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Human Rights Committee

Eighty-sixth session

13 - 31 March 2006

ANNEX\*

Views of the Human Rights Committee under article 5, paragraph 4,  
of the Optional Protocol to the International Covenant  
on Civil and Political Rights  
- Eighty-sixth session -

**Communication No. 1184/2003**

Submitted by: Corey Brough (represented by counsel)

Alleged victim: The author

State party: Australia

Date of communication: 4 March 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2006

Having concluded its consideration of communication No. 1184/2003, submitted to the Human Rights Committee on behalf of Corey Brough under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Corey Brough, an Australian citizen, born on 22 April 1982, currently residing in Australia. He claims to be a victim of a violation by Australia (1) of articles 7, 10 and article 2, paragraph 3, of the Covenant. Although not specifically invoked by the author, the communication also seems to raise issues under article 24, paragraph 1, of the Covenant. The author is represented by counsel, Mrs. Michelle Hannon.

### **Factual background**

2.1 The author is an Aboriginal. He suffers from a mild mental disability, with significant impairments of his adaptive behaviour, his communication skills and his cognitive functioning. (2)

2.2 On 12 February 1999, the author was detained in Kariong Juvenile Detention Centre, due to the revocation of his parole order. On 5 March 1999, the Bidura Children's Court convicted him of burglary, assault and causing bodily harm, and sentenced him to 8 months imprisonment. On 21 March 1999, the author participated in a riot at Kariong, to draw attention to "the mistreatment and brutalisation by Kariong staff." During that riot, one prison staff was taken hostage by the author.

2.3 On 22 March 1999, the Director General of the Department of Juvenile Justice applied to the Gosford Children's Court for the author to be referred to an adult correctional facility, pursuant to section 28 (A) (3) of the Children (Detention Centres) Act 1987. This was granted by the Court, and the author was transferred

to Parklea Correctional Centre, where he was placed in the clinic. He protested against his transfer to an adult prison and asked for a return to a juvenile detention facility.

2.4 On arrival at Parklea, the author was segregated from other inmates, under section 22 (1) of the New South Wales Correction Centres Act 1952, on the ground that his association with other inmates constituted a threat to the personal safety of inmates and to the security of the Correctional Centre.

2.5 During an assessment of his psycho-medical condition, the author stated that he had no reservations against being placed in an adult facility. Although he was not at risk of self-harm, according to the records, he was placed in a “safe cell” (a facility for inmates who are at risk of self-harm) (4) in a segregation area, to protect him from other prisoners.

2.6 The author soon experienced difficulty in coping with long periods of being locked in the safe cell. On 30 March 1999, a first instance of self harm was recorded. The author told a prison officer that “if I don’t get out of here, there will be another black death” (meaning suicide of an Aboriginal).

2.7 On 1 April 1999, after breaking a plate and shredding his mattress with a broken fragment, the author was moved from his safe cell to a “dry cell”, (5) where he was confined for 48 hours.

2.8 On 7 April 1999, the author was observed obscuring one of the surveillance cameras. Officers came to his cell to remove all items that could be used to obscure the camera lenses and, when he refused to take off his clothes, they allegedly assaulted him below the rib area and removed his clothes except his underwear. The officers’ report on the incident reveals that four officers used reasonable force to restrain the author, who kicked one of the officers in the head during the struggle. He was allegedly confined to his cell for 72 hours, with lights on day and night. On 9 April, the author’s pillow and blanket were returned to him.

2.9 On 13 April 1999, the author attempted to break his cell lights to scratch the lens of a surveillance camera. There was a scuffle between the author and six to eight officers, resulting in minor injuries sustained by both the author and the officers.

2.10 On 15 April 1999, the author was placed in a dry cell, while the lights and camera in his safe cell were being repaired. The records indicate that he was returned to his safe cell that day. In the afternoon, he was allowed out of his cell for half an hour of exercise. When asked to return to his safe cell, he refused and a minimum amount of force was used to secure him. His clothes were removed and he was left with his underwear. Later, he was observed trying to hang himself with a noose made out of his underwear. Officers entered the cell and, when the author

resisted, forcibly removed the noose. The Inmate Discipline Action Form of 17 April 1999 indicates that the author pleaded guilty to a charge of failing to comply with a reasonable order, and that he was sentenced to confinement to his cell for 48 hours.

2.11 The author was administered anti-psychotic medication (“Largactil”), without it being clear whether his condition had been assessed prior to the prescription of the drug. On 16 April 1999, the general practitioner at Parklea prescribed 50 mg of “Largactil” for the author each day until he could be examined by a psychiatrist. This treatment continued after the examination took place.

2.12 L. P., a caseworker of the Aboriginal Deaths in Custody Watch Committee, who visited the author several times in March and April 1999, reportedly observed that he was anxious, nervous, and insufficiently equipped with clothes and blankets to protect him from the cold.

