcomes and despite condemnation by the United Nations Human Rights Committee that Australia is in violation of its obligations under international law.[9]

The explanation for this inconsistency is quite simple. International human rights treaties ratified by the Executive are not enforceable within Australia's domestic legal system unless they are incorporated by way of legislation into domestic law.[10] This is not to say that international law is completely irrelevant. It can still be used to assist in the development of the common law,[11] the resolution of ambiguities within legislation[12] and give rise to the principle of legitimate expectation in administrative decision-making.[13] But in the context of the *Migration Act*, none of these windows of opportunity have to date been held to be available by the High Court. Thus, the parallel worlds of domestic and international law refuse to bleed into one and it appears that never the twain shall meet.

This article seeks to challenge this paradigm and encourage practitioners to re-read the relationship between international and domestic law and, in doing so, discover windows of opportunity within the common law and legislation to find rights in the 'wrongs' of our current legal system and bring international law home.

### Home grown values

Part of the reluctance to embrace international human rights principles within Australia appears to stem from a perception that it is the product of a foreign process and is imbued with values that are not necessarily compatible with the Australian experience. As a consequence, its relevance is questioned and a sense of self-sufficiency is promoted within domestic legal discourse. Such an approach suffers from two significant deficiencies.

First, much of the genealogy of international human rights law can be traced to principles and values that emerged and developed within the common law principles that underlie the liberal democratic state which we enjoy today.[14] Protection against arbitrary detention and the inviolability of the individual are fundamental principles that were not 'discovered' during the drafting of international human rights instruments. Rather, these instruments merely reflect and affirm at the international level the importance of such fundamental principles. Indeed, much of the opposition to the idea of international human rights from the realm of cultural relativism is based on the assertion that they represent not universal values but the Western values that underpin Australia's legal system.

The second problem with the current approach to the treatment of international standards within Australia is the failure to acknowledge and engage with a global judicial dialogue that is increasingly making recourse to the language of rights and its underlying values. Whether it be in the South African Constitutional Court[15] or even the United States Supreme Court,[16] advocates are relying on international human rights standards, as well as the jurisprudence of regional human rights bodies, such as the European Court of Human Rights and the Inter-American Commission and Court on Human Rights, and domestic courts, whether they be in Namibia or Fiji.[17] More importantly, the judges who are listening to their submissions are often prepared to accept them. The failure to recognise this emerging global dialogue deprives advocates in Australia of the opportunity to make use of such judicial developments to strengthen the arguments advanced on behalf of their clients. Moreover, it ultimately renders the Australian legal landscape increasingly barren and detached from evolving international developments.[18]

### Finding the hook

Of course, unlike so many other jurisdictions around the world, Australia has no legislative or constitutional Bill of Rights that would provide the obvious point of entry for the application of international, regional and domestic human rights jurisprudence. But while this presents an obstacle for Australian legal practitioners,

REFERENCES

1. *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 9(1) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

2. Ibid art 9(4).

3. Ibid art 10(1).

4. Ibid art 7.

5. *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 43, article 37(b) (entered into force 2 September 1990).

6. *Migration Act 1958* (Cth) ss 189 and 196.

7. See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130; *Al-Kateb v Godwin* (2004) 208 ALR 124 ('*Al-Kateb*'); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 ('*Behrooz*'); *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 210 ALR 369 ('*Re Woolley*').

8. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 208 ALR 201, [4] (McHugh J); Al-Kateb (2004) 208 ALR 124, [31] (McHugh J).

9. *A v Australia* CCPR/C/59/D/560/1993; *C v Australia* CCPR/C/76/D/900/1999; *Baban v Australia* CCPR/C/78/D/1014/2001; *Bakhtiyari v Australia* CCPR/C/79/D/1069/2002.

10. See, eg, *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, 224–5.

11. See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v R* (1992) 177 CLR 292.

12. See, eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

13. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

14. See, eg, *Al Kateb* (2004) 208 ALR 124, [19] where Gleeson CJ noted that personal liberty is the most basic of common law rights and freedoms; *R v Home Secretary, ex parte Daly* [2001] 3 All ER 433, 447 where Lord Cooke explained that international human rights law recognises, rather than creates, rights that are 'inherent and fundamental to democratic civilised society'.

