Monitoring and Oversight of

HUMAN RIGHTS
IN CLOSED ENVIRONMENTS

Proceedings of a Roundtable, 29 November 2010
Monash University Law Chambers, Melbourne

Edited by Bronwyn Naylor, Julie Debeljak,
Inez Dussuyer and Stuart Thomas
Monitoring and Oversight of Human Rights in Closed Environments

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Introduction:
Monitoring and oversight as a mechanism for protecting human rights in closed environments

Dr Bronwyn Naylor

A major Roundtable was convened in Melbourne in November 2010 to examine the role of monitoring and oversight bodies in protecting human rights in closed environments. This book outlines key arguments and models for monitoring closed environments, discussed at the Roundtable, and reproduces the papers presented at the four sessions.

The purpose of the Roundtable was to identify current practices and future possibilities for mechanisms for accountability and oversight of human rights practices in closed environments. Speakers and discussion were focussed on four broad themes, discussed in the four sessions:

- What makes an effective monitoring body? What bodies are currently performing human rights monitoring in closed environments in Australia? Where might the Optional Protocol to the Convention against Torture (OPCAT) fit with these schemes? (Session 1)
- How do volunteer and advocacy groups produce change and what is their relationship with other monitoring or oversight agencies? (Session 2)
- Is ‘human rights’ the most effective framework to be used by monitoring bodies? (Session 3)
- How might new initiatives and oversight agencies come to be established and work effectively? (Session 4)

The Roundtable was part of a larger research project funded by the Australian Research Council (ARC), ‘Applying Human Rights Legislation in Closed Environments: A Strategic Framework For Managing Compliance’, which addresses the question: ‘In what ways can the rights of people in closed environments be protected?’

The Roundtable focussed on monitoring as one mechanism for protecting human rights. The ‘closed environments’ being examined were prisons, police cells, forensic psychiatric institutions, closed mental health and disability units, and immigration detention centres, a selection based on our project definition of a closed environment as:

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Any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order, or by any other lawful authority relevant to the project’s goals.

The project is being undertaken in partnership with a number of Australian monitoring bodies: the Ombudsman Victoria, the Victorian Equal Opportunity and Human Rights Commission, the Office of the Public Advocate (Vic), the Office of Police Integrity (Vic), the Office of the Inspector of Custodian Services (WA) and the Commonwealth Ombudsman.

This chapter provides an overview of monitoring as a mechanism for protecting rights in closed environments. The remaining sections of the book address each of the four session topics in turn. A contextual introduction for each session is provided by one of the researchers, followed by the papers or talks given by each speaker.

Background

Why ‘closed environments’? A challenge arises when a human being, assumed to be the bearer of fundamental rights, is lawfully deprived of their liberty. What are the acceptable limitations on freedom and autonomy when a person is sentenced to imprisonment, or held in a police cell during the criminal process, or placed in detention as an unlawful immigrant, or held in a mental health or disability facility which they cannot leave, for their own safety or the safety of others?

Why ‘human rights’? There are many ways of framing the moral values prioritised under the umbrella term ‘human rights’. We use this term in relation to the modern international ‘human rights’ legal framework, starting with the proclamation of the Universal Declaration of Human Rights in 1948. The Universal Declaration provided a broad reaffirmation of what were seen as agreed moral values, following the horrors of World War II. Relevantly, these moral values include the recognition of human dignity; the right to life and liberty; and freedom from torture and cruel, inhuman or degrading treatment or punishment.1

The Universal Declaration, being an aspirational document, was then followed by the International Covenant on Civil and Political Rights 1976 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR). These ‘hard law’ instruments contain enforceable legal obligations under international law, and are based on the rights of the ‘soft’ Universal Declaration. These three instruments are said to constitute the International

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Bill of Rights. Further human rights standard-setting followed on from the International Bill of Rights, particularly in areas where little progress toward the attainment of the rights was being made. In our context, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) (CAT) is one such example. This instrument focuses specifically on the eradication of torture, and other cruel, inhuman and degrading treatment and punishment.

The main international conventions relevant to rights in closed environments are the ICCPR and the CAT. The ICCPR spells out both the right not to be subjected to ‘torture or to cruel, inhuman or degrading treatment or punishment’ (art 7), and the positive right of people deprived of their liberty to be treated ‘with humanity and with respect for the inherent dignity of the human person’ (art 10(1)). In addition, article 10(3) explicitly states that imprisonment should have a rehabilitative aim: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’.

The CAT commits states to prevent acts of torture, or of cruel, inhuman or degrading treatment or punishment. Significantly, the CAT provides a comprehensive definition of torture, and elaborates on the measures required to prevent torture and other prohibited treatment or punishment, including the criminalisation of acts of torture, establishing appropriate jurisdiction in relation to the crime, education about the prohibition, and victim’s rights.

Australia is a signatory to both the ICCPR and the CAT, but it does not have specific and comprehensive domestic human rights legislation incorporating the protections in those conventions. Two Australian jurisdiction have nonetheless passed legislation embodying rights based on the ICCPR, being the ACT Human Rights Act 2004 (HRA) and the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘Victorian Charter’).

Of relevance to this project, s.10 of the Victorian Charter and (s. 10 HRA) restates the right to protection from ‘torture and cruel, inhuman and degrading treatment’ and s.22 (s.19 HRA) provides the positive requirement to treat persons deprived of liberty ‘with humanity and with respect for the inherent dignity of the human person’.

Protecting human rights: preventive mechanisms

The question then is, how are these rights given force? Breaches of rights can be addressed by reactive measures, such as responding to a complaint, or using available powers to punish a breach, or to enforce rights in the courts. They can also be addressed by proactive measures aimed at preventing abuses of rights.

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The first measures are discussed in other writing under this ARC project and elsewhere. This Roundtable and these papers address the latter proactive measures, that is, the scope for preventing the abuse of rights.

The focus of this Roundtable was on prevention of harm through the monitoring of closed environments. Most broadly, this embodies a notion of monitoring and oversight as a social and community mechanism for making places of detention accountable to the community.

Aims of preventive approaches will include:

- Discovering and exposing breaches through inspections and public reporting;
- Detering future rights violations by driving change and by publicising failures; and
- Achieving change by:
  - making recommendations for improvement – internally and through published findings, and follow up mechanisms to ensure implementation; and
  - ongoing collaborative work with the facility to achieve and maintain good practices.

1. Types of monitoring bodies

Monitoring and oversight agencies can have different locations in government, and different levels of status, power and jurisdiction. They may operate within government departments or externally; they will have varying degrees of independence from the agency being monitored; they may be complaints or compliance-focused; sector-specific or generalist; and they may apply ‘human rights’ criteria, ‘good governance’, or other principles.

Generalist formal monitoring bodies

At the domestic level, there are a number of bodies with explicit human rights roles such as the Australian and ACT Human Rights Commissions, and the Victorian Equal Opportunity and Human Rights Commission. There are also

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state and federal Ombudsman bodies. All of these agencies may operate as monitoring bodies in closed environments.3

The ACT HRC and AHRC are explicitly mandated under statute to deal with complaints, conduct inquiries (either on their own initiative, or at the request of the Minister), and intervene in court cases where appropriate.4

Australia has had general Ombudsman schemes for at least 30 years, with a focus on good governance of public authorities and on dealing with individual complaints. Some Ombudsman offices see their role as including human rights considerations, and others have prioritised due process in government decision-making.5

Ombudsman Offices can both follow up complaints and carry out ‘own motion’ inquiries. The Victorian Ombudsman has engaged with systemic human rights issues in recent reports on conditions in prisons and in juvenile justice facilities, relying on the ‘own motion’ power, the power to respond to complaints, and also on powers granted under the Whistleblower Act, as discussed in the paper by Mr John Taylor in session 3 below.6

The Commonwealth Ombudsman, in addition to acting on complaints in relation to the Commonwealth public sector, is required to monitor conditions in immigration detention. The Ombudsman conducts inspection visits to sites of detention to monitor the conditions and services being provided to all detainees. The Department of Immigration and Citizenship is required to report to the Ombudsman about every detainee every six months so that the Ombudsman can report back to the Secretary of the Department about the appropriateness of the arrangements. The Ombudsman also independently

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2 Section 11 of the Australian Human Rights Commission Act 1986 (Cth) and sections 14 and 17 of the Human Rights Commission Act 2005 (ACT).
3 Stuhmcke, above n 2.
7 Guardianship and Administration Act 1986 (Vic), sections 14 to 18A.
work of this agency is discussed in the paper presented by Dr John Chesterman in session 2 of the Roundtable, below.

Systemic oversight is also provided in Victoria by two regulatory agencies – the Office of the Senior Practitioner within the Department of Human Services (dealing with disability services) and the Office of the Chief Psychiatrist within the Department of Health (dealing with psychiatric services). Papers were presented by each of these officeholders at the Roundtable, in session 1, and appear below.

There are also complaints-handling bodies such as Victoria’s Disability Services Commissioner (which deals with individual complaints about disability services and attempts to resolve them through processes such as conciliation) and the Victorian Mental Health Review Board (which makes decisions about involuntary and security patients).

**Immigration detention**
Monitoring of places of immigration detention is provided by the Commonwealth Ombudsman and the Australian Human Rights Commission, as well as by the International Red Cross and the UNHCR. It is also subject to scrutiny by the Council for Immigration Services and Status Resolution (CISSR).10

As noted above, the Commonwealth Ombudsman has powers of inspection. In his Annual Report for 2009-2010, the Ombudsman reported that his office had visited all mainland Immigration Detention Centres and Christmas Island:

> Our program of inspection visits to Immigration Detention Centres (IDCs) and other places of immigration detention aims to monitor the conditions and services provided to detainees, and assess whether those services comply with the immigration values and obligations of DIAC and the contracted service provider...

During 2009–10 Ombudsman office staff made visits to Christmas Island and inspected detention conditions, dealt with complaints from detainees, oversaw the RSA (Refugee Status Assessment) process and interviewed detainees who have been detained for more than six months.11

The Australian Human Rights Commission can investigate complaints and conduct inquiries in relation to immigration detention. It also carries out inspections of facilities.12

**International formal monitoring bodies**

International regimes are of significance in a number of ways. First, they provide a comparison of approaches to what are common problems (the European model discussed here) and secondly, they can offer an international monitoring framework (OPCAT), currently under consideration in Australia.

**The European Convention:** In Europe, the human rights framework pre-dates the internationally agreed framework. The European Convention on Human Rights (1950) (ECHR) was adopted shortly after the Universal Declaration. Most members of the Council of Europe have incorporated this document into domestic law, with the United Kingdom achieving this in 1998 with its Human Rights Act 1998 (UK).

Similarly to the international framework, the European human rights system has also adopted instruments addressing particularly persistent or egregious human rights issues. The European Convention for the Prevention of Torture is one such in relevant instrument. Of special interest for our purposes is the well-established monitoring process under that Convention. The Committee for the Prevention of Torture (CPT) is empowered to monitor ‘places of detention’, including prisons, immigration detention, juvenile detention centres, psychiatric hospitals, police stations and social care homes. After World War II, European States were looking for a worldwide monitoring body to protect human rights. ‘[W]hen it became clear that unanimity could not be

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reached among the leading world states, Europe went forward alone and developed the CPT as a regional mechanism.  

Under the European Convention for the Prevention of Torture, the CPT makes proactive visits to all States to investigate system safeguards regarding torture, and cruel, inhuman or degrading treatment or punishment, carries out announced and unannounced visits, and reports to the State concerned.

OPCAT: A model of monitoring which is becoming more widespread and offers an international framework and procedure is that prescribed by the Optional Protocol to the Convention against Torture (OPCAT). The potential operation of OPCAT was discussed in session 3 of the Roundtable.

As noted earlier, the Convention against Torture came into force in 1987 and requires signatory states to act to prohibit torture and cruel, inhuman or degrading treatment. At least 149 states are currently parties.

The Optional Protocol was subsequently developed to give practical force to the Convention. OPCAT entered into force on June 22, 2006, covering practices in all ‘places of detention’ – prisons, police, immigration, children’s secure accommodation, mental health detention and any other place where person is deprived of liberty.  

OPCAT has now been ratified by 48 countries. Its requirements challenge fundamental notions of state sovereignty, and ratification has been extremely controversial in some countries. Australia, for example, has signed but not ratified, let alone implemented, OPCAT.

OPCAT requires states to set up National Preventative Mechanisms (NPMs); that is, monitoring bodies that will visit places of detention to investigate and report on the treatment and conditions of detainees. Amongst other things, NPMs are required to have statutory powers and to be granted free access for their visits, and signatory States must agree to publish their reports.

17 Art 4(2). For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

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OPCAT also requires States to provide access for the UN Subcommittee for the Prevention of Torture (SPT) to make announced and unannounced visits to places of detention. Following a visit, the SPT passes on its recommendations and observations to the State in confidence and, if relevant, to the NPM. SPT reports may be published at the request of the State Party. OPCAT emphasises co-operation between the SPT and the State Party, and the need for dialogue about the implementation of the SPT’s recommendations.

The Optional Protocol was ratified in New Zealand in 2007, and implemented using a combination of existing monitoring bodies, with the NZ Human Rights Commission as Central NPM. The NZ Human Rights Commissioner, and representatives of some of the other NPM bodies, spoke at the Roundtable in session 3.

The United Kingdom NPM was established in March 2009. It consists of 18 existing bodies which visit and inspect places of detention, co-ordinated by the Inspectorate of Prisons as the ‘head’ NPM. The group includes the Prison Independent Monitoring Boards, Inspectorate of Constabulary, Children’s Commissioner, and Scottish Human Rights Commission.

2. Powers of external monitoring bodies

Most Australian monitoring bodies discussed above have a statutory basis, and many are independent of the agencies and departments they monitor. These are important prerequisites for effectiveness.

Most have authority to enter the closed environment for purposes of inspection, and can do so with or without providing prior notice.

Monitoring bodies have, however, no direct power to enforce findings or recommendations. The effectiveness of monitoring bodies in preventing human rights abuses and changing institutional cultures therefore depends on structural issues – sources of power, levels of independence, degree of access to the closed environments, access to expertise when monitoring, public accountability – and also on politics and their capacity to negotiate changes in the absence of powers of enforcement. These issues were discussed by a number of speakers at the Roundtable.

Monitoring bodies operate by what Casale refers to in the European context as the ‘pressure of example’. The CPT, for instance, explicitly prefers to announce its visits to allow facilities to make their own improvements. Casale notes

99 See HMCIP, above n 17, 10.
wnly that ‘we tend to smell a lot of fresh paint...’;19 the aim is ‘not to “name and shame”, but to find ways of improving the situation.’20

The WA Office of the Inspector of Custodial Services (OICS) similarly prefers to make announced visits to prisons, rather than unannounced visits. In a discussion at the Roundtable, speakers from OICS emphasised their focus on negotiating improvements, whilst a range of views were presented by the representatives of NPMs in NZ.

3. Informal monitoring bodies

Monitoring of closed environments can also be achieved by less formal processes, which were explored in the ‘informal’ monitoring discussion in session 2 of the Roundtable. The terminology used at the Roundtable was ‘volunteer and advocacy’ groups, highlighting the reliance of many of such groups on voluntary members, and their origins and aims in advocacy for people in detention.

Some of the major international NGOs – Amnesty, Red Cross/Red Crescent – and national civil liberties bodies can be seen to provide a monitoring role, with powers to visit, publish research, and advocate following complaints. This may also be the role and impact of Community Visitor schemes and local advocacy groups. These bodies can be powerful because they increase the permeability of closed environments to civil society.

This is part of the process by which the State and the community can be kept aware of what is happening in places of detention. It is a form of accountability to the society which has authorised these places of detention, and also provides opportunities for less formal surveillance when they visit. 21

It is also about bringing the values of the community into places of detention. Civil society can counter the risk of institutions developing their own norms and values and losing sight of community values of human decency and dignity.

As an illustration, Independent Visitor Schemes exist in several jurisdictions, both in the mental health and disability sectors, and in prisons.

In Victoria, the Office of the Public Advocate manages Community Visitor programs monitoring both disability and mental health facilities. Volunteer visitors can make unannounced visits and take up concerns raised by residents. They report to the service providers and the Public Advocate, and publish an Annual Report to the Victorian Parliament. A recent investigation by the Ombudsman Victoria into treatment of a disabled resident of a Community Residential Unit (CRU) was triggered by the report of Community Visitors. The Ombudsman in his report emphasised the importance of their role:

Community Visitors are independent volunteers who visit CRUs to report on the quality and standard of care provided to CRU residents. They play a vital role in the provision of disability care within Victoria including advocating for those who cannot speak for themselves.22

The Public Advocate observed that ‘If it wasn’t for these volunteers, these marvellous community visitors, this incident would never have been uncovered.’ 23

Similar schemes operate in other states. For example, in 1994 NSW established the Official Visitors’ Advisory Committee to oversee the Official Visitors Program. Visitors under this program visit patients in mental health inpatient facilities and can be contacted by people on community treatment orders, as well as carers, family and friends of such patients.24

Prison visiting has a long history in the UK, where statutory Independent Monitoring Boards now provide local prison-based oversight. Widely adopted in Australia, Prison Visitors schemes do not, however, usually have a statutory base. They are the responsibility of departments managing the prison systems, except in Tasmania where the Ombudsman has responsibility and in Western Australia where the Prison Visitors scheme comes under the Inspector of Custodial Services. Joseph Wallam discussed the WA scheme in his paper in session 2.

In Victoria, the Independent Prison Visitors are appointed by the Minister for Corrections under the Corrections Act 1986 (Vic) to advise the Minister on matters of prisoner operation. The program is overseen by the Office of Correctional Services Review, which is part of the Victorian Department of Justice. There are at least two visitors per prison (both public and private) and they are all volunteers. They visit monthly and prepare a report for the Office

19 Casale, above n 13, 223.
20 Ibid.
21 See further Jim Ife, Human Rights from Below: Achieving Rights Through Community Development (CUP, 2010).
22 Ombudsman Victoria, ‘Ombudsman Investigation: Assault of a Disability Services Client’, above n 6, [17].
of Correctional Services Review following each visit. These reports are provided to the Minister in a consolidated form on a monthly basis. 25

Such schemes can ideally facilitate and sustain a culture which regards the detainee as a continuing citizen of the society, despite their custodial location. Stern observes of the UK visitors that they:

... bring with them the values of the outside world to the closed and deformed world of the prisons. They keep alive in the prison a certain view of how human being should be treated. They can be the eyes and ears from the outside... 26

The effectiveness of an informal organisation in protecting human rights of detainees is likely to vary with a number of factors, including the basis of their power (statutory or non-statutory), the nature of their powers (to enter facilities; to talk to residents/inmates privately; to raise issues with management; to follow up or ‘enforce’), and their role in the accountability of the facility (to report publicly or otherwise).

The powers of most informal monitoring bodies are limited. In practical terms, they cannot do more than address individual complaints, and report and publicise issues. Change will then depend on issues such as politics and resourcing. A UK IMB Report, for example, expresses frustration about not achieving reforms in prisons where ‘slopping out’ persists, despite assurances that the practice was no longer acceptable. 27

One small advocacy group in Victoria, the Brigidine Asylum Seeker Project (BASP), demonstrates the range of roles of an informal monitor. Its work is outlined in Sister Brigid Arthur’s paper below. It provides hospitality and practical support for asylum seekers, including accommodation when released, carries out visits to detention centres, and publicly advocates the rights of asylum seekers and refugees. Most recently the group went to the federal parliament to lobby MPs, and they have been running a High Court case challenging the continued detention of children. Another group represented at the Roundtable, the Victorian Mental Illness Awareness Council (VMIAC), advocates for people in psychiatric inpatient units.

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Victorian Department of Justice, Annual Report 2009-10
Session 1: Potential for oversight – The role and effectiveness of monitoring bodies in overseeing human rights in closed environments

Section overview

This section outlines the roles, functions and workings of monitoring bodies that have responsibility of overseeing issues relating to human rights in different closed environments. Four experts were identified and approached to present their unique insights and experiences of working at this complex interface. A number of key questions were posed for the speakers to consider and potentially address during the course of their presentations. These included:

- What makes an effective monitoring body?
- What bodies are currently performing human rights monitoring in closed environments in Australia/Victoria and where are the gaps?
- How important is independence in monitoring bodies and what degree of independence is required?
- How effective are internal monitoring bodies and is there a role for them?
- Can general monitoring bodies be as effective as specialist monitoring bodies?
- What kinds of relationships currently exist between the monitoring bodies and what interactions occur, including exchanges of information?
- What can we learn from other jurisdictions?

The four speakers were:

- Dr Jeffrey Chan, the Senior Practitioner from the Office of the Senior Practitioner, Disability Services, Department of Human Services, Victoria
- Dr Ruth Vine, Chief Psychiatrist from the Department of Health, Victoria
- The Honourable Catherine Branson QC, President of the Australian Human Rights Commission
- Professor Neil Morgan, Chief Inspector, Office of the Inspector of Custodial Services in Western Australia

Introduction

Dr Stuart Thomas

The first presentation in Session 1 was by Jeffrey Chan on the potential for improving client-based outcomes and changes in practice, within a human rights framework, for people with disabilities who are subject to restrictive interventions and/or different levels of compulsory treatment. This is followed by Ruth Vine’s reflections on the complexities and challenges presented to practitioners working in contemporary public mental health services in Victoria which, incidentally, has the lowest number of inpatient psychiatric beds across all of the Australian jurisdictions. Third, Catherine Branson discusses the role of the Australian Human Rights Commission in the inspection of immigration detention services, drawing upon the objectives set out under an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment (Optional Protocol of the Convention Against Torture; OPCAT). She highlights the benefits of a timely dialogue and opportunity for feedback between parties to achieve desired results or reform. Finally, Neil Morgan discusses the unique situation in Western Australia where there is an independent monitoring body operating within a Government Department, which reports solely and publically to the Parliament.

The four presenters highlight sustained and, in many cases, sterling efforts in their respective sectors at delivering the expected and requisite monitoring and oversight in closed environments. All four identify a complex pattern of both practical limitations and more entrenched, systemic barriers that are impeding effective monitoring and oversight. The level and type of monitoring/oversight body (or indeed service response) that can begin to address the complexities and nuances presented by, and in, the different closed environments under consideration was discussed.

All presenters also highlight the distinct challenges brought about by the need for coordinated multi-agency approaches to groups of people who (collectively) present to services as complex, vulnerable populations. What clearly resonates from all presentations is that no one sector or agency can adequately meet these needs in the short-term, let alone considering provisions over the medium- or longer-term. This has clear implications for monitoring and oversight mechanisms.

The practical impediments noted by the presenters appear, on the whole, to be brought about by the limited capacity of available services to deliver what
would be considered to be a satisfactory 'product'. Because of this, there appears to be an entrenched underlying paranoia about the powers of these monitoring bodies, and about the potential breadth of influence of their findings and recommendations on funding and service delivery. One core concern about the use of internal monitoring processes is their ability to go beyond mere compliance checks and to open the closed environments up for meaningful, transparent internal and external scrutiny and accountability. As such, all speakers advocate for independent monitoring and oversight bodies as an essential part of what should routinely be considered good practice in their respective sectors. At the same time, however, all caution that there are also a number of balances and checks in place which still require informed consideration. Whilst an increasingly skilled workforce, and increased general resources, are dominant themes in this debate, community expectations and community safety figure strongly.

All presenters identify a suite of broader systemic issues that continue to require detailed consultation, cooperation and collaboration, to ensure the realization of the potential offered by these monitoring bodies. And all are positive that these are aspirations that can and will be met given time, and continued debate and reform.

The starting point for developing these initiatives and improving the provision of care and treatment for the vulnerable in our communities remains a commitment from health, social and welfare providers to break away from the traditional silo approach to service delivery, a practical commitment to meaningful collaborations and inter-agency working initiatives, and an increased openness to adopting evidence-based practice principles and independent external scrutiny. This is a lot more complex in practice than we dare to think.
**Session 1 – Potential for Oversight**

**Session 1.1: People with disability subject to restrictive interventions and compulsory treatment: Applying human rights to improve disability client outcomes and practice change**

*Dr Jeffrey Chan. Senior Practitioner, Disability Services, Department of Human Services, Melbourne, Victoria*

**Abstract**

The **Disability Act 2006** established the role of the Senior Practitioner to protect the rights of people with disabilities subject to restrictive interventions and compulsory treatment. Whilst the role is predominately monitoring and regulatory, compliance in itself does not lead to client outcomes and practice change. As such, a prevention science and change management approach is adopted to achieve compliance and client outcomes, and to influence practice change in disability services. This presentation will reflect on the critical success factors, the challenges and the potential capability of such a role in terms of protecting the rights of vulnerable Victorians with disabilities.

**Roundtable Paper**

**Introduction**

This presentation is an opportunity to reflect on the legislative role and functions of the Senior Practitioner in disability services over the past three years. I will begin by providing a brief overview of the role and a summary of the data on restrictive interventions. Next I share what I think are the two primary objectives in monitoring and oversight of closed environments, and reflect on what I think are the issues that facilitate or present as a barrier for oversight and monitoring bodies from the perspective of disability services.

**Background**

The **Disability Act 2006** (the Act) established the role of the Senior Practitioner to protect the rights of people with disabilities subject to compulsory treatment and restrictive interventions. Briefly, the role broadly covers the following areas:

(a) monitoring, regulatory and investigative functions;
(b) leading practice change;
(c) advisory in terms of making practice improvements to the Minister and Secretary; and
(d) a capacity to initiate research and establish linkages with academia and professional bodies in the area.