2.13 New segregation orders were issued on 15 and 28 April 1999, on the ground that the author’s association with other inmates constituted a threat to the personal safety of the staff and to the order and discipline within the Correctional Centre.

2.14 A psychiatric assessment of the author dated 16 April 2002 states: “Unfortunately, Mr. Brough was not able to provide me with a history which in my view was determinative of [...] any emotional reaction which could be described as post traumatic following a period of about a month being isolated under 24 hour bright lights.”

### **The complaint**

3.1 The author claims that he is a victim of violations of articles 2, paragraph 3, 7, 10 and, implicitly, of article 24, paragraph 1, of the Covenant, as he was transferred to an adult correctional facility despite his age, as the conditions of his detention at Parklea Correctional Centre amounted to cruel, degrading and inhuman treatment, and since he did not have access to an effective remedy. He alleges that his transfer to an adult institution violated article 10, paragraphs 2 (b) and 3, of the Covenant, since having regard to his age, disability and status as an Aboriginal, he was placed in a particularly vulnerable position which required special care and attention.

3.2 As regards the conditions of his detention, the author argues that the Committee found violations of article 7 and/or article 10 of the Covenant in what he considers to be similar cases. **(6)**

3.3 The author claims that his segregation and confinement for 72 and 48 hours, respectively, as punishment for his conduct, the absence of facilities in his cell, the

lack of appropriate heating, the removal of his blanket and clothes, his camera surveillance and 24 hour exposure to artificial light, the use of force causing him physical injuries, and the prescription of medication without his free consent were unnecessary to ensure his safety or to secure order in the detention centre. The cumulative effect of these measures amounted to a violation of article 7, read in conjunction with article 10, of the Covenant.

3.4 By reference to a 1991 report of the Royal Commission into Aboriginal Deaths in Custody, the author submits that Aboriginal people are over-represented in the New South Wales prisons and that segregation, isolation and restriction of movement within prisons have more deleterious effects on Aboriginal than on other inmates, given the importance they attach to a high degree of mobility and to access to their family and community.

3.5 The author claims that he still suffers from the effects of his confinement in the safe cell. He sometimes wakes up sweating with his heart racing and experiences panic attacks when he is alone in his cell.

3.6 The author submits that article 2, paragraph 3, of the Covenant creates a substantive right which can be relied upon independently of other Covenant rights. The State party's failure to provide him with an effective remedy to secure his rights under articles 7 and 10 of the Covenant thus amounted to a violation of article 2, paragraph 3. In support, the author refers to the Committee's concluding observations on the State party's third and fourth periodic reports, in which it expressed its concern that "[t]here are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated." (7)

3.7 The author argues that, in the absence of available effective domestic remedies, he cannot be expected to pursue futile claims. (8) In accordance with the Committee's jurisprudence, (9) victims depending on legal aid are not obliged to bring a complaint before superior courts in order to satisfy the requirement in article 5, paragraph 2 (b), if they have been advised that no reasonable prospects of appeal exist. The author submits that legal aid is no longer available to him.

3.8 The author notes that remedies to challenge prison discipline decisions are limited under Australian law. Common law remedies, such as duty of care on the part of custodial authorities, false imprisonment or *habeas corpus*, provide very limited relief for inmates who wish to challenge their conditions of detention. Judicial review is unavailable in cases where the nature of the conduct in question is administrative or managerial, rather than punitive or judicial. (10)

3.9 Although specific guarantees for prisoners exist in New South Wales under the Crimes (Administration of Sentences) Act 1999 and the Crimes (Correctional Centres Routine) Regulation 1995, complaints under these provisions can only be brought to the Minister or Commissioner, but not in a court of law. A complaint to

the Minister would not provide the author with an enforceable right to compensation or any other form of relief and cannot, therefore, be considered an effective remedy.

3.10 As regards the complaint procedure under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), the author states that this procedure applies only to acts or practices of the Commonwealth and not to acts of the New South Wales prison staff. The author also submits a report dated 7 May 2002 by a specialist on personal injury law, which states that he could not successfully make a claim in negligence, based on his treatment at Parklea.

### **State party's observations on admissibility and merits**

4.1 On 3 May 2004, the State party challenged the admissibility and, subsidiarily, the merits of the communication, arguing that the author has failed to exhaust domestic remedies, that his communication is an abuse of the right of submission, that his allegations are unsubstantiated, incompatible with the provisions of the Covenant, and without merit.

4.2 On the facts, the State party submits that it has no record of the alleged incident of 1 April 1999. However, a very similar incident occurred on 13 April 1999, when the author was observed tearing his mattress and smashing his mug and cell light. He assaulted an officer who had entered to remove the items and was subsequently charged with assault and sentenced to two months imprisonment. The records for 14 April 1999 note that the author had insinuated that he would harm himself if he remained in such conditions.

