Draft General Comment on Sexual and Reproductive Health

Submission to the UN Committee on Economic, Social and Cultural Rights on Prisoners' Rights to Sexual and Reproductive Health

8 November 2010

1. Introduction

1.1 Background

1. During its 45th session, the Committee on Economic, Social and Cultural Rights (**Committee**) will hold a Day of General Discussion on the right to sexual and reproductive health in accordance with articles 12 and 10 (2) of the Covenant. The Day of General Discussion is part of the preparatory work leading to the formulation of a general comment on the right to sexual and reproductive health. The Committee has invited organisations to submit written contributions on the themes of the Day of General Discussion.

2. This submission is made by the Human Rights Law Resource Centre (**HRLRC**). The HRLRC is an Australian NGO that undertakes litigation, education, policy analysis and advocacy to promote human rights. Our areas of expertise include women's rights, equality rights and the right to health.

3. The HRLRC thanks the Committee for the invitation to contribute to the Day of General Discussion and would welcome further opportunities to be involved in the development of the General Comment.

1.2 Overview of this Submission

4. The HRLRC supports and endorses the submission made by the Centre for Reproductive Rights (**CRR**) which provides an overview of international human rights standards pertaining to sexual and reproductive health and addresses a number of specific sexual and reproductive health topics.

5. This submission does not seek to revisit the issues covered in the CRR submissions. Instead, it examines the particular sexual and reproductive health rights of prisoners, noting that the principles referred to in this submission also apply to people held in immigration detention, psychiatric facilities and other places of detention.

6. The HRLRC considers that special consideration should be given to the rights of persons in detention because:

   (a) persons deprived of liberty are placed in a vulnerable position; and

   (b) the fact of detention imposes upon the State additional positive duties to ensure the protection of their human rights.[1]

7. There is a broad failure to fulfil the right to health in prisons worldwide.[2] The World Health Organisation (**WHO**) has commented that 'ill-health thrives in settings of poverty, conflict, discrimination and disinterest. Prison is an environment that concentrates on precisely these issues.'[3]

8. Furthermore, the HRLRC considers that the rights of women detainees require particular attention in order to ensure non-discrimination in the provision of the right to sexual and reproductive health.

9. This submission draws on the jurisprudence of the UN treaty bodies, other international human rights bodies and, to a lesser extent, the jurisprudence of domestic courts. It then outlines two case studies which illustrate the need for clear legal protection of the right to sexual and reproductive health for persons in detention.

1.3 Recommendations

10. The HRLRC recommends that the Committee include the following principles in their general comment on sexual and reproductive health:

   (a) the State has an obligation to respect, protect and fulfil the sexual and reproductive health rights of people in detention;

   (b) sexual and reproductive health services in detention must be provided on a basis equivalent to that available in the community; and

   (c) in order for women prisoners to access the right to sexual and reproductive health on an equal basis to men, provision must be made for women's particular circumstances and needs.

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[1] Human Rights Committee, General Comment No 21 (replaces General Comment 9) on humane treatment of persons deprived of liberty (1992). See also *Lantsova v. Russian Federation* (26 March 2002) UN Doc CCPR/C/74/763/1997 [9.2]; *Fabrikant v. Canada* (6 November 2003) UN Doc CCPR/C/79/D/970/2001) [9.3].

[2] See Rick Lines, "The Right to Health of prisoners in international human rights law", *International Journal of Prisoner Health*, 4(1) (March 2008), 7.

[3] Bone and others (2000), p. 11. HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response (UNODC/WHO/UNAIDS New York 2006), 11.

2. Relevant Human Rights Standards

2.1 International Covenant on Economic, Social and Cultural Rights

11. The Committee's General Comment on the Right to the Highest Attainable Standard of Health provides that:[4]

> States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees…, to preventive, curative and palliative health services…

2.2 International Covenant on Civil and Political Rights

12. The right to adequate healthcare for persons in detention is protected by the International Covenant on Civil and Political Rights (**ICCPR**) through the right to humane treatment when deprived of liberty (article 10), protection from inhuman and degrading treatment (article 7), the right to life (article 6), liberty and security of the person (article 9) and protection from arbitrary or unlawful interference with privacy (article 17).