**An overview of the regulatory functions of the role**

Currently, ‘restrictive interventions’ in the Act only cover mechanical and chemical restraints, and seclusion. However under s 150 of the Act, the Senior Practitioner can declare a practice to be “other restrictive interventions” and subject it to the same conditions of compliance. Disability service providers are required to have an authorised program officer to oversee the use of restrictive interventions and sign off on a behaviour support plan. This plan is required to be submitted to the Senior Practitioner before a restrictive intervention can be administered, and a behaviour support plan may be subject to a review. The Senior Practitioner monitors the use of restrictive interventions and report on the data annually.

Compulsory treatment orders consist of residential treatment order (having the same meaning as orders under the **Sentencing Act 1991**) and supervised treatment orders (a civil detention order applying at this stage to people with an intellectual disability only). The Senior Practitioner has to approve a treatment plan and issue a treatment certificate to the service provider who applies to the Victorian Civil and Administrative Tribunal (VCAT) for a compulsory treatment order. The Senior Practitioner is responsible for the supervision of the implementation of the order.

As such, the Act is framed with a human rights paradigm where treatment and support are the focus of a person’s plan. The role of the Senior Practitioner only covers people receiving services from registered disability service providers such as respite; day programs, supported accommodation and other (e.g. criminal justice) services.

**A summary of the data on restrictive interventions – vulnerability of persons with disabilities subject to restrictive interventions and compulsory treatment**

To date, the Senior Practitioner data indicate a total of 2,102 people have been reported to be subject to restrictive interventions. This equates to 0.5% of the Victorian population, or approximately 9% of people receiving disability services. People with multiple disabilities, people with communication impairment, and children and young persons with autism spectrum disorders are more likely to be subject to restrictive interventions than those with only a diagnosis of intellectual disability. This finding is a consistent trend for the past three years.
Compared to individuals subject to restrictive interventions (RI), those subject to compulsory treatment are more likely to have mental ill-health (27% compared to 18% subject to RI); mostly young (89% younger than 45 years of age compared to 70% of those subject to RI); more likely to be subject to multiple medications (including anti-psychotic medication) (74% versus 57% in others of the same age/gender); and have been subjected to trauma and abuse themselves when they were children. Hence, Victorians with disability subject to restrictive interventions and compulsory treatment are a very vulnerable group of people whose rights require continuing protection and monitoring. The findings are not peculiar to the Victorian context, the findings are similar to the international evidence of people with disability presenting with significant behaviours of concern. Furthermore, these consistent findings do have policy, practice and planning implications.

Achieving client outcomes and practice improvement through a practice change strategy

Given their vulnerability, a change strategy model of oversight and monitoring is necessary rather than a compliance model alone. The focus ought to be on improving outcomes for the person and practice improvements across the sector. It has been argued that compliance in itself does not bring practice culture change (such as better support plans) or lead automatically to improvement in client outcomes. Therefore in terms of practice improvement, the continuing focus is how to bring people (service providers, practitioners and managers) along with you to deliver the intent and objectives of the Act. Hence a practice change strategy is the approach used by the Senior Practitioner.

Mandatory reporting and the analysis of the reported data play an effective role as part of practice change and improvement. The legislative reporting requirements to the Senior Practitioner, including every episode of a restrictive intervention and a submission of a behaviour support plan for the person, or approval of treatment plans for those subject to compulsory treatment, play an important role in not only ensuring compliance but providing pertinent evidence for organisational learning. Evidence-based practice must drive change in the disability services industry; in strategy development and prioritisation, practice change, policy formulation and resource allocation. These data are also important because in order to “fix the problem” it is crucial to know what the “problem” is and the underlying causes of the problem in the first place. As such, oversight and monitoring bodies have an important role in making these data meaningful in order to drive change and shine a torch on the underlying causes of the “problem”.

A recent report by the Senior Practitioner indicates achievement of 100% legislative compliance and reporting. Some critical success factors for this achievement include the ongoing feedback of the data to disability service providers, a communication strategy to key professionals within an organisation, capacity of the data to be flexible and customised to suit each organisation’s needs, and screening for compliance to allow disability service providers to remediate non-compliance promptly.

Another change strategy is to influence practice leadership at all levels within the sector. Some of the strategies of practice leadership used by the Office of the Senior Practitioner (the office) to date include the provision of research partnerships, project collaboration, professional education and training, clinical coaching, undertaking individual and service reviews, and setting standards to address current gaps in disability services. Whilst targeted training and the strategy of tracking progress of specific training (such as in the development of behaviour support plans) are critical success areas in influencing practice leadership, some of the training provided by the office are considered areas that ought to be part of general staff development (for example, delivering training in positive behaviour support planning or in trauma-informed care practice). However the office undertook this function due to the absence of such training within general staff development.

It is also important to note that the research and training conducted to date are a temporary measure in the absence of a longer-term workforce development (not just in disability services but in associated professional areas). This often requires collaboration with other government and professional bodies. While the Senior Practitioner has initiated such collaboration (for example, influencing and instigating the Australian Psychological Society to develop a professional position on restrictive interventions and an interest group in intellectual disability) there needs to be an inter-departmental approach on many of the areas.

Investing in workforce and professional development

Linked to the above issue, there are a number of fundamental assumptions that need to be in place, including that there is (a) a workforce readily available in disability services, (b) with the required skills and experience to address the concerns and vulnerability of the people that the legislation has been enacted to protect, and (c) a workforce that is supported and sustained. Therefore, achieving best practice standards also requires a workforce that is able to meet the standards and ready to rise to the challenge. But how do you set best practice standards when it seems evident that the workforce will not be able to meet the best standards now? Hence incremental success towards reaching the standards as an approach is another important change strategy.
It is critical to have a dialogue with the diverse professional associations and human services providers on the matters of best practice standards. The uptake of the Charter and the UN Convention on the Rights of Persons with Disabilities (UNCRPD) by professional associations could be faster. While my office may have achieved 100% compliance to legislative requirements, the more important issue is how do we get professionals and organisations to go beyond technical compliance of the legislation? And if this is the goal i.e. going beyond technical compliance, then a change management strategy must be the approach of oversight and monitoring bodies.

Getting the “rights” mix: The art of practice leadership
In my view, disability services’ clinical practice traditionally is not accustomed to clinical oversight and governance, and more so from an independent body. And more importantly what is missing is the art of practice leadership: in clinical practice, in service delivery and organisational development. A clear clinical governance and human rights practice leadership in disability services would be a step in the right direction. While governance and practice guidelines may not necessarily resolve some of the issues, it is pertinent that vulnerable Victorians with disabilities are afforded the protection and assurance that when they are receiving treatment, practitioners know “the why, what, the how, and when, and the best practice standards”.

The absence of such a governance and assurance framework in practice in some way contributes to the tension between oversight and monitoring role versus that of the practitioners’ view. This is not just specific to disability services. This issue relates back to the earlier point, that is, there are not many professionals in the workforce who understand and have the necessary skills and experience to work with vulnerable people with disabilities who present with high complex care needs.

Another factor that complicates this issue of practitioners being unaccustomed to practice oversight and governance is that clinical practitioners in disability services report to management professionals who typically may not have clinical practice experience or background. In disability services practice, it is not uncommon for management to have more control (or say) in clinical decisions and to moderate therapeutic-based decision-making. Whilst it is appreciated that managers in disability services need to make evidence-informed decisions from a range of sources, one of these sources needs to include clinical practice evidence. This is so especially when the crux of the presenting matter relates to a practice or clinical concern.

The problem arises when managers make management decisions that are actually clinical and practice decisions, and such decisions are often short-term in effect (for example, budget containment or risk aversive management practice type decisions). Furthermore these decisions may in fact be contrary to the emerging research evidence in treatment. For example, a reduction and/or safe elimination of restrictive interventions can deliver economic cost benefits and increase workplace safety, and safety for the person. A “containment approach” may, however, often be the default action, as this approach appears tangible and can be immediately realised (e.g. building a fence or putting more staff on shifts). Or the decision to disregard clinical practice evidence may be based on occupational health and safety (OHS). It is a myth that is inadvertently perpetuated, when the reality is that safety for the person and safety for the staff do go hand in hand, as the emerging research in restrictive interventions indicates.

It is reasonable to suggest that the human rights paradigm is a recent shift in disability service practice (and even in the medical and health sciences) and as such contributes to the tension between monitoring bodies and clinical practice in disability services. Historically, until the breakaway of the positive support models and cognitive behaviour therapy (such as mindfulness) from the traditional applied behaviour analysis, people with disabilities with behaviours of concern experienced aversive, invasive and punitive treatment, such as electric shock or water spraying. The use of punitive and aversive practices has not gone away in the practice culture.

To circumvent the tension of oversight and the traditional infrastructure in disability services, the office had to establish itself quickly as a credible and reputable leader in clinical practice. It had to be at the forefront of ensuring the application of human rights in clinical practice and service delivery. Staff selection based on clinical expertise and values are critical in the establishment of the office. A focus on human rights to underpin the role and activities of the office became an urgent imperative in its establishment. To this end, human rights education has become part of an ongoing professional education provided by the Senior Practitioner. A human rights lens is also applied to clinical reports and reviews. The Charter of Human Rights and Responsibilities 2006 (Vic) (the Victorian Charter) offers significant leverage that is used to reinforce and augment the activities of the Senior Practitioner, particularly when disquiet is expressed at the tension between the Charter and the OHS legislation by certain stakeholder groups.

Rights versus regulatory burden
Another cause of tension, observed in Victoria and in other jurisdictions, is the perceived push-back by service providers who express tension at being burdened by external oversight, monitoring and regulation. Many of the service providers have expressed the strain of an inadequate funding model, increased regulation such as OHS (though this does not have to be the case!) and increased industrial relations regulation. Disability service providers and professionals often frown upon mandatory reporting.

As mentioned earlier in this paper, the onus seems to lie on the oversight body to show that the data gathered via mandatory reporting has many benefits for management. In the case of the restrictive intervention reporting in Victoria, the office took very specific strategies and a lot of focused effort to show the advantages of mandatory reporting, and has achieved compliance to date. Once again, a change strategy is the key for an oversight and monitoring body.

Specialist models of oversight are important
Given the lack of expertise and clinical knowledge about people with disability in the various professional groups (such as psychiatry, general practice, physical health, education), there is a need for specialist models of oversight. Whether it has to be a distinct oversight model or merged with another oversight body needs to be explored further. A specialist oversight and monitoring body is critical especially in “hot topic” public issues. An example is public safety concern versus the evidence that community-based treatment is better in the long run for sexual offenders with intellectual disability. It is during such topical community tensions that a strong specialist model can have an effective role in educating and become a focal point of the “voice of reason” and temperance.

Efficacy and the role of the “f” word
The effectiveness of an independent body, such as the Senior Practitioner, should be measured by the client outcomes and practice change produced that are consistent with the intent and objects of the Act. However the paradox is that the office’s effectiveness is linked to the capacity and resource allocated, including the “f” word - funding to do what the role had been intended to achieve. Whilst the office has initiated several audits, monitoring activities and initiatives to safely eliminate or reduce restrictive interventions, its capacity (in terms of reach and regularity) to undertake on-going audits, reviews and change initiatives is limited by the resource available. This does not even consider the other wide-ranging functions required of the role. The office has been fortunate to date to receive the support of the disability services division for some of the initiatives to date. Another paradox is that the role might be so effective that it resolves the “problem” for the individual and for the service provider, and hence exculpates the provider and/or the department. In this sense, efficacy often deprives itself of the funding, so the question is how to capitalise on the success of active prevention rather than the typical reactive “crises-driven” response.

Oversight in silos
Another difficulty is that the role is limited to the protection of rights of people with disabilities when they are in receipt of registered disability services. The role does not have jurisdiction when the person is in education, mental health or corrections settings for example. This in itself creates silos in the real ecological and social contexts of people with disability and their experiences. These silos contribute to the existing demarcation of service delivery and artificially further segment the lives of people with disability and their exercise of rights every day. Whilst legislative bodies try to reduce the experience of the silo (for example, the Senior Practitioner works closely with the Chief Psychiatrist, Chief Health Officer and Disability Services Commissioner on an informal basis to achieve outcomes for individuals) this is often dependent on the individual in the role.

The silo as an administrative and legislative artefact adds another barrier to the implementation of human rights, particularly in light of the increasing evidence from the Senior Practitioner’s reports (for example, children and young persons with autism are more likely to be subject to restrictive interventions). From the perspective of prevention science, monitoring and protection should therefore go beyond the artificial silos created. For example, a person with disability may be afforded rights protection in one “silo” but not in another. Many family members and practitioners, particularly within an education setting, have echoed this concern to the Senior Practitioner. As such, this is another gap in monitoring coverage.

Another example of the artificial segmentation of the lives of people with disabilities subject to restrictive interventions is seen in the area of chemical restraints. Currently the Act defines chemical restraints as the use of a chemical substance for the primary purpose of behavioural control but does not include the use of a drug prescribed to treat a mental illness, physical illness or physical condition. There is overwhelming research evidence in relation to the interplay between physical health, medications and the behaviours of a person. The current definition limits the role of oversight and monitoring where poor health care and medication may cause or exacerbate the behaviour, and the medication may be iatrogenic. Furthermore in a sense it provides a “loophole” where there has been a diagnosis of “not otherwise specified” and hence the medication may not be reportable. However this could be due to a lack of understanding of our population group. It is
interesting to note that the previous Intellectual Disability Review Panel had uncovered similar concerns.

A small contribution the office has done is to work across the “silos” and establish linkages with key professional associations and academia. Furthermore, the office has initiated and funded a training program for people with cognitive impairment, to be aware of and to be trained to exercise rights and responsibilities.

**Conclusion**

In disability services, the role of the Senior Practitioner is unique nationally and internationally. This is so particularly in its monitoring and reporting of data in disability services, and the use of these data to inform evidence-based practice and policy change. In some sense, the role of the Senior Practitioner is still new, only having been established on 1 July 2007 and as such, there are aspects of the role that have been successful and aspects that can be further fine-tuned. Based on my experience to date, what is very clear is that client outcomes and practice improvement with a human rights change agenda must be the continued focus. It is important to continually remind ourselves that we support a group of highly vulnerable people with disabilities, with histories that have contributed to their current vulnerability. The use of restraints and seclusion is actually an admission of practice and systems failure. Based on the perspective of the person with disabilities, perhaps it is time to re-think oversight and monitoring bodies so they are not merely confined to neat jurisdictional silos, because it is a simple fact that vulnerable people need protection everyday and everywhere.

**Selected references**


French, P., Jeffrey Chan, and R Carracher, Realising Human Rights in Clinical Practice and Service Delivery to Persons with Cognitive Impairment who

30 **HUMAN RIGHTS IN CLOSED ENVIRONMENTS**


Session 1.2: The Role and Effectiveness of Monitoring Bodies in Overseeing Human Rights in Closed Environments: A focus on Public Mental Health Services

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Abstract

State funded mental health services are provided through a range of bed based and community based services. Involuntary treatment and care can only be provided through approved mental health services and in accordance with the requirements of the Mental Health Act 1986 (Vic). A number of Human Rights included in the Charter of Human Rights and Responsibilities Act (2006) are relevant to mental health services. For example, rights such as freedom of movement, liberty and freedom from medical treatment without consent may be limited when receiving treatment as an involuntary patient. Mental health treatment is provided in both open and closed wards. Restrictive practices such as seclusion and mechanical restraint are subject to particular conditions and oversight.

Monitoring and accountability in mental health settings are provided through a number of related mechanisms. Health services must be provided in accordance with funding and service agreements. This includes reporting on Key Performance Indicators which include seclusion rate. These are discussed with services and published electronically every quarter allowing comparison between services and over time. Hospitals must be accredited against agreed standards. For mental health, this includes accreditation against the National Standards for Mental Health Services. The MHA requires that services report to the Chief Psychiatrist use of seclusion and mechanical restraint. In addition the Chief Psychiatrist carries out clinical audits, which include consideration of the use of restrictive practices, and responds to coronial recommendations and complaints raised with the Office. The Chief Psychiatrist issues Clinical Practice Guidelines and participates in the performance meetings. In addition, amenities are included in matters considered by Community Visitors, and the Mental Health Review Board considers whether a person meets criteria under the Act which would support treatment and care as an involuntary patient.

It is important to note that despite this quite comprehensive suite of review and reporting mechanisms, there are a number of issues that impact on how and where a person receives mental health care. There is limited capacity in acute inpatient, secure extended care and forensic facilities. This may mean that access is only available to those most unwell, who are most likely to require the powers and protections under legislation. As the number of beds has declined, so the level of acuity has increased. The options available to staff to manage very disturbed people in a way that best promotes the safety of the patient, other patients and staff are limited.

Edited Transcript of Remarks

This paper is concerned with the monitoring systems in place in regard to coercive interventions in the state funded mental health system. At the outset, it is important to consider the roles and responsibilities of the Chief Psychiatrist within this framework to help contextualize the ensuing discussion.

The Chief Psychiatrist has responsibility for the medical care and welfare needs of people who are in receipt of treatment or support for a mental illness. A core component of this role is to monitor the clinical standards of medical practice that are provided by the public mental health system, and to respond to any complaints that are received from the consumers of these services, their carers and others of significance (See Box 1). The Chief Psychiatrist produces an Annual Report, published by the Department of Health detailing these activities. This also serves as the reporting requirement for the Quality Assurance Committee, as set out under s. 106AC of the Mental Health Act 1986 (Vic).

Box 1: Core functions of the Chief Psychiatrist

- To receive and review statutory reports relating to seclusion, mechanical restraint, electroconvulsive therapy, annual examinations and reportable deaths
- To conduct investigations concerning treatment related issues where the Chief Psychiatrist determines such an investigation is warranted
- To instigate state-wide clinical review of approved mental health services to examine the standard, quality and consistency of clinical practice
- To investigate complaints received from consumers and carers
- To manage enquiries and other correspondence received from members of the public, service providers and other organisations
- The provision of high level advice and consultation

The public mental health system is a service that continues to operate under considerable pressure. Bed numbers are limited and often run at high occupancy levels. This is especially the case with respect to the number and availability of long stay beds and beds designated for forensic patients. A significant proportion of inpatients are admitted as involuntary patients under
the Mental Health Act 1986 (Vic) for at least part of their admission, and many are also treated under Community Treatment Order provisions following discharge from inpatient services. While provisions of the Act, and more generally the mental health system, endeavour to balance the need for treatment and the imposition of involuntary treatment, there are nonetheless a number of tensions inherent in the provision of mental health care and treatment that must be recognised and managed. The core issues of consideration here include the balance between individual autonomy and coercion; the safety or freedom of an individual coupled with considerations of community safety; the right to freedom and the right to treatment; and the duty of care and the ‘dignity of risk’. It is also important to note here that those under involuntary orders are able to access rights and protections, such as external review, which are not available to those who are receiving treatment as an informal or voluntary patient. More specifically, a number of the Rights considered in the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Victorian Charter’) are centrally relevant to the provision of mental health services. See Box 2 for examples.

Box 2: Examples of human rights based considerations with respect to public mental health care and treatment

<table>
<thead>
<tr>
<th>Involuntary treatment – mental health service or Community Treatment Order</th>
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<tbody>
<tr>
<td>• Liberty and security of person</td>
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<td>• Freedom of movement</td>
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<td>• Privacy</td>
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<td>• Protection of families and children</td>
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<td>Restraint and seclusion</td>
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<td>• Liberty and security of person</td>
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<td>• Freedom of movement</td>
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<tr>
<td>• Privacy</td>
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<tr>
<td>• Humane treatment when deprived of liberty</td>
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</table>

There are a number of circumstances under which these rights are limited for the individual; however a number of safeguards are in place to ensure that any limitation is considered lawful, necessary, reasonable, proportionate, logical and demonstrably justified. Within the context of mental health services, guidance for the imposition of restrictive practices is provided under provisions contained in the Mental Health Act (Vic) 1986. As such, information pertaining to the provision of mental health care and treatment is supported through the issuing of a series of clinical practice guidelines. These seek to inform mental health services and practitioners about clinical issues in relation to the provisions of the Mental Health Act 1986 (Vic) (http://www.health.vic.gov.au/mentalhealth/cpg/index.htm).

Coercive interventions, such as seclusion (defined as the sole confinement of a person in a place from which they cannot exit) and mechanical restraint (defined as the restriction of a person’s freedom of movement by means of externally placed restraints such as shackles), can only be instituted in very specific, prescribed, circumstances and by appropriately qualified persons. For instance only the authorised psychiatrist, or senior nurse on duty in the case of urgent need, can approve the use of such practices. This can only occur in cases where there is judged to be an imminent risk of harm to self or others and, further, when other interventions have already been tried and failed or where they are not considered appropriate in that specific situation.

Enacting such provisions brings with it a strict set of requirements for mental health practitioners to follow regarding levels and types of observation of the individual. Furthermore, as outlined in Box 1, it is a statutory requirement that all such episodes are reported to the Chief Psychiatrist. These core processes therefore offer a means for the independent monitoring of mental health service provision. Victoria’s mental health services are State funded; embedded within this funding is an agreement on the part of those services to comply with various expectations and standards. To these ends, services are required to have local audits and reporting practices in place, and to report on a series of Key Performance Indicators (KPIs) which include quality areas such as the use of seclusion. The KPIs are available publicly and allow for benchmarking and comparison between different service providers. In addition, services are subject to more in-depth clinical review by the Chief Psychiatrist from time to time.

A further recent national level initiative, operating over the past few years, utilising a combination of performance and statutory monitoring coupled with staff training and evaluation, has led to a significant reduction in the use of seclusion in a number of mental health services. This has occurred despite a continuing demand and a high threshold criteria set in place regarding admission to public inpatient services (See Figure 1).

Figure 1: A graphical depiction of trends in inpatient admissions and the number of clients secluded and seclusion episodes
Other monitoring mechanisms are also in place and commonly used. These allow for additional monitoring around Rights-based obligations regarding, for example, the reasonableness of decision-making by treatment providers in relation to the appropriateness of continued detention under the Mental Health Act 1986 (Vic). These monitoring options include:

The Mental Health Review Board is a statutory tribunal established under the Act to conduct reviews of, and hear appeals by, individuals being involuntarily treated as inpatients or under provisions of community treatment orders. The most recent Annual Report specifically notes its obligations under the Victorian Charter to adhere to a number of human rights obligations and to give proper consideration to these when making a decision. In 2009/10 5,640 hearings were conducted and 351 patients were discharged (Mental Health Review Board, Annual Report 2010). Thus changes in the treatment decision were made in just over 6 percent of the cases heard in 2010.

The Community Visitors Program operated by the Office of the Public Advocate allows for Community Visitors empowered by law to visit disability or mental health services at any time, unannounced. They monitor and report on the adequacy of services provided in the interests of the consumers by talking to the patients, practitioners and by considering the general amenities available in the environment. In 2009/10 this group made over 5000 visits to services (Community Visitors Annual Report 2009-2010).

The Forensic Leave Panel, established under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 for Forensic Patients. This panel operates as an independent statutory body with jurisdiction to hear applications for leave for forensic patients. It meets on a monthly basis and produce an annual report. For example, in the most recent 2009 report 179 applications were received by 73 individuals for a total of 724 different leaves (Forensic Leave Panel Annual Report, 2009, pg. 7).

While, individually and collectively, these mechanisms provide the means for considerable checks and balances to any imposition or limitation on human rights in the closed environments of civil and forensic mental health inpatient units, there are a number of factors which impede their potential effectiveness in practice. In particular, we return to the perennial problem of the limited access to inpatient care services. Access is limited because of the necessary adoption of a high threshold for admission, the limited amenities available in these inpatient settings, and additional workforce constraints. These practical operational constraints mean that while there may be a number of systems in place to monitor how treatment and care are provided, their capacity to support the provision of improved practice remains distinctly underdeveloped. As such, the core issue of the capacity argument inevitably needs to be balanced with the Rights-based arguments being posed here. Some of the reforms anticipated in the coming years such as increased bed capacity and greater workforce flexibility and support are likely to address some of these core developmental impediments, potentially leading to an improved effectiveness of the monitoring of human rights in mental health service environments. It is noteworthy to conclude here with a reminder that the Mental Health Act 1986 (Vic), and the framework for Rights that occurs under the Act, is currently under review, so it will be very interesting to see how that plays out in the near future.
Abstract

What system of preventive monitoring of places of detention is most appropriate for federated states such as Australia? This presentation will consider the most useful model for a national system of preventive detention in Australia, drawing on international examples. It will also briefly canvas the current challenges in ensuring effective monitoring of Commonwealth immigration detention facilities.

Edited Transcript of Remarks:

I begin with a reminder of the complexities of monitoring the oversight of human rights in closed environments in a Federation and also to emphasise that when we think of public oversight we ought to be thinking not just of domestic (national) oversight, but also of international oversight.

The role of the Australian Human Rights Commission that is most directly relevant to this topic is the inspection of immigration detention services. This last year has clearly demonstrated the need for effective monitoring of these closed environments for which the Commonwealth Government is responsible. Over this year we have witnessed riots and protests in detention facilities; we've also seen three deaths and an increasing level of self-harm among people detained in our immigration detention facilities. At the close of 2010, there were over 6000 people in immigration detention in a wide range of facilities in which men, women and children are being detained. I will talk a little later to the particular challenges of monitoring immigration detention.

