Perspectives of Senior Management on Applying Human Rights in Closed Environments

Working Paper No 1

Australian Research Council Linkage Grant, Applying Human Rights Legislation in Closed Environments: A Strategic Framework For Managing Compliance

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November 2011
# Table of contents

1. Introduction
   a. Background
   b. The importance of senior management perspectives on the implementation of human rights
   c. Method

2. Senior management views on applying human rights in closed environments
   a. Identification of rights in Victoria and the ACT
   b. When there is no formal human right legislation: the experience of WA
   c. When there is no formal human right legislation: the experience of the Commonwealth

3. Implementing human rights in closed environments
   a. Senior management identification of the issues
   b. Meeting the challenges of implementing human rights practices in closed environments

4. Senior management views of human rights training
   a. Effective training
   b. Challenges for training staff in human rights

5. The perceived impact of human rights legislation in Victoria
   a. Reviewing existing legislation and policy against the Charter
   b. Human rights compliance in Victoria; ‘Charter proofing’ or genuine engagement?
   c. Perceived benefits of the Charter across departments
   d. Challenges and changes in practice as a result of human rights legislation
   e. Normalisation of human rights considerations

6. Tensions: Balancing obligations and rights
   a. Prisons
   b. Disability facilities
   c. Mental Health facilities
   d. Immigration detention centres

7. Communicating rights in practice
   a. Informing people of their rights
   b. Avenues for complaint and their limitations

8. Summary and discussion

Appendices
1. Introduction

a. Background

In 2008 the Law Faculty at Monash University was awarded an Australian Research Council (ARC) Linkage grant to examine the application of human rights in a range of closed environments. The ARC project is being conducted in conjunction with five Industry Partners in four Australian jurisdictions: the Commonwealth Ombudsman, Ombudsman Victoria, the Victorian Public Advocate, and the Victoria Office of Police Integrity, the Victorian Human Rights and Equal Opportunity Commission and the WA Office of the Custodial Inspector. All are independent bodies each with external scrutiny responsibilities, including in relation to closed environments.

The aim of the research project is to understand how closed environments incorporate human rights considerations in managing the conditions and treatment of persons held in these facilities. The project enables comparisons across different types of facilities, as well as across the four jurisdictions, two of which have human rights legislation (Victorian and ACT), while two do not (Commonwealth and WA).

The ACT and Victoria introduced human rights legislation in 2004 and 2006 respectively. The legislation essentially adopts the rights articulated in the UN International Covenant on Civil and Political Rights (1966). Each Act requires public authorities to act consistently with these rights, and provides for scrutiny of new legislation for compliance with human rights. Government agencies have therefore also been required to review their policies and practices to ensure compliance with these principles.

The research findings from the project will inform development of a generic strategic framework, as well as sector-specific frameworks, to facilitate and strengthen the practical implementation of human rights practices within these facilities.

The project will also inform the work of oversight and monitoring bodies. These include formal external scrutiny bodies, such as the Ombudsman and human rights commissions, and civil society groups, such as independent visitor schemes and

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1 For the purposes of this project a ‘closed environment’ is defined as ‘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 specific settings being addressed are prisons, police cells, forensic psychiatric institutions, closed mental health and disability units, and immigration detention.


3 Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic)
advocacy groups that play a significant role in support for residents in closed facilities.4

Several studies are being conducted on key components of the project. This Working Paper presents findings from interviews with senior management within government departments that have responsibilities for a range of secure facilities.

Subsequent Working Papers will report on research with facility managers, facility staff, and some inmate and resident groups. Working Papers will also report findings from a wide-ranging survey of monitoring bodies about their work in closed environments, and interviews with members of volunteer and advocacy groups.

b. The importance of senior management perspectives on human rights implementation

In order to understand how human rights are addressed at the facility level, it is important to understand how policies and operational procedures are set by senior management. Implementation of human rights at the front line will reflect how senior management perceives human rights, in terms of priority and of their perceived relevance to operating the closed facility.

Senior management plays a pivotal role in organizations. They are at the centre of strategies to transform organizations and services, and to direct and influence cultural change.5 In the case of implementing human rights, their efforts should lead to modifications in the behaviours and practices of front line staff, which if adopted, would ensure that the traditional secure facility is respectful of human rights and compliant with human rights policies. However, organisations can be resistant to change and there can be many obstacles to implementing new paradigms in practice. Thus the introduction and application of human rights considerations requires strong leadership, careful and sustained effort, and approaches that are effective. As senior management have considerable decision-making power they can set the scene for implementing cultural change towards a human rights based framework, and influence the rate of progress towards this end.

c. Method

The perspectives of senior management for this project were obtained through a series of qualitative interviews using open-ended questions.6 The aim of the interviews was to obtain an understanding of senior management perspectives on the content and application of human rights in closed environments, and to identify the perceived internal (to the organization) and external contextual factors which could influence how (and how rapidly) changes take place.