4.3 The State party describes the events following 28 April 1999 as follows: On 11 May 1999, the author assaulted correctional officers while being strip-searched before being brought to court. On 17 May 1999, the Bidura Children's Court sentenced him to two two-month prison terms for assault and failure to appear in court. On 8 June 1999, he was released from Parklea and transferred to Minda Juvenile Justice Centre. He tried to escape from custody while at Bidura Children's Court on 17 October 1999. On 26 February 2000, he was transferred to Kariong High Security Unit after refusing to attend his trial for armed robbery. On 28 February 2000, the Director-General of the Department of Juvenile Justice requested the Bidura Children's Court to issue an order under section 28 (A) of the Children (Detention Centres) Act 1987, to keep the author in prison until completion of his trial. This application was initially refused, but a fresh application was granted by the Wyong Children's Court on 10 March 2000. The author committed further suicide attempts. At the time of submission of the State party's observations, he served a sentence for armed robbery.

4.4 On admissibility, the State party argues that the author has not substantiated any failure by the Australian authorities to treat him with humanity and with

respect for his dignity. His claims under articles 7 and 10 are therefore unsubstantiated under article 2 and inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.5 For the State party, the author did not substantiate his claim under article 2, paragraph 3, of the Covenant, for purposes of admissibility, as he could have complained to the prison management at Parklea, the Minister or Commissioner for Corrective Services and the New South Wales Ombudsman, or to domestic courts about his treatment in prison. By reference to the Committee's jurisprudence (11) and to the wording of article 2, paragraph 3, the State party argues that due to its accessory character, its free-standing invocation by the author is inadmissible *ratione materiae* under article 3 of the Optional Protocol. Even if he based his claim on article 2, paragraph 3, read together with articles 7 and 10, it would have to be rejected because of the inadmissibility of his claims under articles 7 and 10 of the Covenant. (12)

4.6 While conceding that the author was unable to access the Human Rights and Equal Opportunity Commission, the State party reiterates that other effective remedies were available to him, i.e. a complaint to the Minister or the Commissioner for Corrective Services, to Official Visitors appointed by the Minister for Corrective Services, with wide powers to address problems, and to the Inspector-General of Corrective Services, or an application for review of segregation or protective custody exceeding 14 days by the Serious Offenders Review Council. (13) The latter may order the suspension of the segregation or protective custody or the removal of the inmate to a different correctional centre. (14) These remedies are consistent with international standards, such as article 36 of the Standard Minimum Rules for the Treatment of Prisoners and Principles 33 (1) and (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As such, they must be exhausted before a complaint can be brought before a judicial authority.

4.7 Regarding judicial remedies, the State party refers to recent jurisprudence that courts may examine purely administrative decisions by prison authorities, but that they will not interfere if the decisions are found to have been *bona fide*, if they have no punitive character, and if they are a reasonable use of the power of management. (15) Prisoners subject to unlawful treatment may seek relief like any other person aggrieved by action of a public official. Whether the author could have produced sufficient evidence for an action for breach of duty of care by a prison officer or Governor, (16) who may only be sued for damages if his action was both malicious and without reasonable and probable cause, was doubtful in view of the considerable evidence from various prison officers, welfare officers, medical officers and nurses. However, lack of evidence on the author's part was immaterial to the question of whether effective remedies were available. (17)

4.8 For the State party, the author could have filed a complaint with the NSW Ombudsman, who can investigate a complaint and send a report and

recommendations to the principal officer of the appropriate authority.

4.9 The State party disputes that the author's treatment amounts to torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 and 10, paragraph 1, arguing that he was not subjected to any particular hardship beyond what is strictly unavoidable in a closed environment. **(18)** He failed to demonstrate any physical or mental harm sustained by him, in the absence of evidence of injuries or of a direct link between his emotional state and his confinement to a safe cell. **(19)** Rather than being punitive, the measures imposed on him sought to protect him from further self-harm, to protect other prisoners, and to maintain the security of the correctional facility. They were proportionate and consistent with articles 7 and 10 of the Covenant, with applicable domestic law and with the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