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it is not an insurmountable hurdle. The real challenge is to find the 'hook' by which to legitimise recourse to this discourse. This requires the discovery of the potential for human rights law to assist in the development of common law principles and the resolution of ambiguity within legislation. Take, for example, the concept of reasonableness which is at the core of so many common law principles and legislative standards. In undertaking any assessment of what is considered 'reasonable', there is nothing to prevent lawyers and courts from making recourse to relevant standards which have been agreed by the international community of states, especially when they have been accepted by Australia on its ratification of the relevant treaty.

In the search for a 'hook', careful consideration must also be given to the decisions of judges, as their comments may well provide the opportunity to explore the application of human rights standards in ways which were never anticipated. One case which holds the potential to illustrate this principle is the decision of the High Court in *Re Woolley*.[19]

## Setting limits on treatment of refugees

In October 2004, the High Court in *Behrooz* held that irrespective of whether the conditions of detention were harsh or inhumane, the detention of an 'alien' would not be rendered unlawful, so as to offer a defence to any charge of unlawful escape.[20] In some respects, this decision was not unexpected as courts are loathe to allow individuals to undertake any measure of self-help even if it involves an escape from harsh or inhumane conditions of detention. The legality of detention is prima facie an issue to be determined by the courts and not an individual subject to detention. But on the same day, the High Court also handed down its decision in *Al Kateb*, where in a 4:3 majority decision, it held that the indefinite detention of asylum seekers is lawful because its purpose remained administrative rather than punitive.[21] McHugh J appeared to sound the death knoll for those who harboured thoughts of finding any further implied rights in the Australian *Constitution* when he declared that:

> It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the *Constitution*.[22]

On its face, the outcome in *Re Woolley*, where the High Court held unanimously that children, like adults, could be detained under the *Migration Act*, did nothing to disrupt this position. But obiter from some of the judges of the High Court may well provide the 'hook' on which to launch another constitutional challenge with respect to the treatment of asylum seekers. McHugh J noted that 'if a law that authorises the imprisonment of an asylum seeker ... has a purpose of subjecting the detainee to cruel and inhuman punishment, it would go beyond what was necessary to achieve its non-punitive object'.[23] Gummow J similarly commented that:

> ... if it could be demonstrated that a federal law authorised or mandated detention of those individuals seeking their release from what in their case were harsh, inhumane and degrading conditions, this would indicate that the purpose of the detention went beyond the range of purposes that are permissible, consistently with Ch III.[24]

Kirby J also flagged the possibility that there may be constraints on the legislative power of the Federal Parliament with respect to the treatment and detention of child refugees. He too found that detention of children was prima facie constitutional, 'unless there was some exceptional feature of the detention of the applicants'[25] and added that 'in some cases of proved harsh conditions (unsanitary, violent, inhumane or unhealthy) or inordinately prolonged duration, the conversion of conduct from a classification as "detention" to classification as "punishment" might be upheld'.[26]

There is no express constitutional foundation for any of these comments which refer to harsh, inhumane or cruel conditions and it remains an unresolved question as to the basis on which they were made. They do, however, tend to demonstrate judicial uneasiness at the prospect of unconstrained legislative and executive power with respect to the treatment of 'aliens'. They also invite a consideration as to whether the comments of McHugh and Gummow JJ could be taken to imply a right to protection from 'cruel and unusual punishment' or 'harsh, inhuman and degrading conditions'. Moreover, while Kirby J's comments appear to be a personal, rather than legally recognised, collection of restrictive terms, they are underlined by the notion that the treatment of refugees cannot be 'harsh' or 'inhumane'.

Gleeson CJ in *Re Woolley* also hinted that the conditions of detention may render it unconstitutional when he stated:

15. See, eg, *State v Makwanyane* (1995) (3) SA 391 (CC).

16. See, eg, *Atkins v Virginia*, 536 US (2002) 1; *Roper v Simmons*, 543 US 1 (2005).

17. See <www.interights.org> which provides a database of significant human rights decisions from domestic Commonwealth courts and from tribunals applying international human rights law such as the African Commission on Human and Peoples' Rights, the European Court of Human Rights.