Ethics approval was obtained both from Monash Human Research Ethics Committee, and where required, from the ethics committees in relevant departments. A total of 41 interviews were conducted by the researchers between May and November 2009, and taped discussions were transcribed and analysed thematically.

6 The interview schedule is provided at Appendix 1.
The Department of Immigration and Citizenship participated in an initial interview and provided written responses to our interview questions.

The interviews were broadly structured around the following key issues:

- The types of ‘human rights’ identified as relevant in the interviewee’s area of responsibility in the organization, and the source of these rights;
- Incorporating human rights into practice within the department and in the specific closed environments;
- Awareness about human rights in the department, and among facility staff and residents/detainees/patients;
- Views about training facility staff in relation to human rights;
- Monitoring of implementation of human rights in the department and the nature of any complaint mechanisms;
- Views on the extent to which human rights legislation (where in place) has made an impact upon the protection of human rights in the facilities;
- Challenges in protecting human rights and creating a human rights culture within secure facilities.

This Working Paper draws together themes from these interviews.

2. Senior management views on applying human rights in closed environments

a. Identification of rights in Victoria and the ACT

Many interviewees from Victoria and the ACT pointed out that human rights obligations existed in Victoria and the ACT, in corrections, disability services, mental health and police cells, well before the Charter/Act was enacted and that their respective departments were already attuned to human rights considerations. However interviewees also observed that the new legislative obligations provided them with additional means to build on and expand what was already in place, and/or to sharpen the Department’s focus.

Senior management identified as rights relevant to their department and their facilities:

- Right to life
- Right to humane treatment when deprived of liberty
- Protection from torture and cruel, inhumane or degrading treatment
- Right to safety or security of the person
- Right to protection of families and children.
- In the disability/mental health sectors, interviewees pointed to issues of choice and consent in relation to type of treatment and practices of restraint/seclusion
- Right to privacy and protection of reputation
- Right to equality before the law
- Cultural rights
- Right to a fair hearing

For example s47 of the Corrections Act 1986 (Vic) which outlines Prisoners Rights; Mental Health Act 1986 (Vic); Intellectually Disabled Persons’ Services Act 1986 (Vic) and Disability Act 2006 (Vic).
Some interviewees were hesitant about using human rights language, perhaps reflecting a developing awareness of the vocabulary of human rights following the introduction of human rights legislation, in Victoria and the ACT. Other interviewees preferred to emphasise the provision of a safe facility, rather than a focus on rights per se:

... once you have safe and secure environment, you’ve got opportunities for people to rebuild their lives [SM 01]

Although interviewees were in general familiar with human rights concepts, and able to identify particular human rights as relevant, their use of the terminology and understanding of the content of the rights was, in some cases, formal rather than substantive. When discussing the right to protection from torture and cruel, inhumane or degrading treatment, one interviewee commented … I don’t think we’d give that as much emphasis because … I think, perhaps naively, we provide a reasonably humane environment for prisoners. Not everyone shares that view… But we probably don’t refer to that right quite as often… [SM 05]. Whether an incident is perceived as a ‘human rights’ matter, or whether staff believe that ‘human rights standards’ are being met, may therefore depend on familiarity with terminology, and perceived relevance of human rights language to the person’s work.

b. When there is no formal human rights legislation: the experience of WA

The WA Corrective Services Department manages a range of public prisons and also has contracts with private prison providers. WA is the only Australian jurisdiction with an independent Prison Inspectorate (Office of the Custodial Services), which has a significant human rights focus in its approach and inspection framework. OICS has developed a Code of Inspection Standards for purposes of carrying out its regular inspections.8

WA Corrections has developed its own internal operational compliance standards for prisons. These are separate from the OICS (Inspection) Standards, and draw in part on aspects of the Healthy Prison principles promulgated by the UK Inspectorate of Prisons and now widely employed internationally. The concept of a ‘healthy prison’ focuses on four key tests of safety, respect, purposeful activity, and preparation for resettlement.9

- we use some of the Healthy Prison concepts but these have been further developed in-house … we also recognise and acknowledge the Human Rights Approach to Prison Management … the UN treaties…in the public sector there’s a Code of Ethics [and] we have our own Code of Conduct for our staff [SM 15]

The Corrective Services Department in WA has adopted the philosophy of ‘Making a Positive Difference’ to guide the work of the Department. When asked about the use of the terms ‘human rights’ or ‘rights’ in senior management discussions, one interviewee commented,