- (a) The author's segregation and confinement to a safe cell was an inevitable security precaution, given that he had been involved in a riot at Kariong, **(20)** and fell short of solitary confinement within the meaning of clause 171 **(21)** of the 1995 Crimes (Correctional Centres Routine) Regulation; it was in conformity with the NSW Department of Corrective Services Operational Procedures Manual, **(22)** since the author was provided with daily exercise, food and water, and access to an Aboriginal delegate.
- (b) The temporary removal of the author's clothes, blanket and pillow and the camera surveillance in his cell were necessary to observe and protect him from further self-harm. He was not exposed to the cold; his cell was sufficiently heated.
- (c) There is no record of the use of lights for periods of more than 24 hours. Parklea officers may have considered the use of lights necessary to monitor the author, after he had tried to obscure the camera lenses in his cell.
- (d) Physical force was used by officers on 7 and 15 April 1999, but only after the author had refused to comply with their orders, and was restricted to the minimum extent necessary, as reflected by the reported absence of injuries.
- (e) The prescription of "Largactil" was intended to control the author's self-destructive behaviour; he later consented to the use of this medication.
- (f) There is no record of the author being confined for 72 hours as of 7 April 1999. Rather, Parklea Clinical records indicate that he attended a case management meeting on 9 April 1999. Similarly, there is no record that he was subject solitary confinement in a dry cell for 48 hours on 1 April 1999, or on 13 April 1999, when another incident occurred.



### **Author's comments**

5.1 On 30 July 2004, the author commented on the State party's observations. He maintains that the measures imposed on him were disproportionate to the aim of protecting him, considering his age, disability and his Aboriginal status:

(a) The removal of his clothes was humiliating and degrading and subjected him to excessive cold, as his cell was not properly heated. The fact that his clothes had been removed, on 15 April 1999, before he had tried to hang himself with a noose made out of his underwear showed that such removal was not intended to protect him from self-harm, but rather to punish him for his refusal to return to his cell. Parklea psychological assessments indicated that he was not suicidal but experiencing difficulty in coping with confinement conditions.

(b) For the author, the absence of evidence for the continued use of lights in his cell does not rebut his claim. The fact that the State party could not exclude that the lights had been used for observation purposes showed that it did not fully investigate the claim. Such use was unnecessary, given his constant video surveillance; it was a punitive measure to cause humiliation and sleep deprivation.

(c) The author disputes the absence of records of injuries sustained by him. The NSW Health Department Incident/Assault Report confirmed small lacerations to his middle back and a laceration to the little finger of his right hand as a result of the incident of 13 April 1999. There were also records of bruises on his head, allegedly resulting from the incident on 11 May 1999, when he had assaulted two officers while being strip-searched.

(d) The author submits that he consented to the continued use of "Largactil" because he had been told that he would only be let out of the safe cell if he agreed to take the prescribed medicine.

(e) With regard to the State party's contention that no record exists of the alleged incident of 1 April 1999, or his subsequent confinement for 48 hours and for 72 hours on 7 April 1999, respectively, the author refers to the prison officer's report dated 1 April 1999, stating the he broke a dinner plate and used a fragment to cut the mattress, as well as to the Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, recording that he pleaded guilty to the charge of failing to comply with prison routine on 1 April 1999 and was confined to his cell for 48 hours, and that he pleaded guilty to the charge of assaulting a prison officer on 7 April 1999 and was confined to his cell for 72 hours as punishment.

5.2 On the issue of exhaustion of domestic remedies, the author reiterates that administrative (23) and judicial remedies available to him would be ineffective. While complaints within the prison are received by the prison governor, the very person who authorized his conditions of detention, complaints to the Ombudsman could only result in the adoption of a report or recommendation to the Government, without providing any enforceable right or recourse. The *travaux préparatoires* of article 2, paragraph 3 (b), of the Covenant indicate the drafters' intention that States parties should progressively develop judicial remedies. More than 20 years after ratification of the Covenant in 1980, Australia should have complied with this obligation.

5.3 The author argues that the State party failed to rebut the expert advice he produced on the limited availability of civil remedies submitted by him. Legal action based on a breach of duty of care, under section 263, paragraphs 1 and 2, of the Crimes (Administration of Sentences) Act 1999 (NSW), would require (1) that the author's treatment was malicious, which is difficult to establish, as most of the impugned measures are permitted under domestic law; (2) that it was without reasonable and probable cause; and (3) that harm or injury be established. Any course of action requiring damage to be established would be futile, given that the psychiatrist was unable to determine the exact nature of any damage caused to the author as a result of his treatment.

5.4 While damages could be recovered in negligence only for a recognizable psychiatric injury (not for emotional distress), the author submits that his deprivation of human contact for considerable periods, his humiliation by removal of his clothes, exposure to the cold and to constant lightning, and the physical assaults against him resulted in anxiety, distress, recurring nightmares and panic attacks related to his time in the safe cell. In these circumstances, no medical evidence of distinct psychological or emotional injury arising from his treatment is required to establish a breach of articles 7 and 10 of the Covenant.

### **Additional observations by the State party**

6.1 On 29 July 2005, in response to the Committee's request to provide detailed information on the deadlines for, and *de facto* accessibility of, the administrative and judicial remedies that the author had allegedly failed to exhaust, the State party made an additional submission on admissibility. It argues that the author could have availed himself of several administrative remedies during his period of segregation. Such remedies would have been easily accessible and could have provided effective and timely relief, in view of the inevitable delays in judicial proceedings. In addition, he could have brought a common law action in tort within three years from the date when the breaches of articles 7 and 10 of the Covenant had allegedly occurred.