Ensuring that Australia complies with international human rights obligations relevant to the conditions of detention is of course a Commonwealth responsibility. For the Commonwealth, through signing the Optional Protocol to the Convention Against Torture, commonly referred to as OPCAT, has indicated its support for establishing a system of regular visits to places of detention by independent national and international bodies; the aim of these visits being to reduce the risk of people being ill-treated while they are deprived of their liberty. While much work has been undertaken towards ratification since signing the OPCAT in April 2009, it is disappointing that two years later we still do not have a concrete timetable for ratification or implementation. So I propose this morning to outline some of the benefits of Australia becoming a party to OPCAT and in doing so I will consider some of the challenges to implementation.

Why is it taking so long for Australia to implement OPCAT?

I think the primary challenge is that we live in a federated state. The Commonwealth Government is responsible for entering into international agreements like this and specifically for ensuring that we meet international obligations in this regard, but the State Governments are primarily responsible for administering the multitude of areas of public life that impact on human rights, including most of the places of detention that we have in Australia. As such, the federal system creates a number of challenges around ensuring the effective coordination between the various jurisdictions, as well as determining just how a national system of preventative monitoring could be resourced.

Before turning to consider the most appropriate model for a preventative monitoring body in Australia, I'd like to briefly consider the benefits of ensuring that people deprived of their liberty are not ill-treated. Liberty is a fundamental human right. So, to deprive someone of their liberty carries with it an onerous responsibility to ensure that the conditions of their detention do not undermine the detainee’s fundamental human dignity. We know that the consequences of ill treatment are far reaching; we know this from our experiences of the management of immigration detention facilities in the past. Many people now living in Australia amongst us, as part of our community, are experiencing severe and long lasting mental health harm as a consequence of their experiences of conditions of detention that did not meet Australia’s international human rights obligations. Indeed, my Commission is still dealing with complaints about the conditions of detention and immigration facilities in Australia from nearly a decade ago.

What would a national preventative system for Australia look like?

I think many of you will know that the term employed by OPCAT to describe a national system of regular visits to places of detention is a ‘National Preventative Mechanism’ (NPM). International experience demonstrates that there are two distinct approaches to the establishment of NPMs in Federal States, either by jurisdiction or by theme. For example, Germany has adopted a mechanism based on jurisdiction while the United Kingdom has established its approach by theme. By contrast, the model for Australia, supported by the Australian Human Rights Commission, is a mixed model with each jurisdiction being responsible for selecting a suitable body (or bodies) to monitor places of detention in that jurisdiction. According to this model, there would be a coordinating body for each state and an overarching national coordinating NPM at the Commonwealth level. This type of national system,
based on international human rights standards, should lead to a higher level of effective monitoring of places of detention and consequently to improvements in conditions of detention for many of those who are deprived of their liberty.

**What challenges do we face?**

There is a range of agencies involved that we would need to take into account, together with considering what factors contribute to effective monitoring of immigration detention facilities, and these have to be generalised to the broader picture. These are now considered in turn.

Historically speaking, a number of agencies have played a role in monitoring immigration detention in Australia. The Australian Human Rights Commission has monitored conditions for over a decade; we’ve completed two national inquiries and conducted regular visits to places of immigration detention. Other agencies have also played important roles too, including the Commonwealth Ombudsman whose good work in this area I acknowledge, and the Red Cross whose humanitarian work is also much to be admired. The challenge here is that each agency has a different focal point and different methodology to their monitoring visits so developing a means for the effective coordination between these various agencies becomes paramount. This challenge is further compounded by the ever increasing number of detainees and range of detention services in operation, meaning that none of the agencies is adequately equipped or resourced to complete the work. Hence some facilities are not visited with sufficient regularity; the more remote of these are the most at risk in this regard. The challenge here, therefore, is to find a more effective way of doing it that makes best use of the resources that are available.

**What makes for an effective monitoring body?**

I am going to use some examples from this immigration detention area because what I think that tells us about the essential characteristics of an NPM is an excellent place to start. Monitoring bodies should be independent. They should make regular visits and should be supported by adequate resources and have adequate functions and powers. They should work cooperatively with detaining authorities and be able to report publically on their work. I consider each of these elements to be fundamental to effective monitoring.

The current bodies monitoring places of immigration detention are all independent in the relevant sense. However, I would argue that their independence would be bolstered by ensuring that the functions and powers appropriate for the effective operation of the NPM are set out in legislation. For example, while the Australian Human Rights Commission’s current functions and powers support our monitoring work, we would welcome an explicit legislative basis for the work we are doing in immigration detention.

Returning to the issue of adequate and ongoing communication, the core challenge here is that of developing an effective and cooperative dialogue with the detaining authorities. Central to this premise is the OPCAT objective to help in improving conditions of detention and treatment of those deprived of their liberty, rather than simply denouncing in public those managing the places of detention. The Commission seeks to do this in a number of ways. We make sure we engage in effective communication during each visit to a place of detention. The primary forum for this is in an exit meeting at which we discuss our key observations with the Department of Immigration and Citizenship (DIAC) Managers on site. This often allows us to resolve issues instantly. For example, while on Christmas Island, we became aware that an Indonesian crew detained there had been prevented from using the telephone to call their families; discussion with the local DIAC manager there quickly resolved that issue. Added to this, we also engage in regular dialogue with DIAC staff in Canberra about significant issues, or issues that cut across the various facilities.

We are also committed to public reporting. We do not report on every single observation that we make or even every issue of concern, but we publish detailed reports on the conditions of detention in the facilities we visit. These reports are always provided to DIAC ahead of being published so that they can respond and, if they ask us to do so, publish their response alongside our report.

**Concluding remarks**

My closing message is that effective monitoring can be an important mechanism to help make a fundamental difference to the lives of vulnerable people; our international standards set a measure against which we can monitor these issues. This is a very important minimum standard which we will seek to achieve. We urge all stakeholders to continue to work together to enable the ratification and implementation of the important Human Rights instrument, the OPCAT.
Session 1.4: Accountability, Oversight and Human Rights in Closed Environments: the Office of the Inspector of Custodial Services

Professor Neil Morgan, Chief Inspector, Office of the Inspector of Custodial Services, WA

Abstract
Established in 2000, the Office of the Inspector of Custodial Services in Western Australia (OICS) is the only office of its type in the country. It has unfettered powers of access to places of custody in its jurisdiction (primarily prisons, juvenile detention centres, court custody centres and prisoner transport arrangements) and to all relevant documents. It is also independent, reporting directly and publicly to Parliament. The first part of this paper outlines the role and powers of the Office. It then discusses some major contemporary challenges, including duty of care (especially following the Ward case); conditions of custody; and questions of privatisation and accountability. It concludes with brief reflections on some pending amendments to the powers of the Office and the benefits of specialist external accountability agencies.

Presentation notes
Structure of presentation
• Role and power of the Inspector of Custodial Services
• Major contemporary challenges
  o Duties of care and the Ward case
  o Prison numbers, capacity and conditions
  o Privatisation and value for money
• Pending legislative amendments
• No equivalent office elsewhere in Australia

Office of the Inspector of Custodial Services
• Established 2000 in light of decision to establish a privately operated prison (Acacia).
• Governing legislation: The Inspector of Custodial Services Act 2003 (WA)
• The Inspector is an Officer of the Parliament appointed by the Governor
• This functional independence means:
  o Not in Department of Corrective Services (DCS)

Inspection Powers (Statutory)
• Extensive powers, including:
  o Unannounced inspections (not commonly used but critical)
  o Unfettered access (sites and documentation) at all times
• Offence to:
  o Hinder the Inspector or staff in any way
  o Victimise people for engaging with OICS
• Right to publish findings and recommendation
• Preferred process is one of ‘constructive dialogue’
Statutory Responsibilities and Funding
• The Inspector must inspect every prison, detention centre and court custody centre at least once every 3 years
• The Inspector may inspect at any time a ‘custodial service’ and any ‘administrative arrangements’ in relation to such services
• Undertake some ‘thematic’ as well as site-specific work.
• Funding approximately $2.5 million pa (based essentially on number of prisons and detention centres not number of people in custody)

Ongoing Oversight and Accountability (A ‘continuous inspection’ model)
• Keep track of prison incidents etc
• Contact with Superintendents and others
• Allocated liaison officers regularly visit prisons and detention centres (usually 4-6 visits pa)
• OICS administers the Independent Visitors Scheme (IVS)
• A great deal is achieved ‘under the radar’ and not through formal inspection reports
• Regular reports to Minister
• Risk notices in some critical areas (eg prisoner transport, health services and bunk bed design)
• Evidence to Parliament

Methodology of Announced Inspections
• OICS published ‘Inspection Standards’ (1 x general; 1 x Aboriginal; 1 x juvenile) set general framework
• Aim to triangulate evidence base:
  o Documentary / other evidence
  o Discussions / Q and A with key ‘players’
  o Inspection activities & observations
• Prior to onsite inspection period
  o Lengthy advance notice to DCS
  o DCS to provide documents and briefing
• Meetings with service providers & NGO’s
• Staff surveys
• Prisoner surveys

Reporting on findings
• Inspector’s ‘Exit Debrief’ to management and staff (last day of inspection)
  o Gives a sense of findings and potential areas of recommendations
  o Not a public document

Human Rights in Closed Environments
• Separate debrief to prisoners
• Report production
  o Staff write notes of allocated areas (2 weeks)
  o Report drafted internally (10 weeks)
  o Draft report sent to DCS (and/or other parties) for comment (4 weeks)
  o Report finalised and lodged in Parliament (2-4 weeks)
  o 4 week embargo period
  o Total timeframe from start of inspection to release usually therefore at least 26 weeks

Context: Duties of care
• On 27th January 2008 Mr Ward ‘suffered a terrible death which was wholly unnecessary and avoidable’ (State Coroner Alastair Hope, July 2009).
• He was in the back of a prisoner transport vehicle, privately operated (by GSL) but owned by the State
• (Department of Corrective Services).30
• See also the findings of the South Australian Coroner in the case of Laura Parker (19 November 2010).

OICS and the Ward case
• Legally complex
• OICS had, since 2001, repeatedly:
  o Expressed concern about conditions (noting that 90% of long distance transports involve Aboriginal people)
  o Warned about poor design and maintenance issues with the fleet (operated by GSL but owned by DCS)
  o Raised the question whether such conditions would have been accepted if non-Aboriginal people had been the majority
• These concerns had been expressed in Inspection Reports and in other ways with DCS, the service providers (AIMS then GSL) and with Ministers.

So did OICS fail in the Ward case?
• In a sense, yes: the system did not respond to OICS concerns and Mr Ward is dead
• But in other senses, definitely no: OICS work
  o Continually emphasised State’s overriding duty of care
  o Recorded issues of safety, design & decency in transport

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30 Generally see Four Corners, ‘Who Killed Mr Ward?’
Exposed issues that would otherwise have been hidden
- Triggered Government response immediately after the death
- As OICS recommended years ago, long distance coaches and air are now being used for transport
- Was critical to the Coroner’s investigations, findings and recommendations
- And to decisions re compensation and (non)-prosecution

There is nowhere else in Australia where such scrutiny would have occurred and been made public

The Context: Numbers, Capacity & Conditions
- Overcrowding reflects two factors: prisoner population and prison capacity
- National rise in prison populations (though patterns differ across Australia)
- Precise causes differ between jurisdictions but include:
  - Remand practices
  - Imprisonment or non-custodial sentence
  - Length of prison sentences
  - Access to early release (e.g., parole)
  - Responses to breaches of parole and community-based sentences
- WA has faced particularly rapid changes

Parole numbers
- Number on parole:
  - March 2009: 1448
  - November 2009: 840
  - November 2010: 516 (just 36% of March 2009 figure)
- No change in legislation but changes to interpretation/application on appointment of a new Chair
- Drop reflects the numbers of people
  - Not paroled; or
  - Paroled but returned for breach

Capacity and Conditions
- Very little expansion of capacity 2001-2008. Capacity now being expanded through:
  - Double-bunking
  - New double-bunked units at existing sites
  - New prisons
- Overcrowding:
  - Traditionally measured by the difference between the ‘design capacity’ and the number of prisoners
  - WA DCS now uses ‘operational capacity’ (i.e., including bunk beds) not ‘design capacity’
- But it’s not just about beds: other infrastructure needs (e.g., workshops, education, kitchens, bathrooms, health centre facilities etc)
The Context: Privatisation and Value for Money

- Average cost per prisoner per day in WA: $275 (or close to $100,000 pa): Department of Corrective Services Annual Report
- Costs at the private sector prison (Acacia) are approximately 60% of average public sector costs.
- A significant difference even allowing for economies of scale, location and new buildings.
- But it’s not a matter of $$ alone.

Privatisation and Standards

- When services are privatised, the State retains responsibility for people in custody.
- The State contracts in a service (and retains the ultimate risk and responsibility); It does not and cannot contract out of its duty of care.
- Good models of privatisation see value for money in terms of:
  - Quality of service for $$ paid; and ideally,
  - Innovation and system wide improvement.

Privatisation and Standards – Acacia Prison

- Publicly available contract with clear and specified requirements
- Subject to stringent scrutiny from day one:
  - OICS
  - DCS monitoring
  - [Note: good companies will also set targets, standards and expectations]
- One of the State’s best prisons (as validated by OICS). It is offering VFM in terms of quality of service and $$ paid and potential for system-wide innovation.

Pending Legislative Amendments affecting OICS

The Government Response to Ward case includes two new powers for OICS:

- A New ‘audit’ power:
  - Adds a ‘vertical’ dimension and new capacity
  - Will include thematic analysis of cohorts
  - Potentially very valuable (eg might choose to examine use of force/tasers; bed falls; pregnant women; remote Aboriginal men in metro prisons; people with mental health needs; Indonesian prisoners)

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- Show cause notices
  - With a clear statutory basis, will firm up existing processes
  - To apply to existing functions and new audit power

Concluding Reflections: OICS as an ‘OPCAT-plus’ model

- OICS inspections and Inspection Standards go well beyond what would constitute ‘cruel, inhuman or degrading’ treatment or a ‘lack of respect for human dignity’
- Focus and objectives include:
  - Accountability and performance improvement in a broad sense
  - Staff safety, prison security, and all aspects of service delivery
  - A broad range of recommendations and outcomes

Concluding reflections: Other benefits of an OICS-type model

- Transparency: closed environments are less closed (eg public reports, pictures).
- Accountability – both political and public: Parliament and the media are better informed and better engaged
- Monitoring is regular, ongoing and proactive, not occasional, ad hoc, or reactive. [Compare Victorian Auditor General’s report, Managing of Prison Accommodation using Public Private Partnerships (September 2011).
  - Cost $530,000
  - Concluded that the Department of Justice was “not able to demonstrate that it is receiving value-for-money in terms of the standard of prison accommodation services it is paying for.
  - Nor is it able to demonstrate that it has taken adequate steps to assure that the prison accommodation assets [are being maintained] ... in an appropriate condition.”

- Identify good practice as well as areas for improvement
- Enhance risk awareness
- Increased accountability if incidents do occur
- Human focus (give a voice to staff and people in custody)
- Fresh eyes and ears
- Credibility from independence and specialization
- Balance in analysis
- Help to leverage funding
- Quality assurance

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Editor’s note: The Inspector of Custodial Services Amendment Act 2011 (WA) received royal assent on 11 November 2011.
Session 2: The role of volunteer and advocacy groups in monitoring human Rights in closed environments

Section overview

This section outlines the work of a number of independent volunteer and advocacy groups. Session 2 involved consideration of such issues as:

How do volunteer and advocacy groups such as independent visitors function and what are they empowered to do in relation to closed environments? How do they incorporate human rights into their activities? How comparable are the practices across different sectors? What are the outcomes of their visits and to whom do they report? Can and do they produce change in the conditions and treatment of people in closed environments? What forms of accountability are they subject to? What is their relationship with other monitoring or oversight agencies?

The four speakers were:

- Sister Brigid Arthur, Brigidine Asylum Seekers Project
- Ms Isabell Collins, Victorian Mental Illness Awareness Council
- Dr John Chesterman, Office of the Public Advocate (Vic)
- Mr Joseph Wallam, Community Liaison Officer, Office of The Inspector of Custodial Services

Introduction

Dr Bronwyn Naylor

Speakers in session 1 discussed the roles of external formal monitoring bodies in overseeing human rights in closed environments. Speakers in session 2 provided some examples of the less formal or more grassroots monitoring that can be provided by groups regularly visiting facilities as individuals, or maintaining regular contact with residents or their families. The groups, which we have referred to collectively as ‘volunteer and advocacy groups’, can also be seen as representatives of ‘civil society’. Most schemes involve volunteers. They are, therefore, self-selecting, involving people with a commitment to the interests of the residents/inmates of the closed environments they visit. In some sectors they have themselves been carers or family members of people who have been held in a closed environment, and bring this experience and concern to the task.

As outlined in the Introduction to this volume, monitoring and oversight is a function that can be seen to be carried out through court proceedings, and more institutionally through formal complaints-handling bodies, through bodies with powers of inspection, and through the attention and visits of volunteers and non-government organisations. All can have an important role to play in protecting the rights of residents and inmates.

The UK model of prison oversight, for example, involves an ‘interlocking system’ of three independent processes, including on-the-ground prison visiting; the Prisons Inspectorate carrying out regular system-wide inspections; the Prisons and Probation Ombudsman handling individual complaints; and the locally-based Independent Monitoring Boards (IMBs). The IMBs comprise volunteer visitors with a statutory right to ‘free access’ to their allocated prison or detention centre, to receive requests and complaints from prisoners and detainees, to report back to the prison Governor, and to publish an annual report of their findings and assessments to the Secretary of State. IMB members are expressly required to satisfy themselves ‘as to the humane and just treatment of those held in custody within [the] prison and the range and adequacy of the programmes preparing [prisoners] for release’. External visitor schemes expose the closed setting to the regular visits and observation of people from ‘the outside’ with a concern and a role in ‘the ethical treatment of other human beings’.

This method of lay oversight of prisons can be traced back to the sixteenth century in the UK, and has been adopted in many former British colonies. Equivalent ‘prison visitor’ schemes exist in most Australian jurisdictions. Joseph Wallam, one of the speakers in this session, discussed the work of the WA Independent Visitors Scheme, and in particular its role in protecting the rights of Aboriginal prisoners.

The four speakers in session 2 represent some of the different types of external visitor schemes in Australia, which also reflect the different types of closed environments being examined in this project. Key features of such volunteer and advocacy groups include the nature of their expertise, the sources of their power and funding, their powers of entry and inspection, and the extent to which they can report publicly on findings.
The four speakers were Sister Brigid Arthur, Ms Isabell Collins, Dr John Chesterman and Mr Joseph Wallam.

Sister Brigid Arthur works in the Brigidine Asylum Seekers Project (BASP), funded by the Brigidine Order in Melbourne. Despite being a small group, the BASP provides hospitality and practical support for asylum seekers, including visiting places of detention, and advocating for the rights of asylum seekers in the media, in government and, most recently, in the High Court.37

Isabell Collins is the Director of Victorian Mental Illness Awareness Council (VMIAC). VMIAC is the representative body for people with experience of mental illness or emotional problems. It is government-funded and provides individual, group and systemic advocacy, and aims to support individuals as well as lobbying government for improved services. VMIAC volunteers visit facilities housing people suffering mental illness. Many volunteers have themselves suffered a mental illness and bring that understanding to their work. VMIAC defines itself as an organisation run ‘by and for people who have a lived experience of mental illness’.38

John Chesterman is the Manager of Policy and Education at the Victorian Office of the Public Advocate (OPA). The OPA is a statutory agency, headed by the Public Advocate, within the Department of Justice, working with people with disabilities. Whilst it is located within a Department, it has power to report directly to Parliament. One of the tasks of the Public Advocate is to monitor facilities and services for people with disabilities. As part of this monitoring role, the OPA manages a Community Visitor program. Volunteer visitors can make unannounced visits to facilities and take up concerns raised by residents. They can highlight issues to be raised by the Public Advocate with service providers, and they publish an Annual Report which is tabled in Parliament. This monitoring role is the focus of John Chesterman’s paper in this collection.

Joseph Wallam co-ordinates the WA Independent Visitors Scheme. This Scheme is based within the independent statutory body, the Office of the Inspector of Custodial Services, discussed in Session 1 by Professor Neil Morgan. The WA scheme monitors both prisons and juvenile detention centres. Joseph Wallam focuses on the work of the Independent Visitors Scheme with Aboriginal prisoners. The scheme also involves community volunteers, who can report back to the management of the facility as well as to the Inspectorate, the Department, and the Minister.

SESSION 2 – THE ROLE OF VOLUNTEER AND ADVOCACY GROUPS

Session 2.1: The Brigidine Asylum Seekers Project

Sister Brigid Arthur, Brigidine Asylum Seekers Project

Abstract

Human rights groups have a role to play in the Immigration Detention Centres in two main ways. They can offer some support to individual asylum seekers and this can include advocacy on an individual’s behalf. They can also be used for change at various levels of the immigration bureaucracy. There is a good network of asylum seekers groups in Victoria and, to a lesser extent, across Australia. Communication between these groups assists in making representations for change.

The issues affecting detainees include:

• Mental health issues;
• Personal development being on hold (especially true for children and minors);
• Loss of competency and lack of opportunities to continue acting as a member of society;
• Debilitating dependency, extending even to most basic needs;
• Inability to continue exercising any responsibility for family; and
• Little opportunity to develop and interact socially.

Visitors to the detention centres address these issues in minor ways at least. There is no systematic follow up from any visits.

Roundtable Paper

Introduction

I would like to say from the beginning that there is a difference between prisons and hospitals for the mentally ill and immigration detention centres, because there is at least a real debate that should be happening as to whether the immigration detention centres need to exist at all.

I think detaining vulnerable people in immigration detention centres is an infringement of their rights as human beings.

First, there is the question of why we treat one group of people who are unfortunate enough to have no alternative mode of seeking asylum other than to come without the right papers, differently to other people who are able to come to Australia with passports and visas. The second issue is the way we treat the former category of people during the whole process of visa determination.

The Brigidine Asylum Seekers Project

I am one of the coordinators of a very small group in an asylum seeker support project which offers accommodation to about 20 asylum seekers, supports various asylum seekers in the community, and visits immigration detention centres.

I am a bit different from some of the other speakers that we have had so far in that I think my approach is obviously from the ground up. I have no particular way of influencing policy or the way that the whole thing works, but I do have ten years of experience of meeting asylum seekers who are affected by Australia’s current policies.

The two immigration detention centres that are here in Melbourne, are the Maribyrnong Immigration Detention Centre (MIDC) that has been there for quite a long time now, and the fairly new Melbourne Immigration Transit Accommodation Centre (MITA) in Broadmeadows which is for unaccompanied minors.

There are various groups of people who are in the MIDC, but the ones that I will concentrate on are individuals or families who arrive without valid visas and seek asylum in Australia. As well as this group there are ex-prisoners who have not taken out citizenship and at the end of their prison term are housed in MIDC until they are deported. There are also individuals who have overstayed their visas.

I will paint a quick picture of the arrival of a typical asylum seeker at an immigration detention centre, acknowledging that while every person’s whole story and reason for being here seeking asylum is unique, there are lots of commonalities.

Typically, the person would be a man and, depending what year we are talking about, they will be from Iraq, Iran, Sri Lanka, Afghanistan, Burma, or some African country – Kenya, Chad, Nigeria or Eritrea or indeed any of the troubled spots in the world.

In the beginning, the person is usually fairly upbeat. I have never met a person who came to the immigration detention centre who did not think that they had a very good reason for seeking asylum, that in a democratic country they would be listened to, they would be treated well, and they would get a visa. They believe this because they think that their own experience is something that will speak to people in this country.
However, as the months go on, each detainee’s whole emotional and mental approach changes, typically after about three months. They seem to be able to sustain being detained for that long, and then the prolonged and indefinite detention experience almost invariably takes its toll.

I will describe Mohammed (not his real name). He has been in detention for over 10 months. He is now visibly shaken. He has gone on a hunger strike, he has tried to commit suicide, and now he has gone into what seems to me to be an absolutely unnatural calm. I am not a psychologist or a psychiatrist, but I wonder what this means. He uses phrases like ‘I’m between earth and sky’; ‘I’m between life and death’; ‘I’m a person with a body but no heart’. This is a man with limited English – better now after some months, but limited English; he is a nomadic tribes person who was a small farmer. He says ‘I’ve done nothing wrong, why am I here?’ He says ‘They give me sleeping medicine but I try not to go to sleep because the dreams are too bad’. This is the sort of story that one hears over and over again from detainees. There is no decision that they can make about their own well being which involves cutting themselves.

That sort of story, with many variations, is so typical that you would have to say that all people could not make up this same sort of story. The stories with the variations must resonate across many parts of the world.

One of the things that I constantly hear is, ‘I haven’t done anything wrong’. One man said to me ‘I’ve done nothing wrong. Just convince them to let me out and then if in the next two years – even ten years – they find out anything I’ve done wrong; they can put me back into prison and they can lock me up forever because I haven’t done anything wrong’. That is reiterated over and over again.

Another repeated sentiment is that ‘one day in here seems like a year’. In particular, with the young people in the MITA, that is said so often. I have been a secondary school teacher all my life so I have dealt with teenagers. One thing that teenagers cannot sustain is doing one thing for very long. They constantly want change. Imagine being in a place where there is no difference between one day and the next day and the next day. It is beyond the ability of a teenager to sustain this.

It is a roller coaster ride for people who are in detention. It seems that there is very limited human rights protection for them. The issues affecting people in this situation are not overt ill-treatment – it’s much more subtle than that.