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8 The ‘Code of Inspection Standards’ as well as the ‘Inspection Standards for Aboriginal Prisoners’ are available for download at the site of the Office of the Custodial Inspector at <http://www.custodialinspector.wa.gov.au/go/inspections>

‘...we have a lot of dialogue happening (about offender management) but we may not necessarily bring issues out in a ‘This is a human rights issue’. [SM 15]

One senior manager observed that the ‘Making a Positive Difference’ phrase was … ‘not specific’ and ‘probably a bit woolly when you’re talking about human rights’ but the concept involved is ‘a trusted justice system [that] was safe, secure and decent.’ This manager commented, ‘We can work very much on justice principles and what people’s rights are but there’s nothing tangible for us to hold on to…’ [SM 16]

The role of the Office of the Inspector Custodial Services was also frequently referred to by the Correctional Services Department interviewees, who confirmed that the Office’s use of human rights language in reports was familiar to them or at least usable.

In respect of the training for prison staff, while human rights are not mentioned per se in WA they are seen as an underlying influence.

The interviews with WA Corrective Services senior management highlighted some uncertainty around the content of human rights and how they relate to the approach of the Department in carrying out its work. While phrases such as ‘Making a positive difference’ and words such as ‘dignity’ carry strong values, the question arises how ‘dignity’ and a ‘positive difference’ are defined and what treatment and conditions fit with these notions. It prompts the key question: what is the substance of the right to be treated in a dignified way and how can this be effectively protected in practice. This of course also remains a question where ‘human rights language’ is employed. The use of terminology, and the content of terminology, is a matter we will pursue in later papers.

c. When there is no formal human rights legislation: the Commonwealth experience

The Department of Immigration and Citizenship participated in an initial interview and provided written responses to our interview questions in 2010. The Department provided updated information on the 29 November 2011.

The Commonwealth Department of Immigration and Citizenship’s policy documents employ the language of ‘dignity’ and ‘respect’ rather than the nomenclature of human rights. DIAC established ‘seven key immigration detention values’ in 2008, including ‘6. People in detention will be treated fairly and reasonably within the law’ and ‘7. Conditions of detention will ensure the inherent dignity of the human person’[SM 17]. In their written responses to the ARC project’s questions DIAC position these values within a broader commitment of the Australian Government to ‘treating people in immigration detention with dignity and respect while their immigration status is fairly and reasonably resolved, within the law’ [SM 17]. DIAC’s 2009-2012 Strategic Plan also specifies that departmental staff are to guided by the following strategic objectives: ‘1. fair and reasonable dealings with clients; 2. open and accountable organisation; 3. well-trained and supported staff’ [SM 17].

DIAC’s written response to the ARC project questions on applying human rights in closed environments (see Appendix 1 for questions) focused on the 7 Key Immigra-

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10 See Appendix 2.
11 See Appendix 2.
Detention Values announced by the Minister for Immigration in July 2008. DIAC stated that 'many of the principles and the international covenants upon which the Charter is based also underpin DIAC’s approach to human rights'. [SM 17]‘

Other detention standards cited by DIAC in their written response included Standards for the Design and Fitout of Immigration Detention Facilities, which 'outlin[e] the standards to which facilities must adhere to be acceptable forms of accommodation, comparable to Australian community standards' and ‘instructional material (Detention Instructions) that direct how departmental staff and service providers interact with and support people in immigration detention. These instructions are informed by service delivery values and Key Immigration Detention Values.' [SM 17]

Given that the operation of detention centres has been outsourced to private contractors DIAC utilises 'abatements and incentives' as a means of ensuring compliance by service providers with legislation and policy, which in turn are designed to uphold human rights standards. [SM 17].

The numbers of persons in detention centres rose from 1420 people on the 1 January 2010 to 3549 people on 8 October 2010. On the 18 October 2010 the Government announced a ‘staggered release’ of some groups ‘into the care of church and charity groups to be complete by June 2011.’ As at 27 July 2011 1504 individuals had been released into the care of the Australian Red Cross under this expanded community detention program. As at 30 June 2011 there were 3703 people detained in immigration detention centres.

On 25 November 2011 the Minister for Immigration and Citizenship, Mr Chris Bowen, announced a gradual move towards community processing of the refugee claims of some irregular maritime arrivals, in line with the current processing arrangements for those who arrive by plane. The policy involves the granting of 100 bridging visas per month, beginning with the release of 27 detainees on bridging visas on the 25 November.17 As DIAC noted in its updated written responses, bridging visas will be made available to those who satisfy identity, health, character and security checks [SM 17]. Some people will remain in detention. The type of detention depends on their ‘security risk or support needs’[SM 17]. Some vulnerable persons and those ‘not suited to bridging visas’ will be housed in community-detention [SM 17].