18. This is not to say that Australian lawyers do not make use of comparative case law in their submissions, for clearly they do. However, as a general observation, there is a reluctance to refer to international human rights jurisprudence. Moreover, the reliance on comparative case law still tends to favour traditional Anglo common law jurisdictions such as the United Kingdom and United States and there is little evidence of attempts to look for relevant precedents beyond these traditional sources.

19. (2004) 210 ALR 369.

20. *Behrooz* (2004) 208 ALR 271.

21. *Al Kateb* (2004) 20 ALR 124.

22. Ibid [74].

23. Ibid [78].

24. *Re Woolley* (2004) 210 ALR 369, [167].

25. Ibid [183]. See also *Behrooz* (2004) 208 ALR 271, [122].

26. *Re Woolley* (2004) 210 ALR 369, [186].

> If the possibility of the severity of the operation of mandatory detention in a particular case or class of case altered the character of the power of detention from an incident of executive power to extra judicial power and unconstitutional punishment, then the system of mandatory detention would have been found unconstitutional.[27]

But he seemed unable to define with any precision when this would be the case. Instead, he explained that 'it is impossible to identify the criterion by which the severity of application would be measured'.[28] The identification of such a criterion is far from 'impossible' and it is suggested that the prohibition against torture, cruel, inhuman and degrading treatment provides a clear basis on which to assess the severity of the conditions of detention.

## Is there an implied constitutional protection?

The decision of the High Court in *Behrooz* tends to suggest that the impact of the conditions of detention will have no effect on the legality of the detention. In contrast, the comments of Gleeson CJ and McHugh, Gummow and Kirby JJ in *Re Woolley,* all raise the prospect of there being limitations on the conditions of detention or the means to secure detention. But neither they, nor the counsel in the case, undertook any assessment as to whether on the facts of the case, the treatment of the asylum seekers was indeed cruel and unusual or harsh and inhumane.

Although admittedly ambitious, it is suggested that this issue remains to be decided by the High Court and provides one potential 'hook' by which to explore the possibility that there is some implied limitation on the power of federal government in the exercise of its powers with respect to aliens under s 51 of the *Constitution*. Until now, there has been no direct attempt to challenge any aspect of the mandatory detention regime, including its conditions on this basis. Such an approach is unsurprising given that the High Court has taken the view that the question of whether 'legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law is another question which we need not explore'.[29]

The scope of the powers of the Commonwealth Parliament have therefore been considered largely unfettered in relation to the aliens power itself or the introductory text of s 51 which provides that such powers are for the 'peace, order and good government' of the Commonwealth. As a result, advocates have been forced to rest claims with respect to the alleged unconstitutionality of the regime on the basis that it is a form of extra judicial punishment and thus inconsistent with the separation of powers doctrine enshrined under Chapter III of the *Constitution*. Such claims have to date all failed. But even if they had been successful, it is important to recognise that the Commonwealth would not necessarily have been prevented from implementing a system of mandatory and potentially indefinite detention. The characterisation of the detention as 'punishment' would merely have prevented the Commonwealth from adopting an 'administrative' scheme of detention. But in the absence of any other implied constitutional restriction, the comments of McHugh J in *Al Kateb* suggest that the Federal Parliament would still have been free to make it a criminal offence for any person to arrive or remain in Australia unlawfully and impose a mandatory sentence of detention of such a person.[30]

Thus, in light of the failure of previous Chapter III claims and their apparent inherent limitation even if successful, it is suggested that now may be an opportune time to explore the broader question of whether there are any further implied constitutional constraints on the exercise of parliamentary, executive and indeed judicial power with respect to aliens. It is undoubtedly an ambitious question to ask, but as McHugh J himself said in *Al Kateb:*

> ... the words of a *Constitution* consist of more than letters and spaces. They contain propositions. And, because of political, social or economic developments inside and outside Australia, later generations may deduce propositions from the words of the *Constitution* that earlier generations did not perceive.[31]