6.2 The State party submits that all prisoners in New South Wales adult correctional facilities have access to Official Visitors, who are appointed by the Minister for Corrective Services to visit correctional centres at least once per month and to receive complaints from prisoners. The Governor of the correctional centre must notify all inmates of the date and time of such visits and inform them about the possibility to complain to Official Visitors. Under the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995, the Official Visitor is required to clarify the details of a case and to submit an Official Visitor's record form to the Commissioner of Corrective Services. He is also required to bring the complaint to the attention of the Governor of the correctional facility. The Regulation does not specify a deadline for bringing complaints to Official Visitors.

6.3 Moreover, the author could have requested permission to speak with the Governor of the correctional centre or with the Minister or the Commissioner for Corrective Services. Such requests must be conveyed to the Governor without unreasonable delay; the Governor is required to give the inmate an opportunity to speak on the matter or, respectively, to convey the request to the person with whom the inmate wished to speak during that official's next visit to the correctional facility.

6.4 The State party adds that an inmate may also directly complain, in writing, about his treatment in the correctional centre to the Minister or the Commissioner for Corrective Services. The complaint must be placed in a sealed envelope addressed to the Minister or the Commissioner and must not be opened, or its contents read or inspected. Although the Minister could not intervene personally, all complaints received by him were referred to the appropriate body, e.g. the Commissioner, who had the power to overrule or reverse any previously made decision.

6.5 The author also had the possibility of complaining to the Inspector-General of Corrective Services, whose mandate terminated on 30 September 2003. The Inspector-General was appointed by the Governor of New South Wales and was independent from the Department of Corrective Services. He was given full access to offenders held in custody, as well as to the premises and records of the Department, with a view to investigating and resolving complaints about the Department's conduct. This function could be exercised on his own initiative, at the request of the Minister for Corrective Services or in response to a complaint. Although no deadline for filing a complaint was specified, the Inspector-General had discretion to decide not to investigate complaints relating to incidents which had occurred too long ago or for which satisfactory alternative means of redress existed. He could recommend disciplinary action or criminal proceedings against officers of the Department.

6.6 As regards the author's period of segregation, the State party submits that, under the Crimes (Administration of Sentences) Act 1999, any prisoner whose

segregation exceeds fourteen days has the right to appeal to the Serious Offenders Review Council. Prisoners must be informed of their right to appeal and must sign a form stating that they have been so informed. Upon review, the Council may confirm, amend or revoke a segregation order. Pending the final outcome of a case, it may also order the suspension of the segregation or the prisoner's removal to another correctional centre.

6.7 Lastly, regarding judicial remedies, the State party reiterates that Australian courts consider themselves competent to deal with prisoners' challenges to the lawfulness of their confinement, including actions brought against acts in breach of a duty of care causing harm or injury to prisoners. The relevant cause of action was based on the tort of negligence in common law, subject to the Civil Liability Act 2002 (NSW), which provided for exclusion of personal liability for certain persons under certain circumstances. In accordance with the Crown Proceedings Act 1988 (NSW), the respondent party in proceedings commenced in common law tort against a government agency, which was not a separate legal entity, was the State of New South Wales. However, the author had failed to bring a court action in common tort negligence.

### **Author's comments**

7.1 On 14 September 2005, the author commented on the State party's additional observations, denying that any of the above administrative or judicial remedies would in practice have been available to him or that they would have provided him with an effective remedy at the relevant time. He had never been advised of possible complaint mechanisms upon being admitted to Parklea Correctional Facility. In addition, the treatment complained of was to a large extent compatible with the relevant Australian laws and regulations.

7.2 The author submits that he was never told whether or when an Official Visitor would visit Parklea during his time of incarceration. This had deprived him of an opportunity to complain to the Official Visitor who was, in any event, required not to "interfere with the management of discipline of the correctional centre, or give any instructions to correctional centre staff or inmates." (24)

7.3 The author contends that the Governor of Parklea Correctional Centre dismissed his repeated complaints about the conditions of his detention by replying: "You are not in a boy's home anymore. This is the way we run the place." Or: "Nothing will be done about it; this is how we run the place and how you will be treated." Given that the decision whether or not to act on a complaint was within the Governor's discretion, (25) such a complaint was not an effective remedy. This was reflected by the fact that the author's file revealed that the Governor had approved of his segregation and confinement on six occasions during the relevant period.

7.4 The author claims that he had not been informed about the possibility of making a complaint to the Minister or Commissioner for Corrective Services, whether through the Governor or whether directly in writing. The fact that the Governor was not required to refer a complaint to the Minister or Commissioner but could dispose of the matter personally, (26) the purely recommendatory powers of the Commissioner, as well as the author's difficulties to read and write and the absence of pens, pencils or paper in his dry cell, showed that such complaints were not an effective remedy.