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12 See Appendix 2.
13 These figures cover only those persons in Immigration Detention Centres, and not persons in Immigration Residential Housing, Immigration Transit Accommodation, or an Alternative Place of Detention. These figures were derived from Department of Immigration and Citizenship, Answers to Questions on Notice – Question 3 Summary of Detention Population at each place of detention since November 2007, Joint Select Committee on Australia’s Immigration Detention Network, Parliament of Australia, received 10 August 2011 (accessed 21 September 2011).
16 This figure covers only those persons in Immigration Detention Centres, and not persons in Immigration Residential Housing, Immigration Transit Accommodation, or an Alternative Place of Detention. This figure was derived from Department of Immigration and Citizenship, Answers to Questions on Notice – Question 3 Summary of Detention Population at each place of detention since November 2007, Joint Select Committee on Australia’s Immigration Detention Network, Parliament of Australia, received 10 August 2011 (accessed 21 September 2011).
3. Implementing human rights in closed environments – the issues

a. Senior Management identification of the issues

Senior management identified a range of challenges to the practical application of human rights in closed environments, including:

• An absence of human rights culture or understanding in Australia and concern in a non-Charter jurisdiction at the lack of specificity of ‘human rights’ terminology
• Fear of increased workload and demands on staff
• Perceived misuse of human rights legislation, e.g. by lawyers manipulating rights
• Uncertainty as to the meaning of human rights and their impact on the workplace.
• Concern that there will be unrealistic expectations on staff, including a perception that they are expected to defend their actions in legalistic language.
• Concern that ‘human rights’ will take priority, overshadowing other issues, and denying the complexity of these closed settings.

Interviewees across all sectors and in the four jurisdictions identified a range of challenges in complying with human rights standards within specific closed environment settings, including:

i. Prisons

• Privacy, specifically in relation to searches;
• Health care and access to care;
• Permission for Indigenous prisoners to attend funerals;
• Attitude of staff to prisoners; Staff concerns about an exclusive focus on rights for prisoners;
• Conditions in prisons;
• Rapid growth in prisoner numbers in WA raised issues for prison management such as;18
  o Staffing and recruitment
  o Shortage of prison beds and double bunking
  o Segregation of different prisoner groups, especially sentenced and unsentenced prisoners
  o Access to programs; the impact of lack of access on parole applications
  o Access to visits

ii. Police cells

• Use of capsicum spray, Tasers and assault on detainees;

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• Lack of indigenous and multicultural liaison.

iii. Mental Health Facilities

• Use of restraint and seclusion
• Importance of seclusion and restraint being seen as an indicator either of a problem with an individual or of a problem within a facility
• Privacy: especially at the point where consumers are released and re-settled; eg media freedom of expression/community right to safety vs Consumers’ right to privacy
• Compulsory treatment, and the broad power of psychiatrists under the mental health legislation, including power to move people into facilities whether or not they wished to be there.
• Resourcing, for example when courts declare people ‘not guilty by reason of mental impairment’ but there are no beds available in psychiatric facilities leaving them no alternative but to remain in prison.
• Continued use of mixed wards in some facilities, which can be particularly problematic for women patients.

iv. Disability Facilities

In the area of disability services, rights issues were frequently associated with living in a group home or supported accommodation.

• Difficulties in trying to accommodate the different needs of individual residents within group settings.
• Personal privacy in a group home with a mix of gender and ages.
• Privacy in relation to health records and, for example, the question of who is permitted to access health records. Should the client be required to consent? Can a disability worker work effectively without access to health records?
• Importance of monitoring medication in disability settings to ensure it is only used for a diagnosed condition, and not simply for behaviour modification.

b. Meeting the challenges of implementing human rights practices in closed environments

i. Inclusion, information access and ‘myth busting’

Interviewees noted that requirements to understand and implement ‘human rights’ could create fear, anxiety and uncertainty in the workplace. They highlighted the importance of providing information, effective education and training, and a sense of inclusion in the process of implementation.

ii. Strong leadership and commitment

Many interviewees saw strong leadership as fundamental, to ensure that human rights are taken seriously and that their implementation is not just seen as another management ‘fad’. DIAC in its written response highlighted training that supports ‘the expectation that leaders at all levels will model values–based leadership’.
iii. Embedding human rights into work practices

Interviewees emphasized the importance of embedding human rights into the operational processes of the department and its everyday language. This was needed for change to be effective and sustainable, and not a phase which would disappear with any change in the organisation. One interviewee referred to human rights training as ‘Business as Usual’.

iv. Cultural Change

Many interviewees identified the need for a shift in culture, as a matter of urgency, to provide space for human rights to be introduced and embraced. They highlighted the importance of cultural change, the substance of the change, the contextual factors which inhibit and encourage it and ideas about how to create such change.