It is therefore suggested that, in light of this view and in the search for a right that is 'deeply rooted' in our democratic system and which best encapsulates and reflects the concerns of McHugh, Gummow and Kirby JJ and is capable of providing the criterion that Gleeson CJ thought impossible to define, the protection against torture and cruel, inhuman and degrading treatment is the most appropriate. This formulation (and equivalent expressions) is recognised in countless international, regional and domestic legal instruments. More importantly, it provides the contemporary expression of the original prohibition against 'cruel and unusual punishment' to which McHugh J referred and which traces its origins to the *English Declaration of Rights 1689*.[32]

An application drawing on these principles would require the High Court to decide whether the federal government in the exercise of its powers under s 51 of the *Constitution* has the power to subject children to treatment which amounts to torture, or cruel, inhuman or degrading treatment or punishment either administratively or at the direction of the courts when they have been found to be an unlawful non-citizen. If the High Court were to find that no such power exists, this would then require an examination of the facts of the particular case to determine whether the treatment complained of amounted to torture, or cruel, inhuman or degrading treatment. A precursor to such a discussion, however, would require a determination of the appropriate tests for each of these standards.

## How can international law help?

It is at this point that recourse to international, regional and domestic human rights jurisprudence is particularly helpful. Such an approach displaces the tendency towards self-sufficiency and its associated isolationism that is preferred by some members of the Australian judiciary. But it is based on the view recently expressed by the US Supreme Court that:

27. Ibid [29].

28. Ibid.

29. *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

30. *Al Kateb* (2004) 208 ALR 124, [46].

31. Ibid [69].

32. 1 Wm & M 2, c 10.

*... the High Court in Behrooz held that irrespective of whether the conditions of detention were harsh or inhumane, the detention of an 'alien' would not be rendered unlawful, so as to offer a defence to any charge of unlawful escape.*

> The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.[33]

In this context, the United Nations Human Rights Committee, for its part prefers to adopt a conjunctive approach to the terms under the prohibition against torture, cruel, inhumane and degrading treatment and has stated that 'it is not necessary to draw sharp distinctions between different kinds of treatment and it depends on the nature, purpose and severity of the treatment applied'.[34] In contrast, the European Court of Human Rights adopts a disjunctive test. Under such an approach, torture carries a 'special stigma' and requires 'deliberate inhuman treatment causing very serious and cruel suffering'.[35] Inhuman treatment:

> must attain a minimum level of severity if it is to fall within the scope of article 3 [of Convention for the Protection of Human Rights and Fundamental Freedoms]. This assessment is relative: it depends on all the circumstances of a case including the duration of the treatment, the physical and mental effects and sometimes the sex, age and state of health of the victim.[36]

Importantly, there is no requirement that the suffering be intended.[37] Finally, degrading treatment has been held to include treatment which arouses feelings of fear, anguish or inferiority capable of humiliating or breaking the resistance of a person.[38]

In assessing whether treatment falls within any of these tests, it is important to note that the European Court has indicated that the increasingly high standard being required in the area of protection of human rights inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. Thus, acts originally classified as inhuman and degrading could now be considered torture[39] and those originally classified as degrading now could be considered inhuman. Moreover, it does not matter if the treatment complained of is an effective deterrent as 'it is never permissible to have recourse to punishments which are contrary to the prohibition against torture, inhuman and degrading treatment'.[40] Nor does it matter if the treatment enjoys wide public support[41] fails to outrage public opinion,[42] causes suffering that it is only transitory rather than long lasting[43] or is administered by public officials or private actors.[44] It also extends to both physical and mental suffering.[45]

Just as importantly, the assessment of the impact of the treatment on an individual must recognise that in the case of children their experience will by virtue of their age be different from that of an adult. Sir Nigel Rodley, when acting as the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment, noted that 'children are necessarily more vulnerable to the effects of torture and because they are in critical stages of physical and psychological development may suffer graver consequences than similarly treated adults'.[46] This demands a reorientation from the adult centric approach that has dominated legal discourse to a child centric approach which reflects the view of the Committee on the Rights of the Child that 'in conceptualising violence ... the critical starting point and frame of reference must be the experience of children themselves'.[47]