In my experience there are serious mental health issues arising from detention. There is more self-harm happening in the two detention centres that I know now, than there has been over the ten years that I have been visiting. There are attempted suicides; we get to hear about the suicides, but there are many attempted suicides. There are hunger strikes. There are all sorts of ways people set out to harm themselves, and for the kids there is a lot of self harming which involves cutting themselves.

Personal development is on hold. That is especially true for children and minors. It is absolutely important that kids have an opportunity to make some decisions. There are no decisions that they can make about their own well being, about what is going to happen to them at all. Decisions are made for them. There is a loss of competency, and a lack of opportunity to continue acting and developing as valued members of a society.

For all detainees, there is debilitating dependency, even for the most basic of needs. There is an inability to continue exercising any responsibility for
family. For those who have family overseas, they are guilt-ridden; they just are totally traumatised. There is little opportunity to develop and interact socially.

One young 20 year old Somali woman told me that the best time she had in detention was when she was in what is called ‘observation’ but which is really isolation. Why was that the best time? ‘Because when I was in the detention with the women, no one spoke my language so for months and months and months I had nobody to talk to – when I went into the isolation area the staff were nice to me’.

So what can individuals or groups do? I think we can offer some support to individual asylum seekers. This can include advocacy on their behalf. However there is little chance that anyone will listen to or act on advocacy for an individual. The most frequent answer to any request for assistance for an individual is that because of privacy laws, no discussion about the particular issues can be entered into. On the other hand, if an individual has no one to bat for them, they have even less hope.

The whole process seems to me steely and unforgiving, destined to rob people of hope and, in the end, of any belief in their own ability to help themselves or anyone else. We need a complete overhaul of the mandatory detention of this one category of asylum seekers.
Session 2.2: Closed Environments in Mental Health Services

Ms Isabell Collins, Director, Victorian Mental Illness Awareness Council

Abstract

The Victorian Mental Illness Awareness Council (VMIAC) is the peak consumer organisation for people with experience of mental illness or emotional problems. The VMIAC receives government funding to provide information individual group and systemic advocacy education and training research and evaluation. Part of the advocate’s role is to visit inpatient units to provide consumers with information about their rights and to provide assistance in ensuring their rights are respected and protected. The VMIAC uses the information gathered from consumers and their own observations to inform local organisations, government and bureaucracy of the issues of concern to consumers. Based on our observations and consumer feedback this paper will argue that organisations place more importance on protecting the organisation and its staff (defensive reasoning) than they place on protecting and respecting patients’ rights.

Roundtable Paper:

Preamble

In 1989/90, a Ministerial audit of Standards of Treatment and Care in Psychiatric Hospitals in the State of Victoria was undertaken in the 19 psychiatric institutions that existed at the time. While many of the recommendations have been implemented, including de-institutionalisation, others are yet to be realised. One of the recommendations yet to be implemented is the unlocking of inpatient units as a standard practice. Another recommendation yet to be realised is that nurses cease the practice of spending most of their shift in the ward office. Basically, the recommendations were that the wards be unlocked and that nurses spend more time interacting with patients, including undertaking more holistic nursing assessments.

The VMIAC

The VMIAC is the peak consumer organisation for people who experience mental illness or emotional distress. Part of the funding the VMIAC receives is to carry out individual, group and systemic advocacy. As a consequence, the advocacy staff visit inpatient units (acute and Secure Extended Care Units - SECU’s) as part of their role. During these visits, the advocates provide consumers with an explanation of their rights and take up any issues of concern individual consumers might have with relevant stakeholders.

Issues

Generally speaking, most of the people who are admitted to psychiatric acute inpatient units are admitted as involuntary patients. This means they have met the five criteria under s.8 of the Mental Health Act 1986 (Vic) for involuntary treatment: that is, they appear to be mentally ill, they need immediate treatment, treatment cannot be provided in a less restrictive environment, they are at risk to themselves or others, and they are refusing treatment or are unable to consent to treatment. In essence this means that they are very unwell. Yet, despite their level of un-wellness, they are expected to protect their own rights and generally advocate for themselves.

While it needs to be noted that work is being done to try and improve the culture on inpatient units, address issues of women’s safety and reduce episodes of seclusion, there is still a long way to go before the standard of respectful, responsive care and treatment equals that of the general health care system.

Additionally, it also needs to be noted that most clinicians care about their patients. The negative issues largely stem from staff developing defensive reasoning habits of practice that facilitate good people doing not so good things in order to protect their organisation and colleagues more than to protect patients.

Based on feedback from consumers the following is an overview of their concerns about inpatient units:

- Most of the wards are locked despite a recommendation being made 20 years ago that they be unlocked and despite a requirement of the Mental Health Act for a least restrictive environment.
- While at their sickest and most distressed they are expected to cease smoking as many hospitals are now smoke free. We at the VMIAC believe this practice to be cruel and inhumane.
- Women do not feel safe and often experience sexual harassment and/or abuse from other patients.
- Many voluntary patients believe there is no difference between being voluntary or involuntary, as all you have to do is refuse a particular medication and you can be made involuntary.
- Male consumers will also talk about not feeling safe on inpatient units.
- The nursing staff spend too much time in the ward office and, more often than not, ignore patients when they knock on the door wanting assistance. It is not uncommon for people to have to wait 10-15 minutes.

What do consumers want from an inpatient stay?
• They want to be treated with respect and dignity.
• They want to be listened to.
• They need expressions of empathy and understanding when feeling distressed.
• They need hope and encouragement.
• They want to be heard.
• They don’t want their words to be pathologised.
• They want to feel and be safe.
• They want the nurses out of the ward office spending time talking with them.
• They want to feel and be safe.
• They need expressions of empathy and understanding when feeling distressed.
• They need hope and encouragement.
• They want to be heard.
• They don’t want their words to be pathologised.
• They want to feel and be safe.
• They want the nurses out of the ward office spending time talking with them.

They want the nurses to respond promptly and respectfully when they knock on the ward office door.
They want their nurses to respond promptly and respectfully when they knock on the ward office door.
They want their doctor to seek informed consent when prescribing medication.
They want their doctor to seek informed consent when prescribing medication.
They want their doctor to listen to them and be helpful when they express concern about the side effects of their medication.
They want their doctor to listen to them and be helpful when they express concern about the side effects of their medication.
They want clinicians to stop interpreting what they say and writing it in their file or in reports as if it is fact before checking with them about the accuracy of the interpretation.
They want clinicians to stop interpreting what they say and writing it in their file or in reports as if it is fact before checking with them about the accuracy of the interpretation.
They want to be discharged from hospital when they are ready.
They want to be discharged from hospital when they are ready.
They want their rights respected and to be given assistance and support in realising their rights.
They want their rights respected and to be given assistance and support in realising their rights.
They want to be able to genuinely participate in the development of their treatment and care plan.
They want to be able to genuinely participate in the development of their treatment and care plan.
They want the medical model approach to care and treatment to cease and be replaced with a holistic, humanistic model of recovery.
They want the medical model approach to care and treatment to cease and be replaced with a holistic, humanistic model of recovery.
They want their expressions of concern or complaints heard and acted upon transparently.
They want their expressions of concern or complaints heard and acted upon transparently.

VMIAC Activities in regard to all of the above
During each inpatient visit, the VMIAC advocacy staff provide education to consumers about their rights, and about staff responsibilities regarding patient rights. They also take up any issues of concern consumers might have and, finally, they meet with the person in charge of the ward regarding the positive and negative issues raised, to discuss possible solutions.
During each inpatient visit, the VMIAC advocacy staff provide education to consumers about their rights, and about staff responsibilities regarding patient rights. They also take up any issues of concern consumers might have and, finally, they meet with the person in charge of the ward regarding the positive and negative issues raised, to discuss possible solutions.

Where issues of concern are ignored the VMIAC may write a formal letter to the service, take the issue to the Department of Health, contact the Office of Chief Psychiatrist, or in rare cases notify the Minister of Mental Health or request a meeting with her.
Where issues of concern are ignored the VMIAC may write a formal letter to the service, take the issue to the Department of Health, contact the Office of Chief Psychiatrist, or in rare cases notify the Minister of Mental Health or request a meeting with her.

Through the above processes the VMIAC has contributed to getting seclusion, complaints handling, and ward cultures on the Department of Health’s agenda.
Through the above processes the VMIAC has contributed to getting seclusion, complaints handling, and ward cultures on the Department of Health’s agenda.

Hope on the Horizon with Mental Health Matters
In Australia, while mental illness makes up 14 per cent of the nation’s disease burden, and mental health funding is only 8 per cent of the health budget, the ability to achieve positive reform in a timely manner is virtually impossible. It is the writer’s view that both the state and federal governments discriminate against people with a mental illness by failing to provide adequate funding, and they have been doing this throughout our 20 years of mental health...
reform. Put simply, it is impossible for consumers to receive timely, responsive, respectful and holistic services when staff are completely stressed and stretched to the maximum. However, with the new Victorian policy document “Mental Health Matters”40 one of the reform strategies is to introduce a recovery focus to clinical services. Some inpatient units have already begun the process and the advocates report some improvement in inpatient unit culture and attitudes of staff with more focus on patients’ rights. While we still have a long way to go, at least this is a positive beginning.

Session 2.3 Restrictions on the Liberty of People with Disabilities: The View from the Office of the Public Advocate

Dr John Chesterman, Manager, Policy and Education, Office of the Public Advocate (Vic)*

Abstract

This paper considers the various ways in which people with disabilities are subject to restrictions on their liberty in Victoria. In addition to being over-represented in Victoria’s general prison populations, people with disabilities are subject to a number of specific detention regimes, ranging from psychiatric detention to the civil detention of people with intellectual disabilities. People with disabilities also have their liberties curtailed by the use of restrictive interventions. The paper examines the role played by the Office of the Public Advocate in monitoring and promoting the rights of people with disabilities in these settings, and in doing so outlines OPA’s proposals for reform in a number of areas.

Roundtable Paper

Introduction

The Office of the Public Advocate (Vic) is an independent statutory authority which reports to the Parliament of Victoria. Its mission is ‘To uphold the rights and interests of people with a disability and work to eliminate abuse, neglect and exploitation’. The Guardianship and Administration Act 1986, which is currently under review by the Victorian Law Reform Commission, creates the position of Public Advocate and sets out the roles of the Public Advocate and those in her office.42

Under this legislation the Public Advocate has broad powers to advocate for improved treatment of people with disabilities, and that advocacy can be of an individual or systemic nature. She also has broad powers to inspect institutions and other accommodation settings in which people with disabilities reside, and has the power to ‘investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship’.43

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The way these roles and responsibilities have evolved since 1986 now sees OPA with the following five principal roles:

- To provide statutory ‘last resort’ guardianship as required by orders made at the Victorian Civil and Administrative Tribunal (VCAT).44 In 2009-2010 OPA performed this role on 1574 occasions.45
- To conduct investigations in guardianship applications at the request of VCAT.
- To provide general advice and education on guardianship and administration, as well as alternative substitute decision-making processes, such as enduring powers of attorney.
- To manage three volunteer programs; the Community Guardianship program, the Community Visitors program and the Independent Third Person program.
- To provide individual and systemic advocacy within the disability field.

In this paper I shall concentrate on OPA’s role in relation to people with disabilities in closed environments, which the researchers on this Australian Research Council funded project have defined as meaning:

...any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order, or by any other lawful authority relevant to the project’s goals.46

First I will map the various circumstances that exist wherein people with disabilities are subject to restrictions on their liberty. Later I will examine OPA’s role in relation to these various groups of people, and I’ll close by examining a range of reform proposals that OPA believes would improve the treatment of people with disabilities in these particular settings.

An initial point to make here is that, in addition to the direct ways in which a person can be stopped from moving about freely, some people with profound disabilities end up in the same predicament if the state does not take active steps to assist them in their movement and engagement with society. A person who is not mobile may reside in a suburban house with no locked doors. But if steps are not taken to assist them to move and to engage with society, then they might as well be in a prison. A person with a profound intellectual disability who is not encouraged to engage with other members of society will

42 Guardianship and Administration Act 1986 (Vic), section 16(1)(h).
become isolated and will in fact, if not according to law, live a restricted existence.

The United Nations Convention on the Rights of Persons with Disabilities engages this very point when it talks of the right of persons to ‘personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community’.47 Much of the time of OPA’s biggest volunteer program, the Community Visitors program, is spent pointing out the need for this to happen.48 I won’t discuss this point any further here as it is outside the parameters of the topic, but it is an important point for us all to remember.

**Forms of restriction**

1. **Coercive Detention**
First, let us consider the range of formal mechanisms by which people with disabilities can be involuntarily deprived of their liberty in Victoria.

Victoria’s prisons, which house over 4300 prisoners, 49 are said to have marginally higher than average numbers of people who have intellectual disabilities, 50 and the rate of mental ill health of Victoria’s prisoners is considerably higher than that which exists among the general population. 51

There are also a range of Victorian Acts that enable people, including people with disabilities, to be detained other than through standard imprisonment following conviction of a crime.

Victoria’s Disability Act 2006 enables a number of criminal justice orders to be made in relation to people with intellectual disabilities. These orders – which include parole orders, extended supervision orders, custodial supervision orders and residential treatment orders – can be made when there is evidence of ‘a serious risk of violence’, and they enable the people concerned to be sent to residential treatment facilities.52

The Disability Act also allows for civil containment in relation to people with intellectual disabilities, via Supervised Treatment Orders (STOs), where a person has previously been dangerous and presents a serious threat to others.53 Thirty of these orders were made between July 2007 and July 2009.54 I’ll return to this topic later when I consider the specific role OPA plays in monitoring STOs, and I’ll also discuss later OPA’s systemic advocacy on this topic.

The Disability Act also allows the Senior Practitioner to detain an intellectually disabled person for 28 days who is ‘receiving residential services’ and presents an ‘imminent risk of serious harm to another person’.55 This power, I mention in passing, is one that OPA believes is inconsistent with Victoria’s Charter of Human Rights and Responsibilities Act 2006, partly because the exercise of the power is unable readily to be reviewed on its merits.56

The Mental Health Act 1986 (Vic) enables someone with an apparent mental illness to be detained where they present a danger to themselves or others, or to be released on Community Treatment Orders subject to certain conditions. New proposed mental health legislation, which is currently in draft form, will (if it is enacted) continue to authorise involuntary treatment on a similar set of criteria (though the appearance of mental illness will only justify short-term detention while a diagnosis is made, and there will be improved time constraints, review mechanisms and other safeguards).57 In the year to June 2010 there were 7,815 people subject to involuntary treatment orders and around 5,600 people who year subject to community treatment orders. OPA’s request for ‘point-in-time’ figures shows that at the end of August 2010, 511 people were on involuntary treatment orders and 3,221 people were subject to community treatment orders.58

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50 Disability Act 2006 (Vic), section 152. The Act (sections 166, 180) also enables intellectually disabled prisoners to be transferred to residential treatment facilities as security residents or forensic residents (where, for instance, they were unfit to plead at trial).
51 Disability Act 2006 (Vic), section 191.
53 Disability Act 2006 (Vic), section 199.
54 OPA has received advice from counsel in this regard.
55 Mental Health Act 1986 (Vic), sections 8, 14; Mental Health Bill (exposure draft) part 5.
56 Figures gained from Department of Health via emails to OPA’s Liz Dearn, 29 September 2010, and to John Chesterman, 1 December 2010.
Other ways in which adults in Victoria, primarily people with disabilities, can be detained include: where they are detained as a forensic patient following a ruling that they are unfit to plead to a charge; where they are deemed to constitute a danger to public health; and where they are subject to a treatment order relating to their substance addiction.\(^\text{39}\)

2. Compliant Detention
In addition to formal detention, people with disabilities can be subjected to what is now known as ‘compliant detention’. Here the international developments have not so much concerned those people whose liberty is restricted through formal involuntary processes, but those whose apparent compliance with the restrictive environment in which they live has, until now, obviated the need for any due legal process to sanction their effective detention.

The key development here that has brought this situation to light concerns a legal case in the United Kingdom known as the Bournewood decision of 2004. In this case the European Court of Human Rights decided that an autistic patient who lacked capacity but who was ‘compliant’ was unlawfully detained as an ‘informal patient’ at the Bournewood hospital in contravention of the European Convention for the Protection of Human Rights and Fundamental Freedoms.\(^\text{40}\) This led to the coining of the term ‘Bournewood gap’ to refer to those people without capacity whose treatment amounts to effective detention but who are not being held under involuntary processes. The need to render this practice consistent with the Convention has led in England to the development of ‘deprivation of liberty safeguards’.\(^\text{61}\)

Working out what constitutes a deprivation of liberty is a complex legal question,\(^\text{62}\) and this is why it is difficult even to estimate the number of Victorians and Australians who might be in this situation. This complexity can be quickly demonstrated by asking whether the use, for instance, of a locked front door amounts to a deprivation of liberty. Does it matter if the inability of the person to open the locked door stems from the level of the person’s disability, or the fact that the person doesn’t have a key or know the code with which to unlock it? Does it matter what the reason is for locking the door? For instance, does it matter if the door is locked to stop a person from ‘wandering off’? What if the door is locked in order to protect a person from intruders?

Suffice it to say that there are many Australians with disabilities who might be considered to fall into the ‘Bournewood gap’ in a range of accommodation settings, be they supported residences, mental health institutions or aged care homes. This would cover some of the people in the following situations:

- Whose capacity levels would not enable them to consent to their placement;
- Who are not being housed under formal ‘involuntary’ mechanisms; and
- Who are not in any meaningful sense free to leave their accommodation setting.

Most people in this situation have a disability of one kind or another. I’ll return to this matter in a moment.

3. Restrictive Interventions
The third situation in which people with disabilities are subject to restrictions on their liberty involves the use of restrictive interventions. The use of restrictive interventions – be those interventions chemical, physical or the use of seclusion – are one step down from clear-cut deprivation of liberty (the UK code of practice, for instance, notes that the use of restraints and seclusion does not necessarily amount to a deprivation of liberty).\(^\text{63}\) Yet the use of restrictive interventions, which are (or in some cases, should be) subject to approval, do arguably render an accommodation setting a ‘closed environment’, at least for the person involved. Someone who is living in a locked section of a group home from which they are not free to leave is, in OPA’s view, in a closed environment. Similarly, someone whose behaviours of concern lead them to be subject to chemical restraint that greatly inhibits their movement is, at least for that time, effectively in a closed environment.

The point here is not to argue that any use of restrictive interventions puts people in closed environments, but to make the case in this forum that sometimes they do, and to argue that improved regulation is needed.

Some restrictive interventions are used in situations which are already closed environments. Victoria’s Mental Health Act 1986, which is due to be superseded soon by new legislation, contains provisions regulating the use of mechanical restraints and seclusion concerning a person who is ‘receiving treatment for a mental disorder in an approved mental health service’.

\(^{39}\) Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic); Public Health and Wellbeing Act 2008 (Vic), e.g. section 117; Severe Substance Dependence Treatment Act 2010 (Vic), section 20.

\(^{40}\) H.L. v United Kingdom (European Court of Human Rights) [2004] ECHR 471.


\(^{63}\) See UK Ministry of Justice, above n 6119ff.
Ordinarily, the restrictive intervention must be approved by the ‘authorized psychiatrist’, and the Chief Psychiatrist has a monitoring role. A reduction in the use of restrictive interventions in the mental health field is required, a fact noted by the National Mental Health Seclusion and Restraint project, and the proposed new mental health legislation certainly contains improvements in this regard.

Moving from the mental health to the disability field, a point needs to be made that restrictive interventions have long been used here without being subject to any regulatory regime.

In debates leading to the passage of Victoria’s Disability Act 2006 the Minister for Community Services acknowledged that restrictive interventions were routinely utilised without appropriate regulatory oversight, and the new regime was designed ‘to ensure that disability service providers … meet their duty of care obligations and that better safeguards are provided to protect the rights of people subject to these practices’.

Victoria’s Disability Act has led the way in requiring the use of restrictive interventions by disability service providers to be authorised and reported upon. According to the Act a ‘restrictive intervention’ is defined to mean:

‘any intervention that is used to restrict the rights or freedom of movement of a person with a disability including—

a) chemical restraint;
b) mechanical restraint;
c) seclusion …’

Excluded from the definition of ‘chemical restraint’ is any drug used for the ‘treatment’ of a person, and I note here that the term ‘treatment’ is potentially a very broad one.

Part 7 of the Disability Act enables disability service providers to use seclusion or restraint ‘to prevent the person from causing physical harm to themselves or any other person’. Outside of emergency situations, seclusion or restraint can only be used when:

- This has received authorisation from an Authorised Program Officer;
- It is referred to in the person’s Behaviour Management (Support) Plan;
- An ‘independent person’ has been made available to tell the person about the plan’s mention of seclusion or restraint; and
- The plan has been lodged with the Senior Practitioner.

The monitoring role of the Senior Practitioner is a particularly important one, and has led for the first time to widespread knowledge of the extent to which restrictive practices are used by disability service providers in Victoria. In his 2008/09 Annual Report, the Senior Practitioner wrote that ‘A total of 2036 people were reported to the Senior Practitioner as having been subjected to restraint and/or seclusion at least once’ in the year to June 2009.

The role of the Office of the Public Advocate

OPA has a number of individual and systemic advocacy roles that are particularly relevant to monitoring restrictions on the liberties of people with disabilities. These include the Community Visitors Program, which has its own statutory standing, the Independent Third Person Program, the Prison Disciplinary Hearing Program, the work of the Disability Act Officer, and the systemic advocacy projects in which OPA has been involved.

Community Visitors Program

I will deal at some length with the role of volunteer Community Visitors, so it is necessary briefly to refer to the legislative authority with which they act.

The Mental Health Act 1986, which is soon to be superseded by new legislation, empowers Community Visitors to visit mental health facilities in order, amongst other things, ‘to inquire into … the adequacy of services’ and ‘the appropriateness and standard of facilities’. Each ‘approved mental health service’ is required to be visited monthly, and visits can be unannounced.

The Disability Act 2006 authorises Community Visitors to visit premises run by disability service providers and ‘to inquire into … the appropriateness and standard of premises’, and ‘the adequacy of opportunities for inclusion and participation by residents in the community’, amongst other things. The new Supported Residential Services (Private Proprietors) Act 2010 empowers

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44 Mental Health Act 1986 (Vic), sections 81 and 82. See also Chief Psychiatrist, Annual Report 2008-09 (2009)
46 Mental Health Bill (exposure draft), part 8.
48 Disability Act 2006 (Vic), section 3.
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67 Mental Health Act 1986 (Vic), sections 109, 111. The new legislation will continue these roles: Mental Health Bill (exposure draft).
68 Disability Act 2006 (Vic), section 30.
community Visitors to visit supported residential services unannounced, and
to ascertain ‘whether services are being delivered to residents in accordance
with the principles of’ the legislation.72

In 2009/10 there were 335 Community Visitors, who are all appointed by the
Governor in Council. Community Visitors conduct visits in three ‘streams’:
disability services, supported residential services and in the mental health
field. In 2009/10 these Community Visitors conducted 5069 visits.73

Community Visitors monitor the treatment received by people living in a
range of accommodation settings, including those settings where the liberty of
people with disabilities is severely curtailed. They report on the quality of care
received, the strategies used to promote social inclusion, and they observe and
report on the use of restrictive interventions. The Community Visitors
program has established procedures by which matters of concern can be
escalated and raised directly, by OPA’s Community Visitors program
coordinators or by the Public Advocate herself, with the Department of
Human Services or other service providers. Matters of concern can also be
subject to reporting via the Community Visitors Annual Report, and can be
referred to OPA Advocate Guardians and to OPA policy and research staff for
further individual or systemic advocacy activity. The Community Visitors
Annual Report is tabled in parliament, and usually generates press coverage.74

One recent example shows the way a matter of concern identified by
Community Visitors can be escalated. In this case two Community Visitors
found a doubly incontinent woman in her eighties who was tethered to a chair
each day for eleven hours in a supported residential service. This practice was
designed to prevent her from falling. The Public Advocate immediately took
steps to report and stop this practice, and the reporting of this case in the
Community Visitors Annual Report saw the case receive mainstream press
coverage.75

As can be seen from this variety of roles the work of Community Visitors is
both a form of monitoring and a form of advocacy.

72 Supported Residential Services (Private Proprietors) Act 2010 (Vic), sections 184, 186.
73 See OPA, Annual Report 2009-2010, above n 44, 29; OPA, Community Visitors Annual Report 2009-
2010, above n 47, 13.
74 For instance OPA’s Community Visitors Annual Report 2009-2010 above n 47, received coverage in The
Age, 17 September 2010, 6.
75 OPA, Community Visitors Annual Report, above n 47, 16; Following the tabling in parliament of the
Annual Report, this matter was reported in The Age, 17 September 2010, 6.