Factors influencing the culture of an institution or department

- …Different places have different cultures for variety of reasons: the background of the facility, the type of facility, the leadership. [SM 01]

Challenges in implementing cultural change

- Staff attitudes – the need to incorporate attitudes of respect, dignity, understanding, accountability;
- Community attitudes and expectations of prisons – ‘lock them up and throw away the key’
- Provision of adequate resources to achieve cultural change. Entrenched departmental and institutional cultures, including a ‘tick box’ approach to compliance rather than whole cultural change.

Requirements for creating cultural change

- Support of senior staff;
- Recruitment of new staff with fresh perspectives and skill sets;
- Top down change;
- Requiring senior staff to attend to clients to understand their needs;
- Challenging a predominantly punitive culture in prisons; trying to develop relationship building and case management approaches;
- Extending the expectation of respect beyond staff-staff relations to staff-prisoner relations;
- Recruiting and retaining Aboriginal staff given high numbers of Aboriginal prisoners in WA;
- Ensuring programs prepare prisoners for success outside the prison, not just inside.

v. Cultural change and changes in practice within the disability sector

- Need for shift instaff understanding and perception of disability as a first step: need to challenge the view of disability as permanent, behaviour as intentional, to reframe to focus on the role of environment in behaviour.
- Staff tend to prioritise risk/safety and protection issues over rights;
• Staff need to be encouraged to actively balance their discretion and use of protocols with their work with the residents, towards a situation where rights are protected and both the staff member and the patient feel safe, secure and supported.

• Importance of shifting from a dominant approach of ‘containing’ an individual to an approach which seeks to address the particular cause of behaviour and is respectful of the rights of the individual: When you think about Charter issues, you should look to the underlying causes of behaviour, rather than start by asking whether a constraint is reasonable ...[SM 09]

• Shift to focus on the impact of the setting on producing challenging behaviours:

  The US has significantly reduced the use of physical restraints by adopting a “comfort vs. control” model. Look to the context, if the person is distressed for some reason, ‘relinquish some control’ [SM 09]

• Recognition of autonomy and agency as human rights issues.

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4. Senior management views on human rights training programs

Interviewees agreed that effective training is vital. They discussed the best way to educate employees on legislated human rights; how to ensure training is relevant across all layers of the organization; and how to ensure that knowledge is retained after the training ends.

a. Effective training

Interviewees emphasised the need for training that is relevant and practical, and not overly abstract or purely conceptual. They also emphasized the value of a trainer with hands on experience in the field.

The most effective and valuable training was seen as addressing the activities of the particular group. It is also training that is constructive and engaging, in which human rights are not presented as something to ‘get staff into trouble’. ‘You don’t start from limitations, it is about maximising rights not minimising them.’ [SM 09]

DIAC in its written response identified training that ‘distinguish[es] between rules-based approaches, and values-based approaches to decision making in the workplace’.

Some interviewees emphasised the international standards underlying human rights practice, whilst observing that some of the international language (e.g. ‘torture’) may be confronting and counterproductive.

b. Challenges for training staff in human rights

The difficulty in accurately measuring the ‘success’ of training was acknowledged. Challenges in providing effective training include:
• High staff turnover, and subsequent loss of knowledge and need for ongoing training;
• Existing demand for training time and the risk that human rights training is ‘lost’ amongst the other training programs;
• Difficulty of ensuring that people do take up the general training in their daily practice.

5. The perceived impact of human rights legislation in Victoria

a. Reviewing existing legislation and policy against the Charter

The Charter had a clear impact on Victorian Departments by requiring review of existing legislation for compatibility with human rights. Many saw the necessary reviews as providing a heightened focus on human rights, although some considered it was primarily an ‘audit’. Interviewees noted the value of the review to ensure usability as well as Charter compliance.

b. Human rights compliance in Victoria; ‘Charter proofing’ or genuine consideration?

The Victorian Charter requires Charter compliance both in the drafting of laws or regulations and in their day-to-day work as highlighted below. A Statement of Compatibility (SOC) is prepared for all new legislation and presented to Parliament.

The SOC requires that those drafting the new law explain how it meets human rights obligations. There may be a question whether the process prompt genuine consideration of human rights, or whether it may become a process of charter proofing, with the SOC treated as a standard form task to be added on routinely at the end.