On the basis of the above tests and principles, there is little doubt that the experience of the many refugee children detained by the Australian government amounts to, if not torture, then cruel, inhuman or degrading treatment. The HREOC inquiry concerning children in immigration detention formed this view with respect to the experience of some children in detention[48] and medical research increasingly confirms the harm caused to the development of children detained in Australia's refugee detention centres.[49] Indeed, while the government seems intent on denying these findings, Kirby J indicated by way of obiter in *Re Woolley* that '... it is inescapable that the lengthy detention of a child, necessarily in a state of personal development, impinges adversely on the physical, intellectual and emotional advancement of a the child to some degree'.[50]

## Is the High Court immovable on rights?

It would be remiss not to acknowledge that the majority of the High Court, as presently constituted, is unlikely to be receptive to any suggestion that there is an implied constitutional prohibition against torture, cruel, inhuman or degrading treatment. It may seem like a futile claim given that in the context of Chapter III arguments, McHugh and Gummow JJ have maintained their insistence that it is the purpose of the detention that is relevant in assessing its constitutionality, rather than its effect.[51] This is despite the fact that there is no reason why the High Court must adopt this approach. It remains uncertain as to why its members would feel compelled to do so, especially when it is inconsistent with international and regional approaches that consider the impact, rather than the purported purpose, of government action.

33. *Roper v Simmons*, 543 US 1, 24 (2005).

34. Human Rights Committee, *CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, [4], UN Doc HRI/GEN/1/Rev.5 (2001). Consideration could and should also be given to the work of the Committee against Torture: see <//www.ohchr.org/english/bodies/jurisprudence.htm>.

35. *Ireland v United Kingdom* (1978) 2 EHRR 35, [167].

36. Ibid [162].

37. *Selçuk v Turkey* (1998) 26 EHRR 477.

38. *Ireland v United Kingdom* (1978) 2 EHRR 25, [167]

39. *Selmouni v France* (2000) 29 EHRR 403, [101].

40. *Tyrer v United Kingdom* (1978-80) 2 EHRR 1, [31].

41. *State v Makwanyane* [1995] 1 LRC 269 (South Africa) para 311.

42. *Tyrer v United Kingdom* (1978-80) 2 EHRR 1, [31].

43. Ibid [33].

44. See, eg, HRC, *CCPR General Comment 20*, above n 34.

45. Ibid [5]; *Ireland v United Kingdom* (1978) 2 EHRR 25, [162].

46. Nigel Rodley, *Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [10], UN Doc E/CN.4/1996/35 (1996).

47. Committee on the Rights of the Child, *Discussion Day on Violence against Children within the Family and in School*, 28th session, [704], UN Doc CRC/C/111 (2001).

48. Human Rights and Equal Opportunity Comission, *A Last Resort? A Summary Guide to the National Inquiry into Children in Immigration Detention* (2004) 37.

49. D Silove, 'The Trauma Controversy' (Paper presented at the International Symposium on Human Rights in Public Health: Research, Policy & Practice, Melbourne, 3–5 November 2004).

50. *Re Woolley* (2004) 210 ALR 369, [177].

51. Ibid [167].

Aside from these considerations, the insistence on such an approach, if taken to its logical conclusion, raises the prospect of the High Court restricting its capacity to monitor the actions of the Parliament. It tends to imply that so long as an Act of Parliament validly passed expressly provides, or the government expressly asserts, that its purpose is to achieve an aim pursuant to any of the broad heads of Commonwealth power under s 51 of the *Constitution*, the *measures taken* to implement that lawful purpose, irrespective of *their impact*, will be irrelevant and outside the purview of the High Court's jurisdiction.

Such an outcome would appear to be at odds with the broad principle adopted with respect to purposive powers under s 51 in the *Communist Party Case*[52] that the Federal Parliament cannot bring an Act within power merely by connecting the recitals in the preamble of an Act with a power under s 51 of the *Constitution*. Thus, if the High Court were to confine its power of review with respect to the aliens power to only the broad question of the purpose of the mandatory detention regime irrespective of the measures used to achieve this purpose and their impact on those people who are subject to such a regime, it would represent an enormous concession on its capacity to regulate the actions of the Federal Parliament.