7.5 Although a lawyer from the Sydney Regional Aboriginal Corporation Legal Service filed a complaint with the Minister for Juvenile Justice on the author's behalf, following his release from segregation, no remedial action was taken on that complaint.

7.6 The author further submits that he was never informed about the possibility of complaining to the Inspector-General. Since the Inspector-General had discretion not to pursue complaints for which alternative means of redress existed, he could have dismissed his application on the ground that the author had already complained about his treatment to the Governor.

7.7 Similarly, he had never been advised that he could appeal his segregation to the Serious Offenders Review Council, nor had he signed a form stating that he had been so informed. Such an appeal would not have been an effective remedy, given that he was not a serious offender at the time of his segregation and that the Council had no competence to deal with issues other than segregation, such as, for example, his physical and medical treatment.

7.8 The author argues that, although he was aware that the Governor had authorized his treatment, as evidenced by his Department of Corrective Services file, he took all reasonable steps within the capacity of a 16 year old Aboriginal child with an intellectual disability to seek a change of his treatment, i.e. by complaining to his Aboriginal Deaths in Custody officer and to the Governor of the correctional centre.

7.9 By reference to the expert advice dated 7 May 2002, the author reiterates that any court action for breach of duty of care would have been futile.

## **Issues and proceedings before the Committee**

### ***Consideration of admissibility***

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the prison officers' attempts to secure him in April and May 1999 involved excessive use of force in violation of articles 7 and 10 and that his continuous camera surveillance was incompatible with these provisions.

8.3 With regard to the author's claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated his rights under article 10, paragraph 3, the Committee notes that the State party has not invoked its reservation, to the effect that the obligation to segregate in article 10, paragraphs 2 (b) and 3, "is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned." However, the Committee need not consider whether the State party's reservation to article 10, paragraph 2 (b) and 3 applies, since the author's claims under these provisions are inadmissible on other grounds:

(a) As regards his claim that his transfer to Parklea Correctional Centre on 22 March 1999 violated article 10, paragraph 2 (b), the Committee recalls that this provision protects the right of accused juvenile persons to be separated from adults and to be brought as speedily as possible for adjudication. However, the author had the status of a convicted rather than an accused juvenile person at the time of his transfer to Parklea, since he was convicted of burglary, assault and causing bodily harm on 5 March 1999. His claim under article 10, paragraph 2 (b), is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

(b) As regards the claim under article 10, paragraph 3, the Committee notes that the author was in fact segregated from other inmates upon arrival at Parklea, where he was placed in a safe cell. The author has therefore not substantiated, for purposes of admissibility, how his transfer to Parklea Correctional Centre breached his right to be segregated from adult prisoners, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8.4 As regards the author's claims relating to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil, the Committee considers that he has sufficiently substantiated these claims, for purposes of admissibility. In particular, it considers that he has rebutted the State party's denial that he was placed in solitary confinement in a dry cell for 48 and 72 hours on 1 and 7 April 1999, respectively, by reference to Parklea Prison's Inmate Discipline Action Forms dated 4 and 11 April 1999, which confirm these alleged periods of solitary confinement.

8.5 With regard to exhaustion of domestic remedies, the Committee notes the State party's argument that the author has not exhausted administrative, judicial or other remedies available to him. It also notes the author's challenge to the

effectiveness of complaints to the prison authorities or to the Ombudsman, as well as his doubts about the availability and the prospect of success of a court action for negligence.

8.6 The Committee recalls that the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust “all available domestic remedies” not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.

8.7 As regards the possibility of complaining to the Ombudsman, the Committee recalls that any finding of this body would only have hortatory rather than binding effect so far as the authorities are concerned. It concludes that such a complaint cannot be considered an effective remedy, (27) which the author was required to exhaust, for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

8.8 As regards the possibility of filing a complaint with the Minister for Corrective Services or with the Serious Offenders Review Council, the Committee notes the author’s uncontested claim that he had not been informed about these or any other administrative remedies and that he was barely able to read or write at the time of his segregation at Parklea.

8.9 The Committee also recalls that the author made several attempts to change the conditions of his incarceration by complaining to his Aboriginal Deaths in Custody officer and to the Governor of the correctional centre. It also notes the author’s contentions as to the Governor’s replies to his complaints and observes that the effect of these replies was to discourage the author from submitting further complaints to the prison authorities. Given the author’s age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective.

8.10 The decisive question is therefore whether or not effective judicial remedies were available to, and have not been exhausted by, the author. In this regard, the Committee recalls the State party’s contention that Australian courts will not interfere with administrative decisions of prison authorities, if such decisions are found to have been bona fide and if they constitute a reasonable use of power of management. It also recalls that the State party has argued, and the author has conceded, that most of the measures imposed on the author were consistent with the relevant domestic law. It is therefore hardly conceivable that the author could successfully have challenged the decisions of the Parklea authorities at court.