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Independent Third Person Program
The Independent Third Person program is a volunteer program that enables
people with cognitive impairments who are being interviewed by police to
have an Independent Third Person present at the interview. This can be when
the person with a cognitive impairment is an alleged offender, a victim or a
witness to a crime. In 2009-2010 Independent Third Persons, who numbered
220 by July 2010, were present at 1703 police interviews.76

Prison Disciplinary Hearing Program
OPA’s role is limited in relation to prisons, though in 2009 OPA began the
Prison Disciplinary Hearing Program, which involves attending prison
disciplinary hearings following breaches of internal regulations by prisoners
with intellectual disabilities. OPA staff were present at 106 hearings between
March 2009 and June 2010 at two prisons, and the program has now been
extended to all Victorian prisons.77

Disability Act
OPA has a greater role in relation to the detention aspects of the Disability Act.
The Public Advocate, for instance, must be given notice of any application for a
Supervised Treatment Order, and may apply to become a party to any STO
hearing.78

The Disability Act enables VCAT to make a Supervised Treatment Order where
a person:

- ‘has an intellectual disability’;
- has ‘previously exhibited a pattern of violent or dangerous behaviour’;
- poses ‘a significant risk of serious harm to another person’;
- ‘has a treatment plan approved by the Senior Practitioner’; and
- ‘is unable or unwilling to consent to’ treatment.79

OPA has played a significant monitoring and expert role in relation to STO
hearings.

OPA has also had a monitoring role in relation to people on other orders at the
Disability Forensic Assessment and Treatment Service (DFATS) in Fairfield.80
OPA’s advocacy role was called into play late in 2009 when the Department of Human Services sought, in response to press coverage, to increase the supervision rates for fourteen men at DFATS, some of whom were on STOs, when they went on community access visits. This increase was not consistent with the men’s treatment plans. OPA was a party to an action which saw VCAT order an injunction in relation to these changes, and ultimately the Department withdrew its applications to increase these restrictions, a result that marked a significant human rights victory.\(^{81}\)

**Systemic Advocacy**

OPA has a clear mandate and role to play in systemic reform in a number of areas covered by this paper.

OPA, for instance, has been troubled by the informal ways in which people with disabilities are able to have their liberty restricted, particularly in the Bournewood-type situation where the restriction is not legislatively authorised. One possible way of fixing this legal problem would be to appoint a guardian.\(^{82}\) This is problematic since the only need for a guardian here is to authorise what is already happening. Guardianship should not be used in this mechanistic way. OPA instead has been calling for ‘deprivation of liberty safeguards’, so that safeguards are in place to ensure that the human rights of people in these situations are protected.\(^{83}\)

To take another recent example, as noted earlier, a major review of mental health legislation is currently under way. While OPA is advocating for further changes to be made, the exposure draft of the new mental health legislation incorporates several of the key points raised by OPA in the earlier consultation phase concerning, for instance, the need for involuntary orders to be subject to more rigorous, and earlier, review.\(^{84}\)

Here I want to consider three other systemic reform projects in which OPA has been, and is currently, engaged.

**Long Stay Patient Project**

An example of systemic advocacy in relation to closed mental health environments was OPA’s ‘Long Stay Patient Project’. This project reported on the inappropriate long-term placement of people in mental health institutions, sometimes as involuntary patients, which typically occurred because of a lack of alternative accommodation. Some of the individuals in question here would be in Bournewood-type situations, where they have been effectively detained, though not through formal involuntary processes.\(^{85}\) Indeed if an Australian ‘Bournewood’ type case were to arise, it could easily come from these files.

The report identified as a ‘long stay’ a person’s residence for more than three months in an acute unit, for more than two years in a community care unit, and for more than six months in a secure extended care unit or other setting. The report drew on Community Visitors and Advocate Guardian information collated between 2007 and 2008 and identified 75 people in mental health facilities who could not be discharged either because they were ‘waiting on a vacancy’ or because there was ‘no suitable accommodation available’. People in the latter category had been in the mental health facility for up to 20 years.\(^{86}\) In part as a result of the presentation of this report, the prospects for some of those people discussed in the report have improved, but significant concerns remain.\(^{87}\)

**Supervised Treatment Orders**

Another example of systemic advocacy has seen OPA conduct research on the operation of Supervised Treatment Orders. These orders, which see people detained on the basis of crimes they may commit, raise obvious human rights concerns. Containment is justified, according to the scheme’s philosophy, because it will enable treatment.

OPA has recently completed a report on the first two years of operation of the Supervised Treatment Order scheme. In the period July 2007 to July 2009 there were 42 applications for Supervised Treatment Orders, with 30 orders being made. The risks posed by these people predominantly concerned illegal sexual behaviour, including towards children.\(^{88}\)

As mentioned above, the justification for the deprivation of liberty involved in the scheme is that the people being held receive treatment. But OPA’s report makes the point that there is considerable grey area over what constitutes ‘treatment’ and what simply constitutes behaviour management. The report makes a number of recommendations, including:

81 Ibid.
82 On this point see Bruckard, above n 60, 21.
85 Ibid, 9-17.
87 Bedson, McGuire and Walkinshaw, above n 53, 6, 49.
The need for ‘treatment’ to be clearly defined;

The need to place a time limit on the period for which people can be placed on these orders (currently there is no restriction on the number of times an order can be continued);

The need for a longitudinal evaluation of the treatment received by people on STOs.88

Restrictive Interventions
OPA has developed a clear reform strategy regarding the use of restrictive interventions. Our views on this topic are informed both by the experiences of Community Visitors and by our concerns from across the other programs, particularly the Advocate Guardian program, about the inadequate regulation of these mechanisms.

Community Visitors often point out, as their Annual Reports attest, that behaviour management (support) plans often do not comply with legislative requirements, and they regularly comment on how the use of restrictive interventions – be they seclusion or physical or chemical restraints – can at times be unnecessary and sometimes legally dubious.89

Nor are these isolated criticisms. In its 2008/09 Annual Report the Office of the Senior Practitioner reported that a qualitative review of 60 Behaviour Management (Support) Plans had found that ‘None of the plans were judged to be likely to be able to effect a change in the behaviour of concern … None of the plans provided adequate details about what strategies would be taught, how reinforcement would be used … or how the information about the success of interventions would be communicated.’90

There is also increasing public disquiet about this issue. As I mentioned earlier the 2008/09 annual report of the Office of the Senior Practitioner recorded that 2036 people had been ‘subjected to restraint and/or seclusion at least once’ in the year to June 2009.91 This led to a front-page newspaper report, under the headline ‘Drug-Restraint “Shame” in Care Homes for Disabled’, 92 and prompted Bill Shorten, the then Parliamentary Secretary for Disabilities, to discuss in federal parliament the ‘national mental health seclusion and restraint project’ and the need for ‘national collection of data and national standardised definitions to inform policy and practice’.93

88 Ibid, 83-5.
89 For example, Community Visitors Annual Report 2008-2009, above n 72, 27, 63; Community Visitors Annual Report 2009-2010, above n 72, 32-3, 117.
91 Ibid, 15.
93 Commonwealth Parliamentary Debates, Representatives, 26 May 2010, 110.

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The requirement for disability service providers to register their use of restrictive interventions with the Office of the Senior Practitioner represented a significant step forward for the rights of people with disabilities. But there are some continuing problems and deficits in the regulation of restrictive interventions.

As I have mentioned, OPA’s Community Visitors are one of the safeguards in place to monitor the use of restrictive interventions. But as a monitoring mechanism, the Community Visitors program is naturally limited in some key respects. Most obviously, Community Visitors are only able to report on what they see in their unannounced visits. This means that they can only report on the use of restrictive interventions that are recorded in resident files or that they themselves witness. While they do occasionally report on obviously inappropriate usages of chemical restraints,94 Community Visitors are even more limited in their ability to monitor the use of chemical restraints, since they do not typically have pharmacological expertise.

OPA has sought to increase the regulation of restrictive interventions. OPA’s strategy to bring about a changed regulatory environment has involved internal departmental processes and this issue has been raised in our 2009-2010 Annual Report.95

In our Annual Report we have called for two significant changes to the way restrictive interventions are regulated. We have argued that restrictive intervention regulations that apply to disability service providers should apply to other accommodation providers as well, particularly in the supported residential services sector and in aged-care accommodation. We know that a variety of protocols and accreditation standards exist in the field, but our argument is that these do not provide the external and transparent regulation that is needed. The model that could be used here as a starting point for broader regulation of restrictive interventions is that contained in the Disability Act (specifically Part 7).96

The second significant change that we have sought is broader unannounced auditing of chemical restraint usage. Though some auditing is currently carried out by the Office of the Senior Practitioner, we are calling for far broader and more routine auditing, involving unannounced visits to government-provided and government-supported accommodation settings.97 This could be carried out by the Office of the Senior Practitioner, but that Office would need to be resourced to do this. It would also be preferable for

95 OPA, Annual Report 2009-2010, above n 44, 22-23.
96 Ibid, 23.
97 Ibid.
the Office of the Senior Practitioner to exist as a stand-alone statutory entity, rather than being an office within the Department of Human Services.

One question that is likely to be raised about these proposals is that since aged-care facilities are subject to Commonwealth rather than state regulation, would it not make sense for restrictive interventions in aged-care facilities to be subject to uniform national practices? While this might be ideal, we would make the point that it is the state legislatures and courts that are responsible for regulating most areas of the criminal law, and that restrictive interventions which are not authorised ought to be placed in the category of assault. This suggests that it is the responsibility of states to take the lead here.

Conclusion
In this paper I have considered restrictions on the liberty of people with disabilities and the role that OPA plays in monitoring this treatment and in advocating for individual and systemic improvements. I look forward to learning from other presenters about how our society’s regulation and monitoring of closed environments might be improved.
Session 2.4: The Community Liaison Officer role - how Aboriginal perspectives contribute to oversight and monitoring in WA prisons

Mr Joseph Wallam, Community Liaison Officer, Office of the Inspector of Custodial Services, Western Australia

Abstract

The Office of the Inspector of Custodial Services in WA (OICS) aims to bring independent, expert, and fair scrutiny to custodial services. In part, this is achieved by the Office employing its own staff but there is also value in obtaining the input and insights of members of the general community. OICS administers the State’s Independent Visitor Scheme and also places great importance on its other community links. Given the high rates of Aboriginal incarceration, it is particularly important to connect effectively with Aboriginal organisations and families. Joseph Wallam is an OICS Community Liaison Officer. He discusses the value of community engagement and provide practical examples of that engagement.

Roundtable paper

Mr Wallam greeted the audience in his own language ‘moorditj bina noonook’ (good morning everyone) and paid respect to the Traditional Owners and Custodians of the land that we were meeting on …The Wurundjeri people.

I want you to listen to what I am going to say about Aboriginal perspectives on the monitoring of prisons for this Roundtable meeting on human rights in closed environments, because that is what we do at the Office of the WA Inspector of Custodial Services – we listen. So listen and I wish you well.

What I want to do in this presentation is basically to explain why I work at the WA Office of the Inspector of Custodial Services. I want to start by saying this...

That being an Aboriginal person, together with my family and my community, government policies and legislation enormously impact on our lives. I think that we have to appreciate that point before we look at what happens in prison, because some of those policies and legislation are some of the reasons why Aboriginal people have ended up in prison.

When the Office opened in 1999 I was hugely excited about it and imposed myself on the current Inspector’s predecessor, Emeritus Professor Richard Harding. I went there and asked if I could in some way work with him because I thought the Office was about bringing in changes that were important to me and my community.

As a result, I was appointed as the Liaison Officer to engage with the community. My role as the Liaison Officer has two aspects, to improve communication with community, and in particular, given the high incarceration of my people, extend it to the Aboriginal community. But it is no more or less important that I also talk with the wider community, as prisons do not discriminate between Aboriginal and non-Aboriginal people. In my role, I also talk with juveniles and their families.

My role is important in connecting those incarcerated with their family and making community links. It is not just links with government agencies but also with Non-Government Organisations (NGOs), like the Red Cross, and those NGOs that advocate for prisoners. We engage with them closely and that’s one of the roles I enjoy.

I appreciate the various aspects of my role, especially during prison inspections, because it enables me to facilitate meetings for my Inspectorate colleagues. It enables me to participate with my colleagues in focus groups of prisoners, both Aboriginal and non-Aboriginal, and, in Western Australia, there are in some prisons male and female prisoners, so there is the opportunity to engage with both genders.

I want to talk now about the Independent Prison Visitors Scheme and what the Visitors’ roles and functions are within the prisons. Then I want to spend a bit of time talking about their contribution to monitoring prisons and what we do with the information when they report back to the Inspectorate.

Overview of the Independent Visitor Scheme

The Visitors’ Scheme is part of the WA Office of the Custodial Inspectorate. We have a volunteer Visitor Scheme to help in monitoring prisons; we also have other Liaison Officers who go into prisons every six weeks. The Independent Visitors Scheme is something that I assist with co-ordinating.

The Independent Visitors Scheme in WA is part of the Inspectorate. It is an independent form of external scrutiny that monitors the standards of treatment and services in Western Australian prisons and detention centres. As such the Scheme contributes greatly to the objective of a transparent and accountable custodial system. The Independent Visitors are volunteers who contribute to their community by ensuring Western Australian prisons and detention centres operate justly and humanely. The Independent Visitors attend their allocated prison or detention centre at least once every three months to talk with prisoners or juvenile detainees, and with prison officers.
or juvenile custodial officers about their concerns or issues regarding the prison. Visits take place during office hours. A visit would normally take several hours so the prison can be visited and those prisoners wishing to speak with the Independent Visitor can have access to them.

Independent Visitors can assist prisoners by:

- Helping with grievance and complaint procedures;
- Giving information about prisoner/detainee services and community support agencies;
- Speaking on behalf of prisoners or juvenile detainees, when asked, to senior prison officers, juvenile custodial officers and/or the Superintendent;
- Recording complaints made by anyone in the facility, prisoner, detainee or staff member, who can remain anonymous; and
- Documenting what happened during an Independent visit and forwarding a report to the Inspectorate.

Prisoners or juvenile detainees may want to talk about personal problems. It is important that Independent Visitors are approachable. After each visit the Independent Visitors write and submit a report of their visit to the Office of the Inspector of Custodial Services. The report will usually include concerns raised by prisoners, outcomes that may have been achieved or possible solutions discussed with the Superintendent and staff, and any personal observations, assessments and recommendations the Visitor wishes to make about the prison or detention centre.

**Independent Visitors and prison monitoring**

The written reports are analysed, and responses to some of the matters raised may be sought from the Department of Corrective Services. The Independent Visitor reports assist the Office to maintain an up-to-date view of conditions within custodial facilities. Once every 3 years a team from the Office of the Inspector of Custodial Services conducts a full Inspection of every prison and detention centre in Western Australia. The information provided by Independent Visitors assists the overall prison inspection process. It contributes to the Office’s own assessment of the performance of prisons and detention centres, whose reports are tabled in Parliament and subsequently released to the public.

There are at present approximately 35 community members of the Visitors Scheme that do this; they are volunteers who are appointed by the Minister. It used to be that Independent Visitors were mainly older people who were looking for something to do in their retirement. Today among those 35 Visitors, we have a range of individuals: some are retired, but they also include young people who are still at university, we have lawyers, doctors and we have people with a background in occupational health and safety. We have one particular prison visitor who lived and spent a lot of time in Indonesia; he advocates for Indonesian prisoners and other prisoners of similar background.

We take the reports completed by the Independent Visitors, and provide that information for discussion when the Inspector meets with the Minister. When these Visitors go into the prisons they observe the treatment and conditions of prisoners. They are not just there for prisoners; they can and do also talk to staff.

We have up to about 130 visits each year, so generally we try to have an Independent Visitor going into each prison once a month. The Visitors have the same kind of access as we have as Inspectorate staff. That is, they have unfettered access throughout the prison; they can go to any part of the prison, and so they can talk to prisoners in the education area, at their work place, or in their accommodation units, or prisoners can also ask to see them in private. Following the visit, and before the Visitors leave the prison, they meet with senior prison management, either the Superintendent or Assistant Superintendent (in the private prisons it is the Director or Deputy Director). At that moment the Visitors then can take up with the Superintendent or Director issues of individual prisoners. Generally, not a lot of time would be taken up discussing individual concerns, although this could be done at the request of the prisoners. Sometimes the issues can a minor thing like ‘I’ve lost my shoes’ or ‘I got transferred and I’ve lost my shoes’ or ‘my box didn’t come across with me’. That’s something for the Visitors to ask and discuss with the Superintendent before they leave the prison. Those small things, that can be so important to prisoners, will get discussed and dealt with generally by them.

When the Visitors’ reports come back to us at the Inspectorate, we first take the opportunity to analyse the reports and identify some of the issues of a systemic nature, and that is where we can then take it up with the WA Department of Corrective Services to have the issues resolved. We give them the opportunity to look at those identified systemic issues, to follow up the issues and to clarify and to confirm with us what sort of actions they have taken.

The Department under our Act is required to provide us with a response to the individual issues that are raised, and also to the systemic issues, and to provide feedback to us on what actions they have taken or will take.

In addition to the systemic issues that are identified, the Inspectorate has the ability to follow up on issues directly with the Department outside the
Independent Visitors’ process. The Minister can take up some of the issues from the discussion with the Inspector in that forum, and could even take them up outside the inspection process, directly with the prison Superintendent.

If I was to say in a word what the Independent Visitors bring to the monitoring process, it brings transparency to the system. It brings that human aspect to it. The prisoners are talking to another person about their issues and they feel they can talk freely to that person about it and they can engage with that person. Why I say that, is because I want to touch on a particular aspect of the Independent Visitors. Let me reflect on when I first started with the Office, and go back to why I work with this Office.

When I first started with the Office, I was very conscious of the number of Aboriginal people in prison. You would be aware back then of the kind of things that Aboriginal people went to prison with - health issues, issues about family and so forth. When I first started, I noticed that not too many Aboriginal people were approaching the Independent Visitors. So I analysed why this was so with my colleagues. First of all, under the Act the process is that we have to forward to the prison, about four weeks prior to a visit, a notice saying when the Independent Visitor is coming in to visit. A notice is placed around the units throughout the prison letting prisoners know.

I am very aware of other people in prisons but I am going to talk specifically about Aboriginal people and what I am familiar with. Certainly, as I said earlier, many policies impact on Aboriginal people and by the time they have arrived in prison they have been dealt with by police, by magistrates; they have also dealt with the lawyer and they are all white. They are probably sick of talking to white ‘fellas’. I have tried to address this because it is about systemic change and if you are going to get change, you have to talk to people and listen to them. So one of the strengths of the Independent Visitor Scheme is that we arranged for me to go and walk through the prison with the Independent Visitors.

First of all, it was not my idea at all. When I put it to the Independent Visitors it was like a flood, they just said come along with us, so I have done that, in particular with the older ones who have been there the longest time with the Inspectorate. After that change, I can now honestly and proudly say that there are a lot more Aboriginal people approaching the Independent Visitors and it is bringing about systemic change. And it is also bringing about, I think, greater respect for this Office and, certainly an awareness of my role within the Office, from Aboriginal people.

Conclusion

In concluding, when I was invited to come and talk at the Roundtable, I welcomed the opportunity because I wanted to talk about Aboriginals in prison. But I struggle with the aspect of human rights and I am reflecting on what was said this morning. The challenge for us as Aboriginal people, is to know how to connect with human rights, how to work out the implications of that focus on human rights. If you speak ‘cold’ to Aboriginal prisoners about just what exactly are human rights, you do not get much of a response, but what does a human rights focus mean in practice? It means I think when they miss out on attending a family funeral and do ‘sorry time’, when they are unable to maintain their own language, and certainly it creates awareness of what people can do and can’t do in prisons. You do have a captive audience there and you can get the opportunity to do a six week language program for example. It is those kinds of things that prisoners think of as being about human rights.

That is a challenge I think for the ARC/Monash research: where do you go from here and how you overcome that barrier of prisoners thinking their human rights are really removed from their daily lives in prison. In concluding, I want to say this about the Office and about the Independent Visitors’ Scheme: many aboriginal people who are not in prison but have freedom, do not think about human rights too much. For myself, I do not think about human rights too much. Because it just does my ‘head in’; human rights are too hard to grasp at a community level. On the other hand, I am very much aware of the United Nations and the international treaty obligations, and I am very much aware of the Aboriginal people in prison and the concerns they have.

Finally, why do I work for the Office of the Custodial Inspector? Because it is the one Office that listens and, I believe, the one Office that is the champion for Aboriginal people, when so many Aboriginal people are in prison. I believe that because it has taken guts to produce, for example, the Inspector’s Standards for Aboriginal people in prison. The importance of the Office is about being able to make public statements and publish reports, such as about the quality of life in prison and it is about deaths in custody, for example, at Hakea Prison and the many recommendations for improving prison conditions. It is being able to make statements about unacceptable incidents in prison.

Why did I come here to talk today? It was not just about emphasising human rights but also about the work that the Office has been doing - to bring improvements to prisoners, especially for Aboriginal prisoners. So it is not just about the Office ‘preaching’ about human rights but it is about improving the level of services to prisoners, and as part of that we have got to start educating the prisoners about human rights.
Session 3: The human rights lens

Section overview

This section outlines the ways in which rights in closed environments are conceptualised. Session 3 involved consideration of such issues as: Does the human rights framework provide the most effective framework for monitoring bodies for closed environments? This question involves many other inquiries.

- How are human rights conceptualized and talked about in the context of closed environments?
- Is the language of human rights of assistance, or is there a more appropriate language in the context of closed environments?
- Are international human rights obligations and monitoring structures influential, and what demonstrated impact have they had?
- How effective is the Victorian Charter/the ACT Human Rights Act in promoting and protecting human rights in closed environments?
- How does one engage with, identify, and protect human rights where there is no formal human rights instrument?

The three speakers were:

- Mr John Taylor, Deputy Ombudsman, Ombudsman Victoria
- Mr Phil Lynch, Human Rights Law Resource Centre
- Mr Tom Dalton, Chief Executive Officer, Forensicare

Introduction

Dr Julie Debeljak

Having considered the role and effectiveness of formal and informal, internal and external monitoring bodies in securing the promotion and protection of human rights in closed environments, the focus of the Roundtable turned to the human rights framework itself. The efficacy of human rights as a conceptual framework within closed environments was on the agenda, as was the effectiveness of the human rights monitoring mechanisms under international and domestic law. The contours of guaranteed human rights certainly offer a framework within which to discuss the treatment of people in closed environments, but the rights alone are not enough. A focus on the mechanisms to enforce those rights is also necessary.

Australia has voluntarily accepted numerous international human rights obligations of especial relevance for persons held in closed environments.

These rights include: the freedom from torture or cruel, inhuman and degrading treatment or punishment; the right to be treated with humanity and the inherent dignity of the person when deprived of liberty; the right to privacy and family; freedom of thought, conscience, religion and expression; and the cultural, religious and linguistic rights of ethnic, religious, and linguistic minorities, including indigenous peoples. These obligations adhere under various international instruments, including the International Covenant on Civil and Political Rights (1966) (‘ICCPR’), the Convention Against Torture (1984), and the Declaration on the Rights of Indigenous Peoples (2007). These rights are supported by a treaty-based framework of periodic reporting by States to treaty-monitoring bodies, and the capacity for individual communications to be reviewed for human rights compliance by treaty-monitoring bodies. The results of neither mechanism, however, are enforceable against the State.

In Victoria, the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘Victorian Charter’) replicates the above-mentioned international human rights within the domestic jurisdiction of Victoria, particularly the rights under the ICCPR. The guaranteed rights are supported by two main “enforcement” mechanisms, and some structural, systemic oversight mechanisms.

The first “enforcement” mechanism relates to legislation. The Victorian Charter requires all statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so, consistently with the statutory purpose. A rights-compatible interpretation of legislation is considered a “remedy” for what would otherwise be a human rights violation effected by a rights-incompatible law. Where legislation cannot be “fixed” / “remedied” by a rights-compatible interpretation, the judiciary is not compelled to apply the rights-incompatible law; rather, the Supreme Court or Court of Appeal may issue a declaration of inconsistent application. Such a declaration does not affect the outcome of the case in which it is issued, with the judge compelled to apply the rights-incompatible law; nor does it impact on any future applications of the rights-incompatible law. The rights-incompatible law remains in force and applies to all future cases. Instead, a declaration is intended to act as an alarm bell of sorts, allowing the judiciary to warn the government and parliament that legislation is inconsistent with the judiciary’s understanding of the protected rights. This declaration mechanism is designed to prompt the government and parliament to review their assessment of the rights-compatibility of the legislation. Under the Victorian Charter, what cannot be “fixed” / “remedied” through the judicial interpretation process should be addressed by the democratically elected and supreme parliament.
The second “enforcement” mechanism relates to obligations imposed on public authorities. The Victorian Charter imposes two obligations on public authorities: it is unlawful for a public authority to act in a way that is incompatible with protected rights; and it is unlawful for a public authority, when making a decision, to fail to give proper consideration to a human right. The former is a substantive right, with the latter being a procedural right. There are some “exceptions” to unlawfulness, including where the public authority could not reasonably have acted differently, or made a different decision, because of a statutory provision. An example of this exception is where a public authority is simply giving effect to a rights-incompatible law. The counter-argument to this exception is to seek a rights-compatible interpretation of the law under the first mechanism. Where a public authority fails to meet its obligations, a person can only seek legal redress if they have a pre-existing relief or remedy in respect to the act or decision of the public authority, in which case that relief or remedy may also be granted for unlawfulness under the Victoria Charter. In other words, it requires a person to “piggy back” their Victorian Charter claim onto a pre-existing claim. Moreover, the Victorian Charter explicitly states that a person is not entitled to damages because of a breach of the Charter, but similarly allows a person to claim damages if they have a pre-existing right to damages – again, we have a “piggy back” damages provision.