Some members of the High Court may actually acknowledge this limitation which raises the spectre of either the Federal Parliament under an administrative scheme, or the High Court as an exercise of judicial power, sanctioning the torture, cruel, inhuman or degrading treatment of children as a consequence of their detention. Other members of the High Court may seek to avoid answering this question by pointing to the line of reasoning taken in *Behrooz* that an individual who suffers from inhumane or degrading conditions of detention can always seek legal redress for civil wrongs or criminal offences to which they are subject.[53] Such a retort, however, is flawed as it fails to recognise that these avenues of redress only remain open at the prerogative of the Parliament. Common law remedies and criminal law provisions enacted in legislation have no constitutional protection and are liable to be modified, restricted or abolished should the Federal Parliament wish to do so. Although s 75(3) of the *Constitution* protects the jurisdiction of the High Court with respect to all matters against the Commonwealth, it does not prevent the Commonwealth from changing the substantive law. Indeed, while the *Commonwealth Criminal Code Act* provides that the deprivation of a person's liberty and other inhumane acts will, in certain circumstances, constitute a crime against humanity,[54] proceedings for such an offence require the consent of the Federal Attorney-General.[55] Thus, to reject an implied constitutional protection against torture, cruel, inhuman or degrading treatment would arguably raise the potential of largely unbridled parliamentary power with respect to the *implementation* and *impact* of any measures undertaken pursuant to the broad heads of power listed under s 51 of the *Constitution*.

But still the High Court might reject the need to address the question of the implication of such a protection on the basis that the Parliament has not yet taken steps to abrogate any common law or equitable remedies that may be available to people in refugee detention. Such an approach would create a fragile world in which not only refugees, but all people subject to the jurisdiction of the federal government, find themselves. However, even if this were the case, there is every reason for advocates of people within detention, to invigorate the content and form of any available common law or equitable remedies by reference to international standards regarding the way in which individuals should be treated by the state.

A recent case before the Federal Court in South Australia, *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,[56] actually invoked the Commonwealth's duty of care towards indefinite detainees as the basis of their claim for injunctive relief. Significantly, the Court concluded that the Commonwealth's system to monitor and ensure the mental health of the detainees in question 'may have been exacerbating, or else inadequately or inappropriately treating the very conditions of the two applicants for which it was required to provide health care'.[57] Moreover, Finn J indicated that he 'would have granted injunctive relief against the Commonwealth to prevent exposing' the applicants to that likelihood of harm.[58] But this was unnecessary, as the federal government, presumably in anticipation of an adverse finding, had already removed the applicants from the detention centre and placed them in an appropriate psychiatric facility.

In this instance, the lawyers for the applicants did not make any recourse to the obligations assumed by Australia under international law to assist in defining the scope and content of the Commonwealth's duty of care. But there is nothing to prevent any future applications from being strengthened by the adoption of such an approach. At the very least, there would be scope to argue that the standard of reasonable care required by the state should not transgress the boundary whereby treatment amounts to torture or is cruel, inhuman or degrading.

In this context, it is worth recalling that the effective abolition of the death penalty in several Caribbean States was not the result of the Privy Council finding that this form of punishment was unconstitutional per se. In fact, there was no scope for such a finding as the constitutions of the relevant States expressly allowed for the imposition of the death penalty. Rather, it was the 'death row phenomenon' — the substantial delay between the original decision to execute a defendant and the exhaustion of all avenues of appeal — that created such a level of anxiety and anguish for defendants, that the Privy Council found it to be cruel and inhuman and thus unconstitutional.[59] There are parallels that can be drawn with the experience of those people held in migration detention within Australia who often experience extreme psychological suffering because of the uncertainty of their fate. But,

52. *Australian Communist Party v Commonwealth* (1951) 8 CLR 1.

53. See, eg, *Behrooz (2004)* 208 ALR 271, [16] (Gleeson CJ); [48]–[50] (McHugh, Gummow and Heydon JJ).

54. *Criminal Code Act 1995* (Cth) ss 268.12 and 268.23.

55. *Criminal Code Act 1995* (Cth) ss 268.121 and 268.122.