13. Article 10 of the ICCPR, the most relevant of the above provisions, provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

14. Article 10 imposes a positive obligation on the state towards persons who are particularly vulnerable because of their status as persons deprived of liberty. In accordance with this article, persons deprived of their liberty may not be:[5]

> 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. Persons deprived of their liberty enjoy all the rights set forth in the *Covenant*, subject to the restrictions that are unavoidable in a closed environment.

15. The HRC has stated that the implementation of the right to humane treatment when deprived of liberty is not dependent on the material resources available to the state and the right must be enjoyed by all persons without any kind of distinction as to race or sex.[6]

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[4] Committee on Economic, Social and Cultural Rights, General Comment No 14 on the highest attainable standard of health (2000) [34].

[5] Human Rights Committee, General Comment No 21 (replaces General Comment 9) on humane treatment of persons deprived of liberty (1992) [3]. This principle has been affirmed in the jurisprudence of the European Court of Human Rights, see, for example: *Ilascu and Others v Moldova and Russia,* Application No. 48787/99, 8 July 2004; *Holomiov v Moldova* [2006] ECHR 30649/05 (7 November 2006); and *Dickson v United Kingdom* [2007] ECHR 1050.

[6] Human Rights Committee, General Comment No 21, ibid.

2.3 Standard Minimum Rules for the Treatment of Prisoners

16. The *UN Standard Minimum Rules for the Treatment of Prisoners 1955* (**Standard Minimum Rules**) approved by resolution of the UN Economic and Social Committee,[7] aim to 'set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'.[8] The Standard Minimum Rules informed the drafting of Article 10 of the ICCPR.[9]

17. Rule 22 of the Standard Minimum Rules relevantly provides that prison medical services should correspond to the health facilities available to the general community.

2.4 Bangkok Rules

18. The rights of women detainees require particular attention. Women's prison facilities are regularly designed and managed to mirror a men's facility without regard to the different needs, including health needs, of women.[10] As the former UN Special Rapporteur on Violence Against Women noted in her 1999 report on women's prisons in the United States:[11]

> women…clearly have special medical needs. The mere replication of health services provided for male prisoners is therefore not adequate.

19. On 15 October 2010, the Third Committee (Social Humanitarian and Cultural) approved text recommending to the General Assembly the adoption of the 'Bangkok Rules'. The Bangkok Rules set out standards for the treatment of women prisoners and non-custodial measures for women offenders.

20. The Bangkok Rules have been developed in recognition of the fact that the Standard Minimum Rules, adopted more than 50 years ago, did not draw sufficient attention to women's particular needs.

21. Most relevantly, rule 10 states that 'gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.' The Bangkok Rules also require that:

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[7] Adopted by First UN Congress on the Prevention of Crime and the Treatment of Offenders; approved by ECOSOC by Res 663 C (XXIV) (1957); extended to those detained without charge Res 2076 (LXII) (1977).

[8] *UN Standard Minimum Rules for The Treatment of Prisoners 1955* (rule 1).

[9] Report of Third Committee, UN General Assembly (1958); Mark Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (1987) at 233.

[10] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, A/C.3/65/L.5, 6 October 2010 (the Bangkok Rules).

[11] Special Rapporteur on violence against women, its causes and consequences, *Report of the mission to the United States of America on the issue of violence against women in state and federal prisons*, E/CN.4/1999/68/Add.2, (1999), [64].

(a) Dormitories and rooms used for accommodation of female prisoners shall have facilities and materials required to meet women's specific hygiene needs, including, at least, a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking, those who are pregnant, breast feeding or menstruating (rule 5);

(b) medical confidentiality in relation to their reproductive health history shall be respected at all times (rule 8);

(c) HIV prevention, treatment, care, support and substance abuse treatment services and programmes shall be responsive to the specific needs of women, including prevention of mother to child transmission. In this context, prison authorities shall encourage and support the development of peer-based education initiatives on HIV prevention, treatment and care (rule 14);

(d) female prisoners and prison staff shall receive education and information about preventive health-care measures, including from HIV and STDs, as well as gender specific health conditions (rules 17 and 34);

(e) preventive health-care measures of particular relevance to women, such as Papanicolaou smears and screening for breast and gynaecological cancer, shall be offered to women (rule 18); and

(f) where conjugal visits are allowed, women prisoners shall be able to exercise this right on an equal basis with men (rule 27).