The Victorian Charter also introduces various structural or systematic mechanisms which are aimed at improving compliance with human rights obligations. For example, it empowers the Ombudsman to enquire into or investigate whether any administrative action taken by any government department or public statutory body is incompatible with rights. Moreover, under the Victorian Charter, the Victorian Equal Opportunity and Human Rights Commission can, when requested, undertake human rights audits for the Attorney-General and public authorities. This is in addition to its other functions, which include intervening in court proceedings and annual reporting. Finally, the Auditor-General is empowered to undertake performance audits. This includes an audit to determine whether an authority is achieving its objectives and whether the operation or activities are being performed in compliance with all relevant acts, which now includes the Victorian Charter. In other words, Auditor-General can use the Victorian Charter as a compliance tool.

This very brief summary of the relevant human rights framework, and particularly the international and domestic enforcement and oversight mechanisms, highlights the somewhat weak nature of monitoring and enforcement mechanisms within the human rights framework. Internationally, oversight and review mechanisms under the treaty-based system are unenforceable and only, at best, of influence within the Australian political and legal system. Within the domestic setting, focusing on the Victorian Charter, the independent arm of government – the judiciary – lacks the ultimate enforcement tool of judicial invalidation where legislation is rights-incompatible. Moreover, although public authorities do have significant obligations in relation to human rights, victims of violations of those obligations do not have a freestanding right of action against the public authorities, coupled with a freestanding right to an effective remedy, including damages where appropriate. The complicated provisions in relation to securing a remedy for a failure to meet the obligations reduce the effectiveness of these provisions.

It is against this background that the speakers for this session were identified. John Taylor is the Deputy Ombudsman, Ombudsman Victoria. As discussed above, the Office of Ombudsman Victoria has an external oversight role under the Victorian Charter and is able to suggest structural and systematic changes to improve human rights in closed environments. Mr Taylor begins by highlighting that the values underpinning the rights within the Victorian Charter are the same values that underpin the work of the Office of the Ombudsman Victoria, Mr Taylor then details the independent monitoring and oversight role of Ombudsman Victoria, illustrating its work and achievements in the area of closed environments. He also teases out the differences between, yet inter-dependence of, the external and internal monitoring roles, concluding with an inventory of shortcomings in internal monitoring mechanisms in the closed environments setting. Mr Taylor makes two proposals for addressing the failings of the current oversight arrangements: first, ensuring that closed environments are subject to independent (external) scrutiny; and secondly, improving administrative processes and practices to bring them in line with the rights and spirit of the Victorian Charter.

Phil Lynch is from the Human Rights Law Centre, a leading national community legal centre that specialises in human rights, and undertakes a strategic combination of policy advocacy, litigation, education and capacity building. This engagement increases the human rights accountability of all arms of government. In his presentation, Mr Lynch considers the human rights, and the enforcement and oversight mechanisms, provided under both international law and the Victorian Charter. He proposes that the human rights framework is the most effective normative framework for securing humane conditions within, and for the monitoring and oversight of, all forms of closed environments. He argues that one key to the success of the system is its ability to establish legal duties and obligations in relation to human rights; but, equally, one limitation of the framework is the lack of legal enforceability and accountability.

Tom Dalton is the Chief Executive Officer of the Victorian Institute of Forensic Mental Health (‘Forensicare’). Forensicare is a public authority with obligations under the Victorian Charter. Its clients have rights under the
Victorian Charter that may be impacted upon both in terms of the legislative enforcement, and the public authorities’ enforcement, mechanisms of the Victorian Charter. In his presentation, Mr. Dalton explores the practical impact the Victorian Charter has had on the culture within Forensicare as a public authority. He gives particular attention to engaging staff with the human rights impact and implications of their workplace decisions and actions on the consumers of their services, and ensuring that human rights are part of the clinical decision-matrix, not just management speak. He also gives practical examples of where framing an issue as a human rights issue secured action from government where action previously had not been forthcoming. Turning to the legislative “enforcement” mechanism, Mr. Dalton’s assessment of the ability of the Victorian Charter to influence the interpretation of legislation that applies to Forensicare consumers is much less flattering. He expresses concern with the direction of the Victorian jurisprudence to date, particularly in comparison to other jurisdictions, and queries the up-take of the Victorian Charter amongst legal professionals.

The conclusions of both Mr. Lynch and Mr. Taylor include commentary on the need for independent monitoring of closed environments in order to improve the effectiveness of the human rights framework. Foreshadowing session 4, both speakers indicate that one step to create change in the monitoring of human rights in closed environments across Australia is to ratify the Optional Protocol to the Convention Against Torture (2002), a debate that continued in the Roundtable Proceedings in the next session.
Session 3 – The Human Rights Lens

Session 3.1: Why Closed Environments Need External Scrutiny: The Role of the Victorian Ombudsman in Dealing with Human Rights Issues

Mr John Taylor, Deputy Ombudsman, Ombudsman Victoria

Abstract

The Victorian Ombudsman’s mission, since it was established 37 years ago as an independent statutory authority reporting directly to Parliament, is to promote fairness, integrity, and respect for human rights, and administrative excellence in the public sector. Since 2008, we have also had the added function of ‘making enquiries into or investigating whether an administrative action is incompatible with a human right under the Victorian Charter of Human Rights and Responsibilities.’ Within its broad over-arching role, and with its powers to undertake enquiries and investigations into misconduct and maladministration, the Ombudsman has consistently paid attention to and monitored the conditions and treatment of persons who are deprived of liberty in a range of ‘closed environments’, and publicly reported on them. In these settings, the nature of deprivation of liberty makes people particularly vulnerable and potentially at risk of human rights violations.

The presentation will identify a number of issues and challenges relating to the external monitoring of places where people are deprived of liberty. It will illustrate these issues and challenges with case studies from Ombudsman Victoria investigations involving facilities (such as, the Melbourne Custody Centre and the Melbourne Juvenile Justice Centre) where there had been a clear violation of human rights not addressed by the responsible authorities. It will also discuss how adopting a human rights framework relates to and facilitates the processes of external scrutiny and accountability of closed facilities.

Roundtable paper

Introduction – the Ombudsman’s Role

While the Ombudsman’s statutory role is to investigate administrative actions taken by public authorities, and in doing so ensures members of the public/citizens are not subject to ‘maladministration’, the office has always addressed human rights, well before the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘Victorian Charter’) came into force in January 2008. The values underpinning the Victorian Charter have always been the values that the office of the Ombudsman has upheld; this is often not recognised. Those values relate to treating people with dignity and respect, with fairness and decency – all are linked to good public administration practices, and, in the case where people are held in secure facilities, these help to ensure that loss of liberty is implemented in a way that is no more restrictive than necessary, and that they are treated humanely and with dignity.

We know that in closed environments there is severe curtailment of freedom of movement and of accessing much of what we take for granted; this has the ever-present potential for abuse. It imposes a responsibility on those charged with the duty of care for persons deprived of liberty; it is essential therefore that there are adequate and robust mechanisms for internal as well as external monitoring of what happens in these settings and how the duty of care is exercised.

Ombudsman Victoria’s continuing independent monitoring and oversight role

A number of earlier investigations predating the Victorian Charter have identified a range of human rights issues. These have led to public reports, including:

- Investigations into prisoner property (2005);
- Improving responses to allegations involving sexual assaults (2006);
- Conditions for persons in custody (2006);¹⁰
- Investigation into the use of excessive force at the Melbourne Custody Centre (2007).

Identified concerns in these reports (principally about prison settings but also applicable to other closed facilities) include:

- Practices used to maintain order in the closed facilities;
- How maintaining contact with families is handled;
- Use of restrictive regimes/practices and behavioural or other restraints;
- How management and control of ‘challenging’ or ‘uncooperative’ behaviour is addressed and how discipline is managed if rules are broken;
- Conditions of transport;
- Provision of and access to medical care (including mental health);
- Training of staff;
- How detainees make their concerns known.

Case study 1 – Conditions for persons in custody report (July 2006)

Issues identified included:

- Substandard conditions, e.g. Kyneton police cells, Ararat prison;
- Significant overcrowding, e.g. double bunking, non-segregation of categories;

¹⁰ Conducted jointly by Ombudsman Victoria and the Office of Police Integrity
• Safety issues, e.g. hanging points, duress alarms not working, searches, assaults;
• Limited access to telephones, visiting arrangements, programs;
• Health risks, e.g. communicable diseases (still no condoms in Victorian prisons), self harm;
• Inadequate level of internal monitoring, e.g. Independent Prison Visitors, Office of Correctional Services Review (Formerly the Department of Justice Corrections Inspectorate).

The issues identified by these investigations required significant changes in the procedures and practices of staff and management of the facilities, whether approached through a ‘human rights lens’ or from a sound public administration perspective. The recommendations made by the Ombudsman address these. For example, two recent reports on the implementation of the recommendations (February 2010, October 2010) demonstrate considerable progress (94 per cent of recommendations in ten reports were accepted or under consideration by the departments concerned, while 74 per cent were reported to be implemented).

Yet some concerns with human rights implications, as noted in these reports, remain:
• Infection control in prisons;
• Length of stay of persons detained at the Melbourne Custody Centre.

Since the enactment of the Victorian Charter, there have been more recent Ombudsman reports which identified serious breaches of human rights in dealing with vulnerable people in settings where liberty is restricted.

These include:
• Investigation into conditions at the Melbourne Youth Justice Precinct (October 2010);
• Own motion investigation into the Department of Human Services – Child Protection Program (November 2009);
• Own motion investigation into Child Protection – out of home care (May 2010).

Case study 2 – Juvenile Justice report (October 2010)
Issues identified include:
• Health and safety concerns, e.g. hanging points and other hazards such as glass, electrical wiring, unhygienic filthy conditions;
• Inciting assaults between detainees, excessive force to restrain detainees;
• Overcrowding and non-segregation of sentenced and remand detainees.

The Ombudsman investigation found clear non-compliance with human rights principles, as well as a failure of the Department of Human Services to meet its statutory obligations. The Ombudsman recommendations are driving a number of improvements currently being undertaken.

Case study 3 – Child Protection report (November 2009)
This investigation identified:
• ‘special protection’ for children under the Victorian Charter not provided;
• ‘best interest’ of children not met, with children left at risk of harm;
• Inability to meet statutory obligations and internal practice standards, e.g. criminal record checks of carers not conducted.

Implementation of many recommendations made by the Ombudsman in these reports has been strengthened by the presence of the Victorian Charter; it provides added impetus to making improvements to public administration. In addition, the ARC project will inform us more about how the Victorian Charter is making a difference in relation to human rights in closed environments, particularly in those environments where external scrutiny may be less visible, such as, in the disability and psychiatric sectors.

More or less reliance on internal oversight processes?
Victorian does not have a specific investigatory body for closed environments (unlike the United Kingdom which has a Prison and Probation Ombudsman and Western Australia which has the Office of Inspector of Custodial Services). Ombudsman Victoria performs this function across the public sector and some sections of the private sector (such as, private prisons and the private providers of welfare services).

Ombudsman Victoria is a generalist jurisdiction covering more than 600 public authorities and government departments. Our ability to comprehensively monitor, in particular closed environments within its jurisdiction, is somewhat limited by resources. Nevertheless, frequent announced (and at times unannounced) visits to closed facilities are carried out by Ombudsman staff whenever possible. It does mean, however, that the Ombudsman places reliance on the effectiveness of internal monitoring and oversight arrangements. If these are inadequate or absent, then there is greater demand on the Ombudsman for dealing with complaints (which adds pressure on its limited resources). Systemic issues can also be investigated by the Ombudsman, through whistleblowers coming forward (the Ombudsman has responsibility for the Whistleblowers Protection Act) and through his power to conduct own motion investigations.
Over recent years shortcomings have been identified in the internal monitoring and oversight processes, particularly in relation to closed settings, such as prisons. These include:

- Lack of awareness by staff of the standards and operating procedures relevant to human rights;
- Poorly communicated complaints procedures for detained persons and limited access to external complaints bodies with reluctance or fear of detainees to make internal complaints;
- Inadequate basic conditions and amenities not identified through internal monitoring – food, cleanliness, overcrowding;
- Failure of management to take leadership and commitment to addressing internal complaints;
- Infrequent or deficient internal audits for assessing compliance with standards;
- Focus on internal guidelines and procedures rather than on broader issues such as human rights, fairness and dignity of detainees;
- Poorly conducted internal investigations – not timely, findings without substantiating evidence, limited experience and lack of training of investigators, breaches of confidentiality, and lack of transparency with absence of published reports.

These shortcomings contribute to our lack of confidence in the internal monitoring processes, and in the lack of robustness and effectiveness of the oversight arrangements to help drive the improvements. For example our review of the Corrections Inspectorate in 2008 led to significant changes in that organisation, but not to any transparency or independence in its operations.

**How to strengthen the internal monitoring arrangements**

**Closed environments should be subject to independent scrutiny**

The landmark United Kingdom Woolf report on prisons 1991 (cited by Stephen Shaw Prisons and Probations Ombudsman Annual report 2009-10) stated that:

>a system without an independent element is not a system which accords with proper standards of justice...the influence of an independent element would permeate down to the lowest level of the grievance system. It would give the whole system a validity which it does not otherwise have...

The value of and need for external independent scrutiny is well established in international standards for places of detention (see, for example, OPCAT requirements for independent inspections, published reports, access to all detainees). While monitoring and inspection of facilities can take a number of forms, including informal contact by community visitors and internal administrative monitoring, it is independent scrutiny not associated with the prison system or closed facility and their administration, and with the power to report to Parliament, that is particularly critical.

**Improving administrative processes in the context of human rights**

The Victorian Charter places obligations on public authorities (as well as on private entities acting on behalf of public authorities, including private prisons and non-government organisations running residential facilities) to make decisions and act in a way that is compatible with the rights contained in the Victorian Charter.

The Victorian Ombudsman has the specific function under the Victorian Charter of enquiring into or investigating whether an administrative action is incompatible with a human right, either in response to a complaint received or on its own motion. As shown in the Ombudsman’s annual report, many complaints come from vulnerable Victorians in what has been termed ‘closed environments’, that is, prisons (the highest proportion), children and juveniles in care, and from people held in psychiatric and disability residential facilities (where access to both internal and external complaints mechanisms may be even more problematic than in prisons).

When there is a lack of attention to human rights or incompatible actions taken by public authorities, prompt improvements are required to address the problem. It is the role that Ombudsman Victoria has been actively pursuing through the recommendations made, and by following up progress on their implementation.

Opportunities to promote ‘decency’ and good administrative practices that are consistent with the spirit of the Victorian Charter need to be identified, in particular in relation to settings where there is deprivation of liberty, regardless of the reasons why persons are held there.

There are international and national standards, as well as relevant Victorian legislation, including the Victorian Charter, which provide appropriate standards for people held in closed environments. These include the prohibition against torture, and other cruel, inhuman or degrading treatment, and respect for human dignity. Other standards cover: quality of life and decent physical conditions; provision of proper care, including medical care, which correspond to the needs of the residents; the imposition of just and necessary restrictions to meet the nature and purpose of the detention; appropriate safeguards and guarantees against abuses; and minimising the detrimental impact of the deprivation of liberty.

Many complaints received by the Ombudsman indicate that many of these standards appear not to be met or complied with in Victoria.
Session 3.2: The Human Rights Lens: Is Human Rights the Most Effective Framework to be used by monitoring bodies for closed environments?

Mr Phil Lynch, Executive Director, Human Rights Law Centre

Abstract

The international human rights framework establishes a comprehensive, normative framework for the monitoring of closed environments. It identifies those factors and conditions which are essential to ensuring that a closed environment respects human dignity and promotes rehabilitation, recovery or reintegration, as appropriate. The impact of the framework, however, is highly contingent on two key and inter-related factors: (1) education and acculturation; and (2) legal enforceability.

This presentation will consider two relatively recent cases, one under the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Victorian Charter') (Castles v Secretary to the Department of Justice) and the other under the First Optional Protocol to the International Covenant on Civil and Political Rights (1966) (Brough v Australia), which demonstrate both the potential and the limitations of the human rights framework and existing mechanisms. The cases demonstrate clearly the need for further human rights education and the establishment of independent, robust and effective monitoring and oversight bodies for places of detention.

Edited transcript of remarks

Introduction and Proposition

I am going to start with a proposition and then seek to illustrate that proposition by reference to two key cases.

The proposition that I start with is this: the human rights framework establishes a comprehensive normative framework for securing humane conditions within, and also effective monitoring and oversight of, all forms of closed environments. Moreover, it is the most effective framework within which to achieve these objectives.

I want to identify two key ways in which human rights provide this framework, followed by two key limitations of the framework. I will illustrate these points by discussing two recent cases, one under the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Victorian Charter') (Castles v Secretary to the Department of Justice) and the other under the First Optional Protocol to the International Covenant on Civil and Political Rights (1966) (Brough v Australia).

Two Key Strengths of the Human Rights Framework

The first way in which the human rights framework provides a comprehensive and effective oversight framework is that it identifies, in a very systematized way, those factors and conditions which are essential to ensuring that a closed environment respects human dignity and promotes rehabilitation, recovery and social reintegration.

One need only look at art 10 of the International Covenant on Civil and Political Rights (1966) ('ICCPR'), reflected in s 22 of the Victorian Charter, which provides that 'all persons deprived of their liberty should be treated with humanity and with respect for their inherent dignity'. There is a deep well of international and domestic jurisprudence that flows from these provisions holding, in essence, that prisoners should not be subject to any form of deprivation other than that which is a necessary incidence or consequence of the deprivation of liberty itself. The human rights framework provides a comprehensive framework which sets out the right to health, the right to equality, the right to non-discrimination, the right to privacy, the right to freedom of religious belief and expression, and the right to freedom of association, among others. None of those rights are to be limited in any way whatsoever in relation to detainees other than insofar as is a necessary incident of the deprivation of liberty itself.

The second reason why I think the human rights framework is a very useful framework is because it actually establishes legal duties and obligations in relation to the promotion, protection, and fulfillment of those rights.

So, for example, art 2 of the ICCPR requires all levels and arms of government to respect human rights and to take all necessary legislative, administrative, financial and other steps to give effect to those rights. So too, we see s 38 of the Victorian Charter which requires public authorities to act compatibly with human rights and to give proper consideration to human rights in all decision-making processes.

The imposition of legal duties and responsibilities is a critical factor contributing to accountability and oversight.

Two Key Factors Potentially Limiting the Human Rights Framework

The effectiveness of the human rights framework is, however, highly contingent on at least two key and inter-related factors, or limitations. The first factor is that of education and enculturation, and the second factor is that of legal enforceability and accountability.
Illustrative Human Rights Cases

I now turn to the two cases: the case of *Castles v Secretary for the Department of Justice* under the Victorian Charter, and the individual communication of *Brough v Australia* under the ICCPR, which illustrate these points. They illustrate first of all the potential of the human rights framework and mechanisms, and secondly the framework’s limitation and the significance of the two factors which I have just mentioned.

First is the case of Kimberly Castles. Many of you will be familiar with this case. It is a decision of the Victorian Supreme Court handed down in July 2010. Ms Castles was convicted of social security fraud in November 2009 and sentenced to three years imprisonment with a non-parole period of 18 months. She was imprisoned at a minimum security women’s prison which had an explicit emphasis on release preparation and community integration. Her two-year-old daughter had been living with her in prison. Prior to being incarcerated she had been receiving IVF treatment for over a year. She was desperate to have another child, a sibling for her daughter. Immediately following the point of her incarceration in November 2009 she made repeated requests for the approval of continuation of IVF treatment – initially and for the first few months she made the requests on her own behalf. From about March or April 2010, she made the requests through her lawyers at the Human Rights Law Centre and Blake Dawson. There was a real urgency to these requests because, during the period of her incarceration, Ms Castles would reach an age at which she would become no longer eligible for IVF treatment.

For a prolonged period, the Secretary for the Department of Justice simply did not acknowledge or respond to Ms Castles’ requests as to medical treatment and healthcare in any way. There was just complete and utter silence. Five months after Ms Castles had entered prison and made repeated requests the Secretary had still failed to make any decision whatsoever in relation to the request (although acknowledging her correspondence by this time), despite the fact (which was well known to the Secretary) that with every single month that a decision was delayed, Ms Castles’ prospects of becoming pregnant decreased.

Finally, in late April 2010, Ms Castles commenced proceedings under, among other things, the Corrections Act and the Victorian Charter and, in the course of this proceeding, the Secretary finally made a decision on 3 May 2010. The Secretary’s decision was to deny Ms Castles access to IVF treatment on the basis that she does not have an entitlement to that form of medical treatment, that there were resource constraints, and that allowing the request may set bad precedents and cause discontent within the prison population.

Ms Castles was ultimately successful in her application; she was unsuccessful at an interlocutory stage, but ultimately successful when Justice Emerton found that she had a right under the Corrections Act to undergo IVF treatment. In a really significant decision, Justice Emerton held that the Corrections Act entitles prisoners to ‘do more than remain in a holding pattern with respect to their health while imprisoned’. Her Honour found that IVF treatment was both ‘necessary’ for the preservation of Ms Castles’ reproductive health and ‘reasonable’. The Court recognised, in what is really a landmark international judgment on sexual and reproductive health rights, that IVF is a ‘legitimate medical treatment for a legitimate medical condition’; it is not a lifestyle choice, as the Secretary at times sought to portray it.

The Court went on to find that the right to humane treatment in detention – enshrined in s 22 of the Victorian Charter and art 10 of the ICCPR – requires the Secretary and other prison authorities to treat Ms Castles humanely, with respect to her dignity, and with due consideration to her particular human needs. Justice Emerton took as a starting point the proposition that prisoners should not be subject to hardship or constraint other than that which is a necessary consequence of the deprivation of liberty itself. Access to health care 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’, as Her Honour stated.

There are a couple of points to make from the Castles case. The first is that it took not just the threat, but ultimately the institution, of legal proceedings for the Department of Justice to properly consider Ms Castles’ human rights, and to take steps to give effect to their obligation to give proper consideration to her human rights, as well as act compatibly with human rights. There were a lot of sunk costs. Costs were ultimately awarded against the State of Victoria in this case.

None of this would have been necessary had the Secretary and the relevant correctional authorities done two things: first, properly and fully understood Ms Castles human rights and their legal obligations in the first instance, which requires targeted and ongoing human rights education and training; and secondly, acted accordingly – that is, acted in accordance with the culture of human rights, which requires leadership, commitment and cultural change.

The second case I want to turn to briefly is the case of *Brough v Australia*. Mr Brough is an Aboriginal man who was, at the time of his imprisonment,
16 years old. He suffers from a mild intellectual disability, he has communication difficulties, and impairments with cognitive functioning. He was sentenced to eight months imprisonment at the age of 16 and, in the first month of his incarceration, he was said to be involved in a riot pursuant to which he was referred to an adult correctional facility.

In the adult correctional facility he was placed in a safe cell, which is designed for inmates at risk of self-harm. His condition deteriorated in that cell and he threatened suicide. He was subsequently removed to what is called a ‘dry cell’, which is generally used for very short term containment of inmates when they are providing urine samples or undergoing strip searches. He was confined there for 48 hours. Approximately one week later, he was observed obscuring a surveillance camera, with the consequence that officers removed all of his clothing other than his underwear so that he could no longer obscure the camera. At this point one must remember that Mr Brough is 16 years of age and in an adult correctional facility. Mr Brough was administered with anti psychotic medication without his consent until he could be examined by a psychiatrist.

Mr Brough ultimately took proceedings to the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights (1966) (First Optional Protocol). I will read from the Human Rights Committee’s view on the merits, which found against Australia:

“In the circumstances, [Mr Brough’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 Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to self-harm and a suicide attempt.”

The Human Rights Committee found Australia had breached its human rights obligations and recommended that Mr Brough be provided with adequate compensation in accordance with his entitlement to an effective remedy.

What does the Australian government say in response to this? I will quote from its response. The ‘Australian government presents its compliments to the members of the Human Rights Committee’. Australia has given ‘very careful consideration to the views of the Committee, in close consultation with the relevant department’ being the New South Wales Department of Correctional Services. It ‘does not accept the Committee’s view that Mr Brough’s human rights were breached’, and reiterates its position ‘that he was dealt with in a manner appropriate to his age, indigenous status, intellectual disability’ and so forth, and that the interests of the security and the good management of the relevant correctional facility were taken into consideration. His treatment was ‘the least restrictive option for ensuring safety’ and we ‘do not accept the view that the New South Wales Department of Correctional Services failed to respect his rights’.

The Australian government goes on to say that, in light of the position expressed above, Australia does not consider monetary compensation to Mr Brough, or another remedy of that nature, to be appropriate. In addition, other possible means, such as, early release on parole or reduction in security classification, are not appropriate in the circumstances. But we ‘avail ourselves’, says Australia, ‘of this opportunity to once again renew to the Human Rights Committee the assurances of our highest respect and consideration’.

What does the Brough communication tell us? There were two key problems for Mr Brough. The first is that the decision of the Human Rights Committee is not legally enforceable under Australian domestic law. Secondly, and perhaps more importantly, there is a regime of bodies implicated in, a regime which also have real powers of investigation, oversight and remediation. In short, Australia needs to ratify the United Nations Optional Protocol to the Convention Against Torture and ensure its full and effective implementation.

Conclusion

By way of conclusion, the human rights framework establishes a comprehensive, normative framework for humane conditions within, and the effective monitoring and oversight of, closed environments. However, to be effective, the normative framework needs to be given substance and teeth: substance through a program of comprehensive human rights education; and teeth through the establishment of independent, robust and effective monitoring and oversight bodies for places of detention.
Thirdly, Forensicare provides a suite of services through outpatient appointments to people who are involved in the criminal justice system with mental health problems in the community.