56. (2005) 216 ALR 252.

57. Ibid [262].

58. Ibid [263].

59. This original finding was made in *Pratt v Attorney General for Jamaica* [1994] 2 AC 1.

*On the basis of the above tests and principles, there is little doubt that the experience of the many refugee children detained by the Australian government amounts to, if not torture, then cruel, inhuman or degrading treatment.*

in the context of this article, what the Privy Council death penalty cases also demonstrate is that creative advocacy was both required and successful in achieving effective outcomes when viewed from a human rights perspective.

## Conclusion

This article does not seek to import the entire corpus of international human rights law or even one human rights treaty into Australian law. Nor does it require the High Court to incorporate a Bill of Rights into the Australian *Constitution* or adopt the position often advocated by Kirby J that the *Constitution* must be interpreted in accordance with international human rights standards.[60] It simply suggests that there is scope to argue for an implied protection against torture, cruel and inhuman and degrading treatment under the *Australian Constitution* with respect to the exercise of executive, parliamentary or judicial functions. It also suggests that there is scope to interpret any existing common law or equitable remedies by reference to this standard.

Such claims may seem exceedingly ambitious given the current composition of the High Court and the decisions in *Behrooz* and *Al Kateb*. However, the outcome of such a case would remain significant irrespective of whether it were upheld. In the case of a favourable result, this would not lead to an absolute prohibition on detention per se but rather restrictions on the conditions of detention with the prospect of release from detention in those cases where an amelioration of the conditions would be incapable of addressing the adverse physical and mental effects of the detention. Alternatively, it may lead to significant damages being awarded against the Commonwealth where the conditions of detention violate any common law or equitable causes of action available to detainees.

Moreover, even if the claim to an implied constitutional protection were to be rejected, the effect of such a decision would be profound, as it would require the High Court to effectively legitimise the use of torture, cruel, inhuman and degrading treatment against children, not just as an incidence of the exercise of its powers with respect to 'aliens', but by implication, other heads of power under s 51 of the *Constitution*. It would be a staggering admission of the inadequacies of our current legal system and there are signs in the obiter dicta of some members of the Court that they are not prepared to take this step.

Thus, there is a compelling argument for the High Court to imply such a restriction on the power of the Executive, Parliament and indeed the High Court itself, not because of Australia's obligations under international law, but simply because it reflects a fundamental value that lies at the heart of any democratic society,[61] namely a person's dignity and physical integrity.[62] If such a right were held to exist, then not only international human rights law, but also regional and comparative domestic jurisprudence, can be of assistance in mapping out the meaning of the various terms under such a prohibition and provide guidance as to what sorts of treatment have been held to be in violation. Although the focus here has been on child refugees, there is also scope to draw on the ever expanding jurisprudence, particularly within the European context, with respect to matters which may be of relevance to any person, child or adult, alien or citizen, who is subject to the impact of an exercise of federal power.

Although it is quite possible, and arguably highly likely, that the High Court would find a way to reject such a claim, the process would still remain of immense strategic significance. It would reveal in absolute clarity the immense lacunae that exists with respect to the protection of fundamental values or rights (however one chooses to describe them), that most Australians have long taken for granted and assumed would be protected by the Courts. Although the consequence would be to render the High Court largely mute with respect to the protection of an individual's physical and mental integrity, it would at the same time demonstrate and lend significant support to those advocating the dire need to adopt some form of Bill of Rights in Australia.

To date, the significance of the High Court's determinations with respect to refugee matters has been, if anything, a concern about 'them' rather than 'us'. A High Court decision that has broader implications for 'us' — being those people who are citizens or lawfully resident within Australia — may well act as a potent stimulus of the need to undertake a critical re-examination of the capacity of the legal mechanisms that exist in Australia to protect the fundamental values that we have perhaps, for too long, taken for granted.

**JOHN TOBIN** teaches law at the University of Melbourne.*



60. See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386.

61. See for example: *Soering v United Kingdom* (1989) 11 EHRR 439, [88]; *Chalal v United Kingdom* (1996) 23 EHRR 413, [79].

62. See *Tyrer v United Kingdom* (1978-80) 2 EHRR 1.

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