3. Case Studies

3.1 Access to Condoms and Dental Dams

22. There is evidence to indicate that a significant proportion of prisoners, both male and female, participate in sexual activity.[12] The risks associated with unprotected sex, including a range of sexually transmitted infections (**STIs**), pose serious, and in some instances fatal, health risks for prisoners, prison staff and the wider community. Both male-to-male and female-to-female sex involves exchange of bodily fluids. Therefore, both male and female unprotected homosexual sex gives rise to a risk of STIs. Some of those STIs can become blood born viruses (**BBVs**).

[12] Kate Dolan, Alex Wodak and Wayne Hall, *A bleach program for inmates in NSW: An HIV prevention strategy* (1998) 22(7) *Australian and New Zealand Journal of Public Health* 838, 839.

23. Although it is widely accepted that the use of condoms and dental dams is an effective way of reducing the transmission of STIs and BBVs and minimising other associated health risks, they are not provided in many prisons around the world.

24. International organisations such as the World Health Organisation (**WHO**) strongly support the provision of condoms to prisoners.[13] The UN International Guidelines on HIV/AIDS and Human Rights (co-published with the WHO) stipulate that 'States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations…'.[14] Notably, paragraph 21(e) stipulates that prison authorities should provide prisoners with 'means of prevention' and specifically cites the provision of condoms.[15]

25. Further, in countries where condoms and dental dams have been provided to prisoners, no substantial negative consequences have been reported to date and, notably, no country has reversed its policy.[16]

26. International human rights law therefore requires that condoms and dental dams be made available in prisons as a means to protect the sexual health of prisoners.

3.2 Case Study – Prisoners' access to IVF treatment

27. On 9 July 2010, the Supreme Court of Victoria in Australia found that the plaintiff, Kimberley Castles, was entitled to continue to undergo IVF treatment while incarcerated.[17]

28. Her Honour held that IVF treatment was both necessary for the preservation of Ms Castles' reproductive health and reasonable given:

    (a) the commitment to the treatment that Ms Castles had already demonstrated;

    (b) the fact that she held the lowest possible security rating;

    (c) her willingness to pay for further treatment; and

    (d) her age and the fact that she would become ineligible for further treatment before she is released from prison.

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[13] United Nations Office on Drugs and Crime, UNAIDS and World Health Organisation, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings – a framework for an effective national response* (2006).

[14] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations programme on HIV/AIDS (UNAIDS), *International guidelines on HIV/AIDS and Human Rights* (2006) Guideline 4 UNAIDS.

[15] Ibid.

[16] Kate Dolan et al, 'Evaluation of the condom distribution program in New South Wales prisons, Australia', (2004) 32 *Journal of Law, Medicine and Ethics* 124–125.

[17] *Castles v Secretary to the Department of Justice* [2010] VSC 310 (9 July 2010)

29. Accordingly, Ms Castles was found to be eligible for permits to leave the prison on a visit-by-visit basis, providing that adequate consideration has been given to security and resource issues. The judgment contained extensive comment on the content of the right to humane treatment in detention. Specifically, the Court found that the right to humane treatment in detention:

> [r]equires the Secretary and other prison authorities to treat Ms Castles humanely, with repect for her dignity and with due consideration for her particular human needs.

30. Her Honour took as a starting point that prisoners should not be subjected to hardship or constraint other than that which results from the deprivation of liberty and accepted that:

> access to health case is a fundamental aspect of the right to dignity. Like other citizens, prisoners have a right to…a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.

31. The Court recognised that IVF is 'a legitimate medical treatment for a legitimate medical condition'. In a landmark statement on the status of reproductive healthcare, her Honour held:

> I see no proper basis to treat IVF treatment differently from other forms of medical intervention that are considered to be necessary to enable people to live dignified and productive lives, unencumbered by the effects of disease or impairment.

32. The case illustrates the important role that human rights principles can play in ensuring access to healthcare for prisoners and that reproductive healthcare is not unduly deprioritised.

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