8.11 As regards the possibility of bringing a court action based on the tort of negligence in common law, the Committee acknowledges the State party’s argument that lack of evidence on the author’s part does not have a direct bearing

on the question of whether or not effective judicial remedies were available to him. However, the lack of evidence for a recognizable psychiatric injury does have a bearing on the question of whether or not it would have been futile for the author to exhaust such remedies. In this regard, the Committee observes that to be contrary to articles 7 and 10 of the Covenant, treatment of a person deprived of liberty must not necessarily cause any recognizable psychiatric injury to that person, as seems to be the standard required for establishing a tort in negligence under Australian law. It considers that the author has sufficiently shown, and the State party has not refuted, that the emotional distress and anxiety allegedly suffered by the author would have constituted insufficient grounds for filing a court action based on a breach of duty of care.

8.12 Against this background, the Committee considers that, although in principle judicial remedies were available, in accordance with article 2, paragraph 3, of the Covenant, it would have been futile for the author, in the circumstances of his case, to commence court proceedings. It therefore concludes that he was not required, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, to exhaust these remedies.

8.13 The Committee concludes that the communication is admissible insofar as the author's claims raise issues under articles 7 and 10 of the Covenant, and to the extent that they relate to the periods of his solitary confinement, the removal of his clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil to him.

### *Consideration of the merits*

9.1 The Committee takes note of the author's allegation that his placement in a safe cell, as well as his confinement to a dry cell on at least two occasions, was incompatible with his age, disability and status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect. It notes the State party's argument that these measures were necessary to protect the author from further self-harm, to protect other inmates, and to maintain the security of the correctional facility.

9.2 The Committee recalls that persons deprived of their liberty must 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. **(28)** Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.



9.3 The State party has not advanced that the author received any medical or psychological treatment, apart from the prescription of anti-psychotic medication, despite his repeated instances of self-harm, including a suicide attempt on 15 December 1999. The very purpose of the use of a safe cell “to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment” was negated by the author’s negative psychological development. Moreover, it remains unclear whether the requirements not to use confinement to a safe cell as a sanction for breaches of correctional centre discipline or for segregation purposes, or to ensure that such confinement does not exceed 48 hours unless expressly authorized, were complied with in the author’s case. The Committee further observes that the State party has not demonstrated that by allowing the author’s association with other prisoners of his age, their security or that of the correctional facility would have been jeopardized. Such contact could have been supervised appropriately by prison staff.

9.4 Even assuming that the author’s confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author’s extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt. The Committee therefore concludes that the author’s treatment violated article 10, paragraphs 1 and 3, of the Covenant.

9.5 As regards the prescription of anti-psychotic medication (“Largactil”) to the author, the Committee takes note of his claim that the medication was administered to him without his consent. However, it also takes note of the State party’s uncontested argument that the prescription of Largactil was intended to control the author’s self-destructive behaviour. It recalls that the treatment was prescribed by the general practitioner at Parklea Correctional Centre and that it was only continued after the author had been examined by a psychiatrist. In the absence of any elements which would indicate that the medication was administered for purposes contrary to article 7 of the Covenant, the Committee concludes that its prescription to the author does not constitute a violation of article 7.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of

the view that the facts before it disclose violations of articles 10 and 24, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including adequate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken an obligation to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhango, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

### Notes

1. The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 13 November 1980 and 25 December 1991. Upon ratification of the Covenant, the State party entered the following reservation: "Article 10 : In relation to paragraph 2 (a), the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that

such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned. [...].”

2. See Clinical Psychological Assessment, 19 October 2000, prepared by S.H., PhD, Associate professor and Head, Department of Behavioural Sciences in Medicine, University of Sydney, at p. 5.

3. Section 28 (A) (2) of the New South Wales Children (Detention Centres) Act (1987) reads: “(2) In any criminal proceedings against a child to whom this section applies a court may remand the child to a prison pending the commencement of the hearing of the proceedings or during any adjournment of the hearing, but only if: (a) the person by whom the proceedings were commenced or the Director-General applies for such remand, and (b) the child is not released on bail under the Bail Act 1978, and (c) the court is of the opinion that the child is not a suitable person for detention in a detention centre.

4. Para. 12.19.2 of the New South Wales Department of Corrective Services Operational Procedure Manual provides that “(a) [t]he use of a safe cell is a short term management strategy. The purpose is to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment. (b) The safe cell is not a punishment area and is not to be used as a sanction for breaches of Correctional Centre discipline or for segregation purposes. [...] (d) No inmate is to be held in a safe cell for longer than 48 hours without the approval of the Regional Commander.”