Consideration of human rights at an early stage in the policy development was seen as an important part of making the SOC process effective. Most interviewees saw the SOC as creating a process through which there is a genuine consideration of human rights, with real transparency and an obligation to explain where rights are to be limited. However others also saw a temptation to simply charter proof where convenient.

c. Perceived benefits of the Charter across departments

Interviewees generally saw the Charter as acting as a positive force for change. It becomes part of regular ‘business’ and provides a language for raising issues. It promotes government accountability; and it establishes connections with international standards, which provide guidance for local application.
d. Challenges and changes in practice as a result of human rights legislation

Some interviewees saw the human rights legislation being used to actively question and interrogate practices and decisions in closed environments whilst others saw it as bringing new challenges, or thought it had not lived up to expectations.

Some were also reluctant to attribute changes wholly to the Charter or Act, in light of earlier rights-focused laws and practices.

Challenges and positive changes included:

- Restrictions on strip-searching in a prison in response to human rights considerations were a positive change, but had resulted in a backlash from staff who felt that prisoners’ rights were seen as more important than theirs.
- Assisting service providers in the disability sector to be mindful of rights without making their daily work bureaucratic or too ‘analytical’.
- Concern that disadvantaged groups such as those held in psychiatric and disability settings had difficulty accessing rights or enforcing them in practice.
- The legislation has led to greater attention being paid to the types of restrictive practices needed in psychiatric services.

e. Normalisation of human rights considerations

Interviewees spoke of how human rights considerations were starting to ‘seep’ into their everyday practice and reviews and become part of the language, though many emphasised that it is a gradual and slow process.

6. Tensions – Balancing obligations to the community and rights of residents

The art of human rights in Government is that you want people who understand human rights and are committed to them but who are also able to facilitate the pursuit of legitimate departmental obligations or Government priorities… [SM 06]

A key issue in a secure environment will be how to balance what may seem to be competing obligations, to security and to the personal autonomy of residents.

Interviewees found that human rights legislation prompts in depth questioning as to where and how the ‘balance’ between competing interests, including competing rights, is being struck. The main issues, according to interviewees, by each sector included:

a. Prisons

- The conflict between community expectations of prisons – to keep people locked up and secure – and the provision of opportunities for rehabilitation;
- There is a ‘delicate balance’ between maintaining safety of staff and other prisoners (e.g. blood testing in prisons) and protecting an individual prisoner’s rights.
• There are complexities in providing health services, with confidentiality requirements, and competing issues of security, and the need to notify of communicable diseases.
• Choosing what services to provide to which prisoners, where there are infrastructure and resource limitations.
• Balancing a prisoner’s right to be near their family with the right of the community to be safe.
• Indigenous prisoners’ cultural needs to attend family funerals to be balanced against cost and issues of fairness across families.

b. Disability facilities

• Balancing rights of the community to safety, with rights of the person.
• Providing staff with standards, and at the same time wanting them to exercise discretion in their work with clients.
• Balancing resident independence and choice with attention to their vulnerability and risk.

For example in the administration of medicine, A resident in a group home, notwithstanding their disability, may want to decide whether or not to take their prescribed medicine, or to take a reduced dose, but be physically reliant on staff to administer the medication. In the circumstances, the service provider may focus on what they interpret as their duty of care and risk management and try to insist that the medication be administered according to the treatment sheet. This can leave residents with no effective choice, even when it is agreed that they are capable of making the choice and their own decisions. [SM 21]

• Facilities may tend to maintain a level of control that does not allow for the individual’s development and progress.

c. Mental Health facilities

• There is the risk that staff will use restrictive practices because they do not have skills or training to do otherwise. This may also arise because of lack of resources – staffing resources, or appropriate facilities.
• There can be a perceived conflict between the professional with a therapeutic aim, and the patient’s autonomy and rights; an outcome can be that the profession’s focus on beneficence is lost.
• A lack of privacy may have to be balanced against security in a psychiatric hospital.
• Hospital staff may set up programs to reduce isolation of patients and improve the quality of their lives; however they may be concerned that if they require patients to attend they are then breaching their human rights.
• Ease of treatment allows psychiatrists to make decisions on behalf of patients, but ‘it would be good if there was someone else in the transaction that was there…whose sole motivation was the best interest of the patient.’ [SM 18]

d. Immigration Detention Centres

Immigration detention involves balancing community perceptions of risk from unlawful arrivals against rights of individual people in detention. It also requires
balancing risks inside and outside the facility in terms of health, security risk and identity. DIAC written information stated that DIAC:

recognises the rights of all people in immigration detention while maintaining the integrity of the migration program.[SM 17]