Responding to the Victorian Charter within Forensicare
I want to talk about what Forensicare has done to respond to the introduction of the Victorian Charter, given our core work, whilst addressing the topic of this session: ‘is human rights the most effective framework to be used for monitoring enclosed environments’?

As Mr Lynch and a number of other people have said today, one of the classically important things in looking at human rights in an enclosed environment is: ‘what is the culture?’ It is important to bear in mind that we work in the mental health sector, and the discourse around ‘what is the least restrictive option’ is a discourse which is familiar to mental health clinicians. That fact, for Forensicare organisationally, made it a little easier when the Victorian Charter came into effect. This is especially significant because we, along with every other public agency, had no additional resources to implement what was a really significant change in the legal landscape for the provision of the services that we are required to provide by statute.

We responded by training many of our clinical staff. We provided briefings to our Council and to our Executive. We tried to bring human rights and Victorian Charter discussions into the way our staff think, in a real sense, so that it was not about a legal “tick and flick”, but about looking at our ongoing and active programme of review of all our policies and procedures. When those policies and procedures came up for review (including some policies and procedures that address the most restrictive practices like seclusion and mechanical restraint) we wanted our staff, not our lawyers, to review the implications of the Victorian Charter. We do not get our lawyers involved in that review programme in the first instance; rather, we get our staff to look at the policies and procedures and ask themselves a series of questions that engage them about the human rights issues. Human rights are not something that staff can refer off to management. When we review our policies and procedures we do that in a way that engages our staff.

As part of the orientation for all new staff, they receive a talk from the Chief Executive Officer. In that session, I talk about the importance of human rights, and the importance of human rights as one of the public sector values. Later in the orientation program as part of the legal overview of the work of Forensicare, new staff are given a specific session which actively talks about human rights and about some of the human rights issues for us as a health

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*The Council is the equivalent of a board of directors.*
care provider. The session includes discussion of overseas jurisprudence on some key human rights in closed environments, particularly correctional health care and forensic mental health, and particularly in the European jurisdictions.

Our clinicians are actively engaged and have, since the inception of the Mental Health Act 1986 (Vic), thought about doing things in the least restrictive way possible. In this respect, our staff engagement surveys in recent years have been of interest.

When staff are asked the question ‘do you consider human rights when making decisions or providing advice’, in 2009 96 per cent of our staff responded ‘yes’ they did, and in 2010 99 per cent of our staff responded ‘yes’ they did. That is fantastic.

However, when staff are asked the question ‘I understand the Victorian Charter as it affects me as an employee’, there is a significantly lower percentage of people who answer in the affirmative: only 90 per cent in 2009 and 88 per cent in 2010. What does that reveal about getting our orientation right? Are we perhaps engaging our staff on the issue of human rights as it affects patients, but not so much about how it affects them?

Significantly, when staff are asked the question ‘my manager treats employees in a manner that respects their human rights’, only 91 per cent answer in the affirmative. Of interest, when human rights language is used internally as part of a human resources strategy, it is influencing our staff thinking about what they are doing with our patients; however, we must question whether human rights has got the same resonance for staff when they think about what is happening to themselves and their colleagues.

The External Impact of the Victorian Charter

Externally (and provocatively), I question the extent to which human rights is being used effectively as a lens which promotes the case of our consumers – that is, promotes the case of the people who receive our services, not voluntarily but involuntarily, in their engagement with the legal system.

This is particularly so with respect to those cases where our clinical decisions go back to the Supreme Court and the County Court over 50 times a year. This review process is part of the mental impairment legal framework, under which people who have been placed on a supervision order following a finding of ‘not guilty by reason of mental impairment’ or unfitness to plead, go back to court applying to have their supervision order revoked so that they can move back into the community.

In these cases a human rights discourse is not occurring and lawyers are not actively using the Victorian Charter to progress or advocate for the human rights of their clients, who are our consumers. There have been some decisions in the Supreme Court. One example is the case R v White [2007] VSC 142, where Justice Bongiorno found that the continued detention of someone in prison, while they are awaiting a bed at Forensicare after a court order had been made, was contrary to the spirit if not the letter of the Victorian Charter. In another case, Justice Bell considered the Victorian Charter where one of our patients who had a child was in the community on extended leave (Re TLB [2007] VSC 439). In considering whether he should grant continued extended leave, Justice Bell placed particular emphasis on the United Nations Convention on the Rights of the Child (1989).

Of note in those cases is the underlying principle in the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) that states ‘the Court must apply the principle that restrictions on someone’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’. There is already a statutory overlay to these decisions. We are beginning to see jurisprudence that considers the interplay between that statutory overlay and the Victorian Charter. Of concern, however, earlier this year Justice Cogbian accepted the submission by the government that the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 already recognised the human rights of people subject to it, such that he did not need to consider the interplay between the law and the Victorian Charter, or that the Victorian Charter was not then engaged (Re Percy [2010] VSC 179).

This is of concern because of the lost opportunity for the Victorian Charter to be used in a more proactive way. It seems that lawyers have not come to grips with this yet. We know from comparative jurisdictions, in Europe and America, that rights have actively been used to push government to increase health care provision in closed environments and to really change the way systems operate.

I do not think we have seen this in the Victorian legal domain. I think there is a long way to go for the legal profession in Victoria to actively pick up the opportunities the Victorian Charter has to offer our patients and clients. This group of people are disenfranchised in the criminal justice system, and disenfranchised in the mental health system. Are they getting the support that the legal profession could provide them in the existing avenues where

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103 This question is in the State Services Authority attitudinal survey.

104 This finding concerned the case of Derek Percy, who is the only person held under this legislation in prison.
they have recourse? I do not think so. I am concerned that there is the beginnings of jurisprudence which is going to exclude the Victorian Charter as a relevant consideration. We need to ‘watch this space’.

The other thing that then behooves us to ask is: ‘what are other mechanisms that we can use?’ I think that we should not underestimate the power that community visitors have to effect real change under the Victorian Charter. Taking our organization – we did not have air conditioning in the bedrooms of our units because there was a cost cutting measure when the hospital was built. Community visitors advocated for better conditions in hot summer periods when our clients were in their bedrooms at night sweating away. This saw the introduction of funding by government of air-conditioning to our bedroom units. I am not professing that this aspect is the most important aspect of human rights for our patients; but it is a critical area in which human rights can be advanced by activity that happens through community visitors and other voluntary organisations.

The Victorian Charter and Administrators
The challenge for us as administrators is to incorporate human rights factors into our administrative decision-making at the time we make the first instance decisions. Are we going to build a women’s only ward? How do we lobby for the funding for the $15-20 million to do that? We should start by having discussion with government within a human rights discourse.

The human rights framework has led to expenditure decisions. We recently employed additional staff in our organisation to give clients leave from the hospital where the leave had already been granted by the relevant independent authority. Initially we did not have the resources to allow that leave to happen because we did not have enough staff to escort patients. One factor that the organisation took into account in going into deficit this year was the human rights implication. The issue: we are going to put on an extra staff member to allow approved leave to happen because we are concerned about the difference between the amount of leave granted and the amount of leave our clients can take because of the need for a staff escort. Here we use the human rights framework to have that discourse with government.

The impact of the Charter on administrative decision-making and budget allocation is a really growing area for administrators and state government agencies. We need to be able to articulate how human rights are considered as part of the administrative decision-making in the first instance. I am not suggesting that Forensicare has got it right in all respects; it is a journey we are starting on. I think it is one of the great challenges of using the human rights lens to look at what we do for our very disadvantaged clients.
Session 4: Seizing the Day – How to create change in monitoring human rights in closed environments

Section overview

This section outlines the political issues in achieving improvements in closed environments. Session 4 involved consideration of such issues as: How can a new initiative/oversight agency come to be established and working effectively? This section includes an exploration of the establishment of OICS, and the key political factors which aligned to make it happen; the lessons for other jurisdictions from both the OICS experience and the NZ example; and a global perspective on the need for and implementation of OPCAT from APT.

The speakers were:

- Ms Rosslyn Noonan, Chief Commissioner, New Zealand Human Rights Commission, with guest speakers Ms Janis Adair, National Manager of Investigations, Independent Police Conduct Authority, and Ms Zoey Caldwell, Office of the Children’s Commissioner
- Professor Richard Harding, Crime research Centre, University of Western Australia
- Ms Dina Savaluna, Coordinator of Research and Monitoring, Center for Detention Studies, Jakarta, Indonesia

Introduction

Inez Dussuyer

The final session turned to the question of the politics of achieving change in the monitoring and oversight of human rights in closed environments. This theme was captured by the concept of ‘seizing the day’ (Horace’s carpe diem103): making the most of present opportunities. A major opportunity to establish a comprehensive scheme of monitoring and oversight of closed environments in Australia is the ratification and domestic implementation of OPCAT.104 Having signed the Optional Protocol in May 2008 the Australian government’s progress toward ratification appears to have been delayed until an appropriate domestic scheme is developed and agreed upon, although the complexity of developing and implementing OPCAT in a federation such as Australia is acknowledged. In the meantime, other States have ratified and implemented OPCAT, such as New Zealand.

Each of the speakers in this fourth and final session of the Roundtable highlighted the notion of ‘seizing the day’ in relation to the politics of establishing monitoring arrangements for closed environments. Each speaker, from three different countries at different stages of development in relation to monitoring regimes and OPCAT compliant mechanisms, spoke about how change in their jurisdiction has been, or is being, brought about. Each speaker also stressed the need for a long-term view on change, although they recognised that unique sets of circumstances can be utilised, at the right time, to create momentum for change.

Rosslyn Noonan, Chief Commissioner of the New Zealand Human Rights Commission, with her colleagues, described the establishment of the innovative NZ multi-body National Preventative Mechanism under OPCAT and its early years of operation. While she states categorically that OPCAT is not a panacea, she and her colleagues clearly show how change can be generated and created over time with coordination between the different elements of the National Preventive Mechanism.

Dina Savaluna, Co-ordinator of Research and Monitoring, Center for Detention Studies (Jakarta, Indonesia) provides a non-government organisation’s perspective on how to carry out monitoring of human rights in custodial environments in Indonesia. She vividly describes the challenges her organisation faces in attempting to monitor what goes on behind prison walls. Her approach is practical, and realistic about what can be achieved in the short term, without losing sight of longer-term objectives.

Richard Harding, the former and inaugural Inspector of Custodial Services in WA, is optimistic that ratification of OPCAT will proceed in Australia. He examined the independent role of the Inspector of Custodial Services WA and how the arrangements for monitoring custodial environments have been set up there. These arrangements would enable WA to be OPCAT-compliant. The WA Office of the Inspector of Custodial Services represents a leading model for other jurisdictions. Professor Harding also explores how the other Australian jurisdictions might interpret OPCAT requirements, with an emphasis on the implications of defining notions of cruel, inhuman and degrading treatment or punishment in practical terms for people held in closed environments.

This session concluded with a lively discussion about the specific political triggers which have produced major changes in monitoring and oversight of closed environments. For example, in WA there was the need for the Greens support for the then government to pass legislation for private prisons to operate in WA; this was obtained subject to the creation of the WA Office of the Inspector of Custodial Services. In New Zealand, there was a timely combination of having a government Minister to champion human rights and employ an international focus, a major review of human rights in New

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103 Carpe diem, quam minimum credula postero
104 Please see discussion in the Introduction, ‘Monitoring and Human Rights in Closed Environments’, above.
Zealand by the independent statutory Human Rights Commission together with several high profile court cases where human rights abuses were not identified under the previous monitoring arrangements. The discussion highlighted the importance of political leadership and the right combination of circumstances in achieving change.
Session 4.1: Monitoring mechanisms under OPCAT: the New Zealand experience

Rosslyn Noonan, Chief Commissioner, New Zealand Human Rights Commission.

Abstract

It is just three years since New Zealand ratified the Optional Protocol to the Convention against Torture (OPCAT) and designated a Central Preventive Mechanism, the Human Rights Commission, and four National Preventive Mechanisms:

- The Ombudsman
- The Independent Police Conduct Authority
- The Children’s Commissioner
- Inspector of Service Penal Establishments

The presentation provides an overview of this multi-member mechanism, its challenges and benefits; the development of its monitoring standards framework; and its impact and limitations in the first two years of full operation. The experience of the Independent Police Conduct Authority will be offered as a case study.

Edited transcript of remarks

I've greeted you in the language of the first people of New Zealand and in that greeting I have acknowledged the many respected people here – the speakers, all of you, but also the first people of this country, the traditional owners of this land, its elders and people.

I am going to briefly introduce to you the key features of the New Zealand Optional Protocol of the Convention Against Torture (OPCAT) process and then ask colleagues from two of our National Preventative Mechanisms (NPMs) to share with you their experiences. I also particularly want to highlight what value OPCAT has brought to their traditional roles. The colleagues are Janis Adair, National Manager of Investigations at the Independent Police Conduct Authority and OPCAT Co-ordinator, Matthew Pierce, Investigations Analyst at the Independent Police Conduct Authority, and Zoey Caldwell, responsible for OPCAT at the Office of the Children’s Commissioner.

My starting point is quite clearly that OPCAT is no panacea. As a previous speaker today noted there is a whole range of tools which can be used for monitoring. These tools, however, are no substitute for the role of civil society which, in the experience of New Zealand, is really the prerequisite for any significant human rights developments, and for change to take place towards the development of a truly rigorous human rights culture.

They are not a substitute for departmental provisions, for promoting and protecting human rights and their implementation in relevant areas, and for ensuring that within government agencies there is adequate monitoring and accountability processes. We are not interested in doing the work that government agencies should be doing for themselves. However, we are interested in supporting them to do those tasks and in making sure that they are actually doing them.

The OPCAT process in New Zealand complements what should be happening on a daily basis. It provides external independent scrutiny and, unlike other UN protocols to International Human Rights Covenant and Conventions, it is not reactive; it is not a process for dealing with abuses and human rights violations after they have occurred. It is, for the first time, putting in place a process which aids in being proactive and preventing abuses occurring in the first place. So it is very different from other optional protocols.

In the case of New Zealand, we signed OPCAT in 2003, and then we spent two and half years debating how it was actually going to be implemented. In 2006 the amendments to the Crimes of Torture Act 1989 were introduced and passed, and so in 2007 the Optional Protocol to the Convention Against Torture was ratified.

I have distributed to you draft copies of the third annual report that we are required to table in Parliament. Its appendices include detailed information about the implementation of OPCAT in New Zealand. It also provides a copy of the Amendment Act and the standards which we use and by which we frame the OPCAT investigations.

There are also copies available of our second annual report which, together with the third report, show very much a process of OPCAT development and evolution. I would like to acknowledge what Professor Richard Harding said this morning – that he thought five to ten years was the minimum for OPCAT having a significant effect and I think he is right in that. We are very much still in the process of development and each of our annual reports has shown that very clearly.
But I want this third report to be considered as it publicly reflects what has gone on within the National Preventative Mechanisms; particularly how the NPMs are thinking through their role and making changes as a result of input from external experts, such as the Association for the Prevention of Torture and the UN Sub-committee on Prevention of Torture (SPT).

- The New Zealand OPCAT monitoring system is a multi-body NPM. It is made up of several NPMs.
- The NZ Ombudsman covers prisons, health and disability services, immigration, and children and young persons in residential care.
- The NZ Children’s Commissioner also covers children and young persons in residential care, so there’s some overlap there.
- The NZ Independent Police Conduct Authority has responsibility for police cells and police custody.
- The NZ Inspector of Service Penal Establishments covers military custody. I want to highlight this, as it is the first external monitoring of defence force detention and is an exciting development. Although the upside of that is the New Zealand Defence Service does not hold many persons in detention. So, it’s not quite as exciting as it sounds.

In NZ the rationale for a multi-body mechanism was three-fold. First, there was value in building on existing mechanisms that already had the expertise, relationships and profile in particular areas. Secondly, it was also a mechanism to reassure what was initially quite a resistant public sector. Thus the corrections staff and the Corrections Department did not think they needed anybody further overseeing them; as in New Zealand, as in Australia, there are already layers of monitoring of one sort or another. In the health sector, the Mental Health Services sector, in particular, saw absolutely no reason for any further ‘interference’ with their ability to deliver health services unconstrained by human rights.

It was not that long ago that the Human Rights Commission was told by a very senior group of mental health practitioners that human rights ‘got in the way of decent treatment’. So existing services certainly have been an area where there have been some initial challenges. In spite of this, what we have found over these last three years is some degree of co-operation from all of the authorities.

The third reason for a multi-body OPCAT mechanism was that the Government was not going to put up a whole lot of extra money. Rather it was going to provide us with additional responsibilities with very little additional funding. In that way, it was a very cost effective way of delivering on the establishment of OPCAT.

In respect of funding, it is an issue. I think on behalf of all of the NPMs, I would say that at the end of the day our position has been that funding is not an excuse for breaching the fundamental human rights of people in detention. Regardless of whatever funding levels exist, human rights have to be respected and fulfilled. We have found that it has been good working with a group of independent agencies that have come with that very strong commitment. All of us have made some arrangements in order to be able to fulfil the responsibilities.

But in our view, and the annual report makes it quite clear, although it is not made into a major focus of our report, we actually cannot do the level of inspections that we would regard as optimum preventative visits. As a result, there is a whole process of prioritising, of identifying risk factors and so on, that has to go on in order to cover them.

The role of the National Human Rights Commission as the central coordinating mechanism has been very much a positive element in the arrangements because it means that we have a responsibility to bring people together. We have a responsibility for encouraging a degree of consistency across all of the NPMs. For all of us, the co-ordination role has meant that there has been a rich exchange of experience, ideas, analysis and development, and a continuing challenging of each other. As a result, some of the changes reflected in the annual report have come through discussions where one or other of us has said, “Are you doing that?” or “are you doing that fully, to the optimum”. The co-ordination required with the multi-body mechanism actually avoids some of the longer-term dangers of falling into a lack of co-operation; it protects against co-option into the system where you get very comfortable alongside the system.

Interestingly, we generally involve the Minister of Justice officials in our regular meetings and, again, that is a process which has meant very much that the discussions that go on are taken out into the public service. We also receive quite a lot of support from the Ministry of Justice.

In concluding my part, I want to acknowledge what I see as the values and impacts of what OPCAT has done, as a mechanism for taking human rights into the detaining authority agencies, in ways that nothing else before has done, including our own Bill of Rights Act which was very much seen as a sort of imposed compliance, something you had to reluctantly comply with.

We have seen really the value of the development of OPCAT, and the requirement that it is intended to engage and develop constructive relationships, particularly at the institutional level, and to work and find ways through the complexities. It is not about reporting in a “name and shame” sense. Although, at some point, there might be naming and shaming,
essentially we are building constructive relationships which have translated into changes at an institutional level.

During a period when the public climate has been punitive with respect to most of the people who are in detention, the OPCAT process has nonetheless been able to bring about practical positive change for people in detention without the negative headlines. That is something to be valued. It has also led to an increasing openness of correctional staff, of Police and others, and enabled them to actually integrate human rights into their day-to-day training. Human rights is thus not seen as an optional extra or something to be added on when they find time, but more like looking at how it evolves in their current educational training.

The Human Rights Commission as one tool is, as I said, not a panacea. All of the other components of the OPCAT mechanism are necessary. The building up of knowledge and understanding of human rights, from early childhood and within our schools, means building a culture of human rights that permeates not only legislation, but also policy and practice. It is the practice from day to day that we need to get right because that is what makes a difference for people in detention.

I shall present briefly on the role of the Independent Police Authority as a National Preventative Mechanism in New Zealand.

From the Police Authority’s perspective, we see human rights as being the foundation and not just the theme that runs through our work. In respect of our other functions and mandates as a complaints mechanism and oversight body in New Zealand, we also reflect our OPCAT mandate in both our public reporting, our reporting to the Commissioner of Police and in our response to complainants.

How then does OPCAT work in an operational sense within the Police Authority? I can tell you it is a resounding success in terms of the engagement that we have had and the approach that we have taken. It has been a success both from the top down and from the bottom up in our engagement with Police.

We have changed from being a faceless watchdog to a barking watchdog, which is prepared to bite on occasions. Whilst in some ways I agree that constructive dialogue is important, and is part of the picture, it is also important that our recommendations have to be followed by Police. It is non-negotiable, and that actually gives us some teeth and it gives us some bark and bite. That is important because it means that we can actually fix things that are broken, or that we see as being fractured.

I want to briefly speak about the value of unannounced visits. With both detainees and with police, and importantly with civil society, there has been a great call for the Authority and the other NPMs in New Zealand to ensure that there are unannounced visits conducted. In the OPCAT requirements, there are announced visits, unannounced visits and also repeat visits. We have seen great benefit from conducting those visits and it is part of the prevention approach. It is about ensuring that if a system is broken – if there are ways to ensure that people have access to legal advice, access to others, have their basic human rights met – then we want at least to be able to go in without prior notice. This means that at any time of the day or night, we will come calling and that will either come in respect of a concern that has been raised by way of a complaint, or a trend that we see emerging through a complaints process, or as a result of what civil society are telling us. To announce to the police that within two or three weeks time we will be visiting a police site enables police to perhaps put things right in a cosmetic way, to fix things up for our benefit, to ensure that the registers are in place and that we will not find anything wrong at least on the surface.
In all of the unannounced visits that we have conducted in the last year, which has been our first year, we have been very well received by the police. The level of engagement has continued to be high and continued to be positive, and we have been able to effect a real change. As a result of the collaboration work that we have done with the other NPMs, we have also conducted specialists site visits. In one such visit to a police station with custodial facilities, we not only took the Human Rights Commissioner along with us, but we also took other specialist advisors, including members from the Department of Labour, and the New Zealand Fire Service. As a result of our visit, the New Zealand Fire Service gave immediate direction to the Police Station to have it closed down because it was unsafe – for both Police staff and for those who were detained. That is the power of OPCAT; the mechanism has teeth and can make things happen.

In conclusion, I believe the OPCAT role is a tremendously important part of the Authority’s work. We receive feedback from all members of society in terms of the conditions and treatment of persons in police custody. We have also embarked on a significant public awareness campaign, with the website and posters, in terms of the role of the Authority as an OPCAT mechanism. We work very closely with the other NPMs and we are deeply grounded by the fact that we do not have targeted funding and the resources except for a very small allocation from the Ministry of Justice. What we can do is maximise the effect of our funding by working collaboratively. For example we are conducting a thematic review along with the Office of the Children’s Commissioner, in respect of the treatment and detention of children and young persons in custody. We need to work smarter and in constructive ways in order to effect change but we are seeing the measure of that change certainly in the police detention situation.

The Children’s Commissioner has a statutory monitoring function that was imposed before New Zealand signed up to OPCAT, but OPCAT has given us more powers in terms of the ability to undertake unannounced visits and to ensure the confidentiality of people that speak to us is maintained. Being an independent agency outside of Government has absolutely strengthened and given weight to our recommendations and everything that we can see and have access to.

Some of the achievements I think that have been really important in terms of the work that we have done is that we have created a transparent open process with Child Youth and Family, which is the child protection service in New Zealand. We have got a good process in place where we have an ability to follow up on the recommendations that we have made. So this is not a stagnant process at all.

I think that there is a balance we have to maintain between being an independent agency and having a close working relationship. So it is a careful tightrope that we walk, but we do it well I think. I also think a strength, as Janis mentioned, is being able to go with other NPMs to visit places of detention. This has been really valuable. We are only gazetted to visit places where children and young people are detained; residencies we call them in New Zealand. But we go with the Office of Ombudsman to prisons where they have youth units or with the IPCA to Police Detention Centres or Police cells and look at where young people are held. So I think there are some real positives to having a collaborative approach with other NPM’s.

And finally, someone was talking earlier about bad staff practices and it made me think of something that a young person said to me on a visit earlier this year that I thought was worth sharing. He said, “Staff here really want us to succeed but they expect us to fail”.
Abstract

Ratification of OPCAT will oblige the Commonwealth to ensure that all Australian jurisdictions establish National Preventive Mechanisms (NPMs) to inspect closed institutions and “Regularly examine the treatment of persons deprived of their liberty”. This examination will be referenced back to the international requirement that States Parties should “prevent torture and other cruel, inhuman and degrading (CID) treatment or punishment.” The purpose of NPM inspection is to “protect persons deprived of their liberty” from such treatment.

The notions of torture and cruel, inhuman and degrading treatment or punishment have been fleshed out in the interpretation of other related international and regional instruments, particularly in relation to the European Convention against Torture. However, the jurisprudence is incomplete, and it is by no means clear that all of the main issues of importance in the equitable and effective management of a prison system (and likewise the systems operative in all closed institutions) are currently within the scope of the agreed definitions.

The provisions of the Western Australia Inspector of Custodial Services Act go further. They include: “the management, control or security of the prison”, the “security, control, safety, care or welfare of prisoners” and the related matter of administrative or managerial practices underlying these issues. Consequently, the WA Inspector is able to report on a broader range of matters, going to the question of whether the chosen protocols and policies are effective from the point of view of achieving the overall objectives of the prison regime.

The question therefore arises: should the Australian jurisdictions, when enacting OPCAT-compliant legislation, go further than the minimal requirements that address torture and CID and seek to establish NPM agencies that look to the broad purposes that it is sought to achieve through the establishment and operation of the various closed institutions.

Edited transcript of remarks:

At the outset, as Ros Noonan knows, I am a great admirer of OPCAT in New Zealand. We cannot beat them at rugby and we are not getting within a bull’s roar of equalling them at OPCAT, but with any luck, perhaps in 2011, we should start doing something. I am still optimistic that there will be ratification by the Federal Government of OPCAT and, if so, that a national framework will start to be created which the States and Territories will have to conform with.