5. The State party defines a ‘dry cell’ as “a secure cell used for the short term containment of inmates, and is used only in the case where [inmates are] unable to provide a urine sample or are suspected of concealing contraband in their bodies.”

6. The author refers to Communications No. 458/1991, *Mukong v. Camreoon*, Views adopted on 21 July 1994; No. 28/1978, *Weisz v. Uruguay*, Views adopted on 29 October 1980; No. 8/1975, *Weismann v. Uruguay*, Views adopted on 3 April 1980; No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002.

7. Human Rights Committee [69], Concluding observations on the third and fourth periodic reports of Australia, 28 July 2000.

8. In this regard, the author refers to Communication No. 229/1987, *Reynolds v. Jamaica*, Views adopted on 8 April 1991; Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991; Communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991.

9. See Communications No. 619/1995, *Fray Deidrick v. Jamaica*, Views adopted on 9 April 1998, at para. 6.1, and No. 680/1996, *Gallimore v. Jamaica*, Views adopted on 23 July 1999, at para. 6.5.

10. The author refers to *Vezitis v. McGeechan* (1974) 1 NSWLR 718.
11. The State party quotes from Communication No. 75/1980, *Fanali v. Italy*.
12. Reference is made to Communications No. 363/1989, *RLM v. France*, Decision on admissibility adopted on 6 April 1992; No. 348/1989, *GB v. France*, Decision on admissibility adopted on 1 November 1991; and No. 347/1988, *SG v. France*, Decision on admissibility adopted on 1 November 1991.
13. See Crimes (Administration of Sentences) Act 1999 (NSW), section 19 (1).
14. ee *ibid.*, section 20 (1).
15. *Christopher Murielle et al. v. David Moore and Eric Holt* [2000], NZSC 23.
16. See Crimes (Administration of Sentences) Act 1999 (NSW), section 263 (1) and (2).
17. The State party refers to, *inter alia*, Communications No. 224/1987, *A and SN v. Norway*, Decision on admissibility adopted on 11 July 1988, at para. 6.2, and No. 397/1990, *PS v. Denmark*, Decision on admissibility adopted on 22 July 1992.
18. The State party refers to Communication No. 265/1987, *Voulanne v. Finland*, Views adopted on 7 April 1989.
19. By reference to Communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994 (at para. 8), the State party argues that the author's claims are not supported by the psychological reports submitted by him.
20. See section 10 of the then applicable Crimes (Administration of Sentences) Act (1999): The Commissioner may direct that an inmate be held in segregated custody if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to: (a) the personal safety of any other person, or (b) the security of a correctional centre, or (c) good order and discipline within a correctional centre."
21. Regulation 171 of the then applicable Crimes (Correctional Centres Routine) Regulation (1995) states: "(1) An inmate must not: (a) be put in a dark cell, or under mechanical restraint, as a punishment, or (b) be subjected to: (i) solitary confinement, or (ii) corporal punishment, or (iii) torture, or (iv) cruel, inhuman or degrading treatment, or (c) be subjected to any other punishment or treatment that may reasonably be expected to adversely affect the inmate's physical or mental health. [...] (2) For the purposes of sub-clause (1) (b) (i): (a) segregating an inmate from other inmates under section 10 of the Act, and (b) confining an inmate to cell in accordance with an order under section 53 of the Act, and (c) keeping an inmate separate from other inmates under this Regulation, and (d)

keeping an inmate alone in a cell, where the medical officer considers that it is desirable in the interest of the inmate's health to do so, are not solitary confinement.”

22. Section 14.1.6 (on “Segregation of Aboriginal Inmates”) of the then applicable Manual reads: “It is undesirable that an Aboriginal inmate should be placed in segregation. Segregation should only occur where there is no other means of managing the inmate in the circumstances. However, where segregation action is necessary, the Governor shall: (i) ensure that the inmate is provided with daily exercise, appropriate clothing, food water, and access to visits; (ii) ensure that the segregation cell has adequate lighting, sanitation facilities and heating; (iii) ensure that the relevant Regional Aboriginal Officer is informed; (iv) provide the segregated inmate with access to a member of the Aboriginal Inmate Committee or appropriate Aboriginal delegate. This access may assist inmates who are experiencing problems, which could lead to physical or mental harm. This procedure accords with Recommendations 181 and 183 of the Royal Commission into Aboriginal Deaths in Custody.”

23. The author claims that the ineffectiveness of administrative remedies was acknowledged by the Committee in Communication No. 900/1999, *C. v. Australia*.

24. Regulation 133(3) of the Crimes (Administration of Sentences) (Correctional Centre Routine) Regulations 1995 (NSW).

25. *Ibid.*, Regulation 135(3).

26. *Ibid.*, Regulation 136(3).

27. See Communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, at para. 7.3.

28. General Comment 21, 1992 [44], Article 10, at para. 3.



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