The Australian government takes a risk based approach to detention that requires consideration of the risk posed to the Australian community balanced against the risk posed to the individual if they were to be detained.[SM 17]

7. Communicating rights in practice

a. Informing people of their rights

It is essential where human rights legislation or provisions exist that individuals are aware of their rights and that the legislation is relevant to those it is aiming to serve. In the area of closed environments this can present various challenges. Interviewees identified as issues:

- Ensuring that particular groups fully understand their rights;
- Ensuring that methods of communicating rights are appropriate and effective;
- Addressing the fact that there may not be a culture of informing people of their rights within particular departments; and
- Addressing challenges in, for example, disability facilities where people may have limited understanding of rights information.

Measures taken to maximize information provision mentioned by interviewees included:

- Information provided to facilities as part of the human rights legislation implementation process, with documents for people in the facility and posters about their rights.
- Immigration detainees are provided with information posters in different languages, informing them about rights, access to legal representation, and complaints mechanisms.
- Prisoners given information at their orientation to the prison; some interviewees were not sure of the quality of the specific information but noted that prisoners also circulate such information amongst themselves.
- Prisoners to be given reasons for decisions and rights of appeal as part of their right to information.

b. Avenues for complaint and their limitations

Complaints mechanisms are important components of any regime for protecting the rights of people held in closed environments. Some interviewees identified cultural differences, age, and fear of damaging relationships or of reprisal as inhibiting detainees lodging complaints about conditions or treatment.

- People with disabilities can have long-term relationships with providers and fear disturbing the relationship with adverse consequences to themselves if they complain.
• People in disability settings may be fearful of losing their placement in a particular group house if they complain.
• To reduce risks from making complaints, there could be avenues for issues to be raised without characterizing them as ‘complaints’.
• Some issues – e.g. mental health services in prisons – are not raised in complaints and that this raises concern too, that some issues are not being dealt with at all.
• There can be cultural differences in the willingness of people to raise complaints; these differences must be better understood by management of facilities.
• Independent visitor schemes can be valuable but there can also be tensions for the Visitor in deciding what to raise, and whether it will put the detained person at risk.
• Direct phone lines to complaints bodies/ Commissions/ Ombudsman were seen as beneficial by one interviewee, although another interviewee suggested they were open to abuse.

8. Summary and discussion

This Working Paper has reported observations of senior management dealing with the protection of human rights in key departments responsible for closed environments. The interviews were carried out across several Australian jurisdictions and across a range of sectors of closed facilities. Responses are based on the interviewees’ experience and observation, and not claimed to be representative of all senior management in these sectors. They highlight key challenges, complexities and dilemmas experienced by these senior managers.

Language: The interviews with senior management raised key questions about language. Do you need formal human rights legislation to ensure that rights are adequately protected? In the absence of human rights legislation how do you talk about rights? What language do you use and what is the substantive content of words that may be used in place of human rights terms, such as ‘dignity’ and ‘respect’? The senior management perspectives on protecting rights in closed environments in Western Australia, Victoria, the Commonwealth and the ACT differ in a number of ways, but they also share some common elements. These provide useful anchors for the next phase of the research which will look more directly at how staff and persons held in closed environments experience rights in their daily lives. This next part of the research will provide important comparisons of the effectiveness of human rights legislation at a grass roots level.

In the context of Victoria and ACT the interviews permit analysis of the effectiveness of formal human rights legislation. The majority of interviewees saw the legislative framework for human rights as making an impact at a policy level, and as beginning to filter through to those working in closed environments at the day-to-day level. However many interviewees emphasised that it can take time for human rights to become embedded in the culture and language.

Cultural change: The need for cultural change was also widely acknowledged. This prompts the question whether, or how, human rights legislation can act as a catalyst for cultural change, and whether its effectiveness depends on, for instance, the strong leadership, and applied training, which interviewees discussed.
**Training**: It is clear from these interviews that resistance to human rights as a concept needs to be countered, for example by effective communication and appropriate, relevant training. In some cases a fairly rigorous myth busting campaign may even be required from the outset, to ensure that staff are open to the training and receptive to the concepts presented. Staff also need to be assured that their own rights are not being ignored in any program. As some interviewees emphasized, human rights training can provide staff with the opportunity to build on their current work practices and to create a safer and more respectful environment for everyone either living or working within a closed environment. However before it can reach this stage a range of assumptions and fears may need to be addressed and overcome.

**Information**: Another challenge is to effectively inform people held in closed environments about their rights and their avenues of complaint. As noted, there are numerous potential barriers to informing someone of their rights and further barriers to lodging a complaint. It is therefore crucial to examine whether measures taken to inform people inside the facility are in fact adequate, and to address access and grievance mechanisms.