It is important to remind ourselves of how that will happen. It will be a Federal statute made pursuant to the external affairs power of the Commonwealth Constitution. The implementing legislation, the framework, the instruction, the parameters within which the States will have to introduce their own national preventive mechanisms (NPM’s), obviously will have to be sufficiently closely linked to the UN Convention on Torture to survive constitutional challenge. You can confidently expect that there will be mutterings about constitutional challenge from some of the States.

Box 1: Constitutional authority under the external affairs power (s. 51 (xxix))

- Implementing legislation must:
  - not depart too far from the terms of the Convention;
  - be reasonably capable of being considered appropriate and adapted to the implementing treaty;
  - prescribe a regime that the Convention itself has defined with sufficient specificity;
  - Probably the Commonwealth could not enact implementing legislation that required States and Territories to establish NPMs with such extensive jurisdiction as that of the WA Inspector.

In my view, that means that the Commonwealth’s implementation of the legislation cannot depart too far from the definitions of “torture” and “cruel, inhuman and/or degrading treatment” in terms of the expectations that they impose upon States. That being so, I believe it is important that we think about what these legalistic terms mean. Box 2 summarises the key aspects of each term.
Box 2: Definitions

“Torture”
- Defined by Article 1 of the UN Convention in terms that require not just severity of the infliction of pain and suffering but also some purposive intent – e.g. To obtain a confession.
- “Torture” is thus primarily an agent-focused rather than a victim-focused concept.
- Even such an extreme case as the death of Mr Ward, who died in the back of a prison van during a long journey in extreme heat without air conditioning would probably not be covered.

“Cruel, inhuman or degrading treatment or punishment’ (CID)
- Article 16 defines CID by way of exception to torture: “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1”.
- Thus we need interpretative tools, including case law, inspection observations, coronial inquest findings, official inquiries to give substance to the notion.
- However, we can often recognize it when we see it – there is a common sense aspect to it.

“Degrading”
- Degrading is essentially a victim-focused or victim-impact term.
- The OED talks of “deposing someone from a position of honour or estimation”. The notion of inherent dignity is thus involved.
- Treatment is degrading if it arouses in the victim “feelings of fear anguish and inferiority capable of humiliating and debasing them” Tysiac v. Poland, no. 5410/03, ECHR 2007-I.
- However, there can be an agent-focused aspect: even if the particular person does not react as feeling degraded, the treatment can nevertheless be degrading if “right-thinking bystanders” regard it as degrading: Burke v United Kingdom (unreported, No 19807/06, ECHR, 11 July 2006).

“Inhuman”
- This has connotations that are both victim-focused and agent-focused. If the victim has to endure conditions that undermine the basic elements of human functioning, it is inhuman. Thus: undermining rational thought and self-control (provocation by the agent and consequential frustration), lack of reasonable privacy, unhygienic conditions, limited opportunity to care for self, etc.
- Inhuman also refers to the attitude with which the agent imposes these conditions, and the view of the ‘right-thinking bystander’.

Box 3: European Court of Human Rights decisions in relation to inhuman and degrading treatment

- “Cruel”
  - Essentially an agent-focused notion.
  - The condemnatory implications of “cruel” are rightly applied to anyone who takes advantage of the opportunities afforded by lawful punishment to inflict greater suffering than is appropriate, or to inflict suffering without the appropriate attention to necessity and proportion.\(^{107}\)
  - The above examples could also be deemed “cruel” according to the attitude and motivation of the persons imposing the conditions.

Of course, these terms are not readily litigated here in Australia, although you have heard Phil Lynch discuss a Victorian case, and a Human Rights Committee decision\(^{109}\) which did not specifically centre on OPCAT but dealt with the Victorian Charter and the International Covenant on Civil and Political Rights (ICCPR respectively).

Most of the litigation in relation to human rights obviously comes out of the European Court for Human Rights, and those cases are technically confined to the meaning and scope of “inhuman and degrading”. The word “cruel” does not appear in the European Convention on Human Rights, but I think the general opinion is that it has not weakened the effect of the European legislation or the European Convention.

Box 3 provides an overview of these issues. In very broad terms, what the European Court of Human Rights and the various domestic decisions made pursuant to that tell us is that when you are talking about cruel, inhuman and degrading, intent is not necessary. You do not have to have intent for something to be inhuman or degrading to create an inhuman or degrading environment. This is of course, very important.


\(^{108}\) Castles v Secretary for the Department of Justice [2010] VSC 310 (9 July 2010)

• Intent not necessary – look to the effect: “Prison conditions that infringe prisoners’ human rights are not justified by lack of resources”;
• Overcrowding can be assessed;
• All elements of health care are within scope;
• Diet relevant (sufficient nutrition; preparation; timing of availability; religious requirements; no deprivation as punishment);
• Segregation regimes/isolation must meet proper standards as to process and length of time;
• Contact with the outside world (visits);
• Strip searches, if unnecessary or done inappropriately;
• Repressive transport conditions;
• Climatic conditions (extreme cold or heat).

The general principle has been that conditions that bear upon a prisoner’s daily life can in principle be examined and weighed in the balance to determine at what point they become inhuman or degrading. Nevertheless, a fair degree of discretion remains with prison authorities.

For example, it was said in one of the cases of the European Court that prison conditions which infringe prisoners’ human rights are not justified by a lack of resources. This argument of a lack of resources is one that the correctional departments are so quick to put forward. It will not cut any ice. When we look at overcrowding, the impact on that is profound if intent is not required. Privacy issues, such as who is being mixed with whom and so on, likewise are not excused simply because there has not been an explicit intent by the correctional authorities to cause inhuman or degrading conditions, if indeed that is what the outcome is.

The European Court looks at all elements of health care. They look at diet - whether it is sufficient, how it is prepared, when it is served, at what time. The kind of 3.00 pm distribution of dinner that you get in some Australian prisons, and then breakfast at 7.30 am the next morning, will not do. You have also got to take note of religious requirements. You cannot deprive people of food for punishment and so on. The notion of ‘inhuman and degrading’ takes account of segregation regimes and contact with the outside world. Likewise, strip searches and repressive transport conditions are matters to be assessed against the criteria of inhuman or degrading.

In other words, matters that bear upon a prisoner’s daily life tend to be the matters that are most focused on, under the rubric of ‘inhuman or degrading’. The European case law has arguably tended to give perhaps a little bit more weight than one might ideally expect to the discretion of the prison authorities to run the regime consistent with good order and safety and so on. Nevertheless, it is good stuff.

I want to make one more point about that. It is fairly clear from the European case law that the notion of inhuman and degrading treatment is not one that includes treatment that is merely unjust or due to inefficient management. Poor correctional management without an end product in sight, without concern for rehabilitation or preparing people for release, is not per se inhuman or degrading.

However I refer you to the case of Dickson v UK which was dealt with by the European Court. In that case the point was made that the increasing relative importance of the rehabilitative aim of imprisonment could be weighed in the balance when assessing whether any given practice was inhuman or degrading. But we have not quite got to the point that Ros Noonan and the New Zealanders have got to (see Box 7 below).

Box 4: Correctional efficiency or purposiveness

• “On their terms, the norms [inhuman and degrading] do not prohibit ‘unjust treatment’ or ‘inefficient punishment’”

However, in Dickson v. UK (2007) the ECtHR noted ‘the evolution in European prison policy towards the increasing relative importance of the rehabilitative aim of imprisonment’ and affirmed that this could be weighed in the balance when assessing whether any given practice was inhuman or degrading: Dickson v United Kingdom (unreported no. 44362/04, ECHR 18 April 2006)

I turn now to what the WA Office of the Custodial Inspector does. The criteria against which the Inspector measures the operation of prisons are outlined in Box 5.

Box 5: WA Inspector’s criteria

1. See the Code of Inspection Standards (2007) – very comprehensive, including sections on Rehabilitation, Reparation and Resources and Systems.

2. Inspector of Custodial Services Act 2003 (WA):
   - the management, control or security of a prison;
   - the security, control, safety, care or welfare of prisoners;
   - and includes an administrative arrangement in relation to such matters.
   - 3. Categorised areas for recommendation as follows:
     - Human rights;
     - Racism, Aboriginality and Equity;
     - Care and well being;
     - Health;
     - Custody and security;
     - Rehabilitation;
     - Reparation;
     - Administration and accountability of DCS;
     - Staffing issues;
     - Correctional value-for-money (efficiency).

In Box 6 have listed how the reports of the Inspector were divided up by general topic in the first four years of the Office. The top six of these categories were human rights; racism, aboriginality and equity; care and wellbeing; health services; custody and security. These first five undoubtedly are in principle the sorts of things that the European Court is dealing with when it talks about inhuman and degrading. In other words, these are the sorts of things that the Federal Government can tell the States they have to deal with, if they can only legislate in terms of cruel, inhuman and degrading treatment.

Box 6: Recommendations by category and percentage 2000-2004

<table>
<thead>
<tr>
<th>Recommendation category</th>
<th>Percentage</th>
<th>Number of recommendations per category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human Rights</td>
<td>4.0</td>
<td>12</td>
</tr>
<tr>
<td>Racism, Aboriginality and Equality</td>
<td>7.0</td>
<td>21</td>
</tr>
<tr>
<td>Care and well being</td>
<td>17.0</td>
<td>31</td>
</tr>
<tr>
<td>Health</td>
<td>7.7</td>
<td>23</td>
</tr>
<tr>
<td>Custody and security</td>
<td>7.7</td>
<td>23</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>11.0</td>
<td>33</td>
</tr>
<tr>
<td>Reparation</td>
<td>3.0</td>
<td>9</td>
</tr>
</tbody>
</table>

So, the first five of those areas would be within the narrow reach of the notion of cruel, inhuman and degrading (CID). Box 6 shows that only 43 per cent of the Inspector’s jurisdiction actually relates to what might be cruel, inhuman and degrading treatment. The remaining 57 per cent of the recommendations, as of 2004, relate to areas which on the narrow definition of CID would be beyond its remit. These are: rehabilitation, repARATION, and preparation for release, as well as how the Department is run, whether the staffing numbers are appropriate for the needs, and whether the Department is doing an effective job and providing correctional value for money.

The reason why the WA Inspector’s jurisdiction is so much wider is because of the way that the statute was drawn up. It was not drawn up as an OPCAT tool, a mere replica of an OPCAT statute. OPCAT did not exist in 1999 when the WA Inspector’s jurisdiction was being created. At the time when the Inspectorate was being set up, it seemed the government just wanted to know whether the prison system was being run sensibly.

The problem we have is this: when we have a national framework and it is linked into OPCAT notions of cruel, inhuman and degrading, the States could perhaps get away with creating very narrow or relatively narrow national preventative mechanisms. But of course they do not have to do that. They are not limited by any constitutional barriers and parameters. They can do what WA has done for prisons. They can create a much more wide-ranging kind of inspectorate or NPM, and it is certainly to be hoped that they will do so, although they do not have to do that.

It is likely that in the implementation of OPCAT, we will actually have different models in the different States. Some States will go as far as New Zealand has gone (see Box 7) and WA has gone with prisons. Some will go for the limited, narrow scope of cruel, inhuman and degrading and torture. So, there is going to be some inconsistency.

Box 7: The New Zealand position
Free from Constitutional inhibitions, New Zealand has empowered its NPM agencies as follows:

- to consider the conditions of detention applying to detainees, and the treatment of detainees;
- to make any recommendations it considers appropriate (i) for improving the conditions of detention; (ii) for improving the treatment of detainees; and (iii) for preventing torture and other cruel, inhuman and degrading treatment or punishment in places of detention

Rehabilitation, vocational training and education opportunities, preparation and preparation for release could fall within the NPM remit within this formula.

Some might even go as far as the WA office is likely to go, as in the Ward case (where an Aboriginal man died in a prison transport van). The Inspector can serve on the Corrections Department high risk notices which might indicate that: “This kind of incident is bound to happen, the risk is extreme, the consequences are catastrophic, and therefore please have all your vehicle fleet replaced; make sure that there are proper processes in place for long haul land-based transports”. In the Ward case, the Department ignored all of that. So, when the death occurred, it led to considerable problems and discussions. As a result, it is likely that the Office of the Inspector will soon be given a “show cause” power. This “show cause” power will be written in terms of: “If, in the Inspector’s view, there is a serious risk to life or safety in disregarding a recommendation, then the Inspector can require the Department to show cause to Parliament and to the Minister as to why they are not actually proceeding with implementing that recommendation.” Such a power turns the Inspector into a regulator in a very narrow range of situations. Whether any other Australian States will go that far, I do not know. But I do know that it is an opportunity that could be seized.

In conclusion, let me just make a few comments about how OPCAT-related developments might be taken forward, assuming the Australian Government actually in 2011 ratifies OPCAT. The point has been made, and I agree, that we might all think about the scope and reach of our detention systems generally. I must confess I was surprised to learn from Dr Chesterman’s paper this morning how many people are held in various forms of detention under aspects of the Mental Health Act. We know how immigration detention centres have burgeoned and that needs to be looked at. However, we must not hold up OPCAT until we have sorted out that problem, or else OPCAT will never happen.

Another theme that has emerged today is that there are problems about feeding the insights and concerns of civil society, or civil organisations, into such accountability mechanisms as exist currently. From the day I first became involved in this, I heard a lot about the role of civil society and incorporating it into the NPM arrangements. At a conference I attended in Argentina in 2008, the whole thrust was that civil society actually should be the NPM, and official agencies could sort of tag along. That was the Argentinean approach. I do not go that far, but I do believe it is crucial when we set up our NPMs that we strengthen the links between civil society and the official agencies that would be NPMs. These links are very weak in many parts of Australia.

In this context that is something we can do. Everyone assumes that if you create an NPM, you are putting on another layer of accountability, duplicating what is there already. We have heard this point made today. In fact, as I tried to persuade people in power, if you set up a proper NPM, you can actually rationalise and strengthen your accountability structures. There are too many bits and pieces that are not necessarily co-ordinating very well with each other. And so an NPM structure could actually, if properly implemented State by State and at the Federal level, take account of refurbishing accountability structures in relation to closed institutions generally and reducing their numbers.

The final point I would like to make is one that has been made several times and I made it myself earlier today. It is absolutely crucial that we do not think that you can wave a wand and everything changes. This is a long-term project and it will take time for the nuances to be worked out and established, for the culture to change. In this context, I believe that the Victorian Charter has not been embedded. We have constantly heard today that, for the culture to change, it is not going to happen overnight. Some of us will be disappointed perhaps that the change has not been quick enough and radical enough. But this is a very profound cultural shift that we are attempting to bring about, in relation to agencies which are not actually used to having people look over their shoulder, and, which for the most part, genuinely believe they are doing a wonderful job. They are not out there thinking “we do a lousy job”, they are out there thinking “we do good a job; we do not want these people looking over our shoulder”.

To actually change the culture, we need to have them understand that it is in their enlightened self-interest to have an effective NPM, an inspection mechanism. That is something that is not going to occur overnight. But it will occur if you work at it and hang in there long enough. The key is actually a cultural change; and the creation of NPMs both enables the cultural change to commence and feeds back into how the NPM conducts itself. I am still reasonably optimistic despite the shilly-shallying of the Federal Government on this matter, and I hope very much that in 2011 we will have something new to talk about. Thank you.
Session 4.3: Monitoring closed environments: An Indonesian perspective

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Abstract

The OPCAT has set a series of standards to conduct effective monitoring in liberty-deprivation places. The standards have to be followed by States who have ratified the Optional Protocol and might be used as a useful reference by the States who have yet to do so. The prohibition of torture is generally acknowledged in Universal Declaration of Human Rights and many States’ Constitutions. As such, the obligation to prevent torture and ill treatment, including in closed environments, does exist with or without ratification of OPCAT, and monitoring detention is one of the best ways to prevent torture. As the human rights framework is a universal language, it could be the best baseline used to develop indicators as monitoring tools.

In Indonesia the initiative to conduct detention monitoring, similar to National Preventive Mechanism (NPM) arose from National Human Rights Institutions (NHRIs), who already have monitoring mandates, and NGOs. The initiative was supported by the Directorate General of Correction as ongoing prison reform requires transparency; yet similar support has not been given by other detention authorities. The NPM has not been established yet, but detention monitoring is conducted sporadically by some institutions, such as the ombudsman, NHRIs, and Community Service Organisations working on detention-related issues.

Edited transcript of remarks

Thank you very much for the opportunity to speak at the Roundtable. I also want to acknowledge the Association for the Prevention of Torture (APT), which nominated me to attend today from Indonesia. The APT was founded in 1977 and is based in Geneva, Switzerland. It is an independent non-governmental organisation working world wide to prevent torture or other cruel, inhuman or degrading treatment or punishment. The APT has been leading the international campaign for the adoption and ratification of the Optional Protocol to the UN Convention against Torture (OPCAT). It promotes effective monitoring and transparency in places of detention, and contributes to effective international and national policy and legislative frameworks for the prevention of torture. The APT also provides expert advice and training support on the role of National Human Rights Institutions (NHRIs), including to the Asia Pacific Forum, an APT partnership project.

I work with the Centre for Detention Studies, a Jakarta based Human Rights non-government organisation, working exclusively on detention issues. The Centre is working on monitoring places of detention, as well as conducting research, advocacy and campaigns in order to promote human rights in places of detention. My organisation has an official cooperation agreement with the Director-General of Corrections and we are starting cooperation with Immigration Department. We have recently received approval to conduct monitoring in immigration detention centres, including unannounced visits; the only such organisation, I regret to say in the whole of Indonesia. We have eleven staff members.

I want to give some background firstly to OPCAT. The OPCAT has set a series of standards to conduct effective monitoring in places of detention where people are deprived of liberty. The standards that have to be followed by countries which have ratified OPCAT could be used as a useful reference by countries yet to do so. The prohibition of torture is generally acknowledged in the Universal Declaration of Human Rights and many countries’ Constitutions. As such, the obligation to prevent torture and ill treatment, including in closed environments, does exist with or without ratification of OPCAT.

Monitoring places of detention is one of the best ways to prevent torture. As the human rights framework is a universal language, it could be the best baseline for developing indicators as monitoring tools. However, every country has its own limitations. The important issue is how to overcome those limitations and how to make recommendations from the monitoring body effective. In Indonesia, the initiative to conduct detention monitoring, similar to a National Preventive Mechanism (NPM), arose from the NHRIs which already have monitoring mandates, and from Non Government Organisations (NGOs). The initiative was supported by the Directorate-General of Correction as ongoing prison reform requires transparency; yet similar support has not been given by other detention authorities. Although the NPM has not been established yet, detention monitoring is being conducted sporadically by some institutions, such as the ombudsman, NHRIs, and Community Service Organisations (CSOs) working on detention-related issues.

A major difference between detention issues in Indonesia and in Australia is that in Indonesia we are struggling with negative public opinion about detainees. In Indonesia, people still think that detainees, regardless of the reason they are in custody, deserve torture, even death.
Indonesia signed the UN Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in 1998 but it is not fully implemented because we need to translate the international covenant into domestic law following ratification, which is yet to be done. Indonesia has not yet signed OPCAT, although in its National Human Rights Action Plan 2004-2009 the Indonesian government suggested it would accede to it. Nevertheless there is an interesting development in Indonesia because we have three national human rights institutions working on human rights, namely, the National Human Rights Commission, the Commission on Anti-Discrimination against Women, and the National Commission for Child Protection.

There is a coalition between the National Human Rights institutions and civil society organisations in order to establish mechanisms similar to NPM with or without OPCAT ratification. Because we understand that the prevention of torture is extremely important in Indonesia and the mandate to prevent torture is in our constitution, with or without OPCAT we are going to establish a monitoring body similar to the NPM. To avoid the problems of budget constraint, we have chosen the model whereby the NPM will be attached to existing bodies which are the human rights institutions mentioned above.

Up to the present moment there are some bodies, the NHRIs, which have a mandate to monitor conditions and treatment in places of detention, but unfortunately they can only make non-binding recommendations. In addition, there is a lack of follow up actions by these organisations.

In addition to the NHRIs, we have the Ombudsman, but that office is more about assessment of maladministration. We also have the Inspector-General under the Minister of Law and Human Rights. The office of the Inspector-General only has the authority to monitor immigration detention centres, pre-trial detention facilities, and correctional facilities which come under its jurisdiction. Other places of detention, such as rehabilitation facilities, mental hospitals and other kinds of detention outside its jurisdiction, are not included yet.

Recently, we have also established a special Taskforce on judicial corruption. It is an ad hoc body which includes issues relating to detention. It only has two years to fix all the problems in detention, which is an impossible task. The Taskforce has only conducted reactive monitoring instead of preventive monitoring. As we know, there is a fine line between preventive monitoring and reactive monitoring. The latter is conducted as a response to a complaint; hence it tends to blame authorities regarding the allegation of the violation. On their first visit, the Taskforce invited the media to visit the places of detention where the monitoring was being conducted. Unfortunately, the media violated their own code of conduct and broadcast the conditions in detention; this information also violated children’s rights and prisoner rights.

Detention monitoring in Indonesia can be carried out by civil society organisations, but we have budget constraints and also limitations on access. Not all organisations have unlimited access, like my own organisation. We guarantee to the correctional service that we will not violate the prisoners’ rights and we do not report to the media. Instead we make recommendations for solutions regarding conditions and treatment. The question is: to what extent do civil society organisations have the ability and capacity to influence the legislative process? While we conduct the monitoring of places of detention, it takes our resources and efforts, but with what result? It comes back to our terms of reference and how we can create change in monitoring human rights in closed environments. The key is in the recommendations. But how do you make your recommendations effective so that you achieve the changes that you see as necessary?

My strategy to make the recommendations effective is, first of all, to be specific. You cannot say that the recommendation is that “the government has to improve all the detention conditions in Indonesia”. That is too broad. You need to know which part of the government you aim for. Only then can you be specific about how to improve detention conditions. The detention authorities need to understand what you want.

The recommendation also has to be measurable. You have to start the first assessment of the recommendations and make it measurable. While that is extra work, it is something that you need to do. It then has to be actually achievable in Indonesia.

Conditions in detention in Indonesia are very different to those in Australia or New Zealand. We have much to do and it cannot be achieved in only two years or even ten years. But you have to begin by setting one year’s priority target and it has to be achievable. You cannot make a recommendation that “I want you to end torture in two years”. This is not achievable. The recommendation has to be results-oriented and it has to be time-bound.

Two weeks ago I went to Palembang, a province of Indonesia, to visit juvenile facilities. I found that there was high tension in this facility. There was evidence of bullying and I interviewed many juveniles who were threatened by bullies. I made a recommendation that the facility needed to separate the juveniles under eighteen years from those over 18 years. However, the facility refused my recommendation because it would take money, time and energy. According to the standard operating procedures of our organisation, I have to give this recommendation to the Director-General of Human Rights in Jakarta. I then have to lobby and set the time frame.
However I have not done this yet because in my organisation something more urgent arose five days ago. I received a phone call in the middle of the night. I was told that one prisoner who I interviewed weeks ago was brutally killed, his stomach sliced open and mutilated. I can say that I did not do my job properly in following up the recommendation and it had cost my client his life. You have to be careful to set your time lines because every day is bad, and may cost people their life.

Then you have to give the suggested solutions. You cannot just blame the detention facilities, rather you should give them solutions because it helps them to think about how the situation can be improved. The staff in facilities see the conditions every day; they cannot see the bigger picture. You, however, are the independent person who can see the problems. You can identify what should be the first priority, the second priority, the third and so on.

So, you have to be mindful about your priority setting. Your recommendations have to rely upon reasonable arguments. And then you have to be responsive to the root causes of the problems. You can see that there is torture and you want to prosecute this perpetrator, but you have to see that incident in the context of the bigger picture. In Indonesia, as the UN Special Rapporteur for Torture said, the biggest motive for torture is bribery. They use torture as a tool for blackmail; to blackmail poor people because they have nowhere to go. This must be targeted and goals have to be set, including long-term goals with timelines. It is something that we have to do.

We also go to pre-trial detention facilities because that is where torture happens, especially of those who have just arrived. The Directorate-General of Corrections has a prison reform agenda and the bureaucratic reform requires them to be transparent. But for people detained, the facilities are still closed. They are even refused visits by the National Human Rights Institutions.

There are also marginalised groups in custody, such as transgender and transsexual, lesbian, gay and bisexual, prostitutes and sex workers who are vulnerable. Poor people and juveniles are also vulnerable. There are also use of force issues in juvenile detention because in Indonesia they still use weapons, and even fire weapons, to manage the juveniles.

While every country has big challenges, in Indonesia the first challenge is actually the local geography. It is very large and difficult to reach remote areas of Indonesia. For example, I went to one of the remote areas in Papua – I flew for six hours and then I have to ride in a canoe for eight hours. Another problem is the opaque culture inherited from the previous regime which prevents access to the detention facilities. Although some organisations have a mandate to visit the detention facilities, due to the disharmony of the legislation, the facilities have no obligation to open themselves up for inspection.

It is also really important to speak with their own language. For example, if I make the recommendation to the Islamic party in Parliament, I always say Kaum Duafah, which means “poor people” in Arabic. But if I give the recommendation to Police, I would like to use the language used in their code of conduct, so it is easy for them to understand what you want and what you need done.

In conclusion I would like to give you my favourite quotation from my training: “Power is when we have every justification to kill but we don’t. Power is not when we beat people to death because we can, but when we can, and we don’t.”
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