**Monitoring**: A closely related aspect, which will be addressed in a subsequent Working Paper, is the role and effectiveness of monitoring bodies charged with ensuring human rights are being protected. Valuable comparisons and insights are anticipated from this next part of the research, given the variety of jurisdictions examined in the project and the various oversight agencies involved.

This Working Paper outlines options for training staff on human rights, valuable reflections on how senior management perceive human rights and the challenges to protecting human rights in various sectors, and insights into why the implementation of ‘human rights’ is sometimes resisted. These insights point to gaps in current attempts to ensure human rights protection in these environments and highlight the need for informed and progressive dialogue on how best to fill them.

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19 See also Bronwyn Naylor, Julie Debeljak, Inez Dussuyer and Stuart Thomas (eds.), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable* (Monash University Law Faculty, November 2011 forthcoming) also published under this grant.
Appendices

Appendix 1. Interview Schedule

1. Rights

Which rights (HRs) are relevant and important to your organisation? Please tick the 3 most important on the sheet attached.

Why are the identified rights particularly important?

What are you doing about HR in your organisation and who told you to do it?

2. Current approach: Identify best practice and what frustrations exist

What is the current approach to HR?

What policies and procedures are in place for the application of HR?

Where and by whom has the directive come from to change or implement the current HR approach/policy?

Who does your approach aim to protect?

How were HRs considered and acted upon before the introduction of the Charter/HRA? (Only VIC and ACT)

How and to what degree has your approach to HR changed with the introduction of the Charter/HRA? (Only VIC and ACT)

Jurisdictions without (WA and CWTH): What are you doing and how has your approach on HR been determined (i.e. who gave the directive and what is it based on)?

What are the challenges to implementing HR policy?

Do you have an implementation plan for the application of HR? If yes, What is your implementation plan? How do/will you monitor outcomes? What are the results/expected results of your implementation plan?

3. Training and information sharing: What works well and what does not?

Who is trained?

What is the training? Please provide examples of content and activities

Who developed the training module?

How is it delivered?

What is its effectiveness and how is this monitored?
What are the practical ramifications of training for service delivery?

What are the ongoing resources for staff (ie pamphlets, brochures, workbooks, workshops)? Please give examples.

What information about HR is given to staff and residents/detainees (and in what format)?

Have the residents/detainees been made aware of your (changes to) HR approach/policy?

What have the residents/detainees been given in terms of information about HR? Please be as explicit as possible

What access do staff and residents/detainees have to make queries and requests re HR?

4. Putting HR into practice and service delivery

We would like to understand your approach on the ground in terms of training and service delivery. What can you tell us about it?

How is the success of the training module measured?

How do you measure your facility’s/organisation’s ability to meet HR standards? Can you give examples of when your approach has and has not succeeded in your facility/organisation?

What are the processes in place for resolving departures from your HR approach or processes for resolving non-compliance?

What are the processes in place for resolving departures from your HR approach or processes for resolving non-compliance?

What are the reporting procedures (for both staff and residents/detainees)?

How do you monitor complaints? How do they come to your attention?

Do you use monitoring tools?

Are you aware of any recent incidents or complaints? Please give examples

5. Other

Because we are interested in understanding how best practice is achieved we would like to get as much relevant information as possible about how your facility/organisation approaches HR, both from a policy level and the on-the-ground approach.

What is conducive to a culture of HR acceptance in organisations/facilities? What are the practical elements we can take from this to apply in the development of a model of best practice? Does this differ between different facilities? Would those cultural factors be relevant across all levels (ie from top govt. officials through to the residents/detainees)?
What other factors may impact upon a culture of HR acceptance (eg environment, staff turnover)?

What suggestions can you make to inform best practice?

What improvements could be made with regard to putting HR into practice?

Can you give us any suggestions for this project? Where we should look, who we should talk to, any other relevant information?
Appendix 2. Key Immigration Detention Values

On July 2008 the Minister for Immigration and Citizenship delivered a speech entitled ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’. In this speech, the minister outlined seven values that will guide and drive new detention policy and practice into the future.

These values will result in a risk-based approach to the management of people in immigration detention.

The government’s seven key immigration detention values are:

1. Mandatory detention is an essential component of strong border control.
2. To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
   a. all unauthorised arrivals, for management of health, identity and security risks to the community
   b. unlawful non-citizens who present unacceptable risks to the community and
   c. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).
4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
5. Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
6. People in detention will be treated fairly and reasonably within the law.
7. Conditions of detention will ensure the inherent dignity of the human person.