Our Prisons – Human Rights, Mental Health & Privatisation
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'Human Rights for Prisoners – the ACT Experience'
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I would like to acknowledge the Cadigal People, the traditional owners and custodians of the Eora Nation and pay my respects to their elders past and present. I will talk about the legislative mandate of the Human Rights Commission, the ACT *Human Rights Act 2004* and our Human Rights Audits of detention facilities, adult and juvenile in the ACT.

Legislative mandate

The ACT Human Rights Commission ('the Commission') is an independent agency established under the *Human Rights Commission Act 2005* ('HRC Act'). The Commission comprises three Commissioners: the Human Rights and Discrimination Commissioner; the Children and Young People Commissioner; and Health Services Commissioner and Disability Services Commissioner. I handle about 100 discrimination complaints annually under the ACT *HRC Act 2005* and the *Discrimination Act 1991*, under a conciliation resolution model. The Commissioner's functions relating to human rights are to:

- provide education about human rights and the *Human Rights Act 2004* - we have conducted extensive human rights training of Corrections staff (16 sessions);
- advise the Attorney-General on anything relevant to the operation of the HR Act – eg bikie gangs and anti-terrorism laws;
- foster public debate, identify issues, and publish information about the operation of the ACT HR Act, eg online attitudes surveys of the community and public servants;
- review the effect of laws on human rights and report to Attorney General - own motion Human Rights Audits of Quamby youth detention centre (2005) and adult correctional facilities (2007). In relation to the Quamby Human Rights Audit, we discovered that there was no proper legislative basis for operating the facility, and amending laws were passed immediately. Section 41 requires the Attorney-General to table a copy of the Report within 6 sitting days; and
- intervene (with leave) in court proceedings under s. 36 that involve the application of the HR Act, eg September 2008 in the ACT Supreme Court in the cases *Morro v ACT*, *N v ACT an*d *Ahadizad v ACT* - unlawful detention matters on the availability of compensation under the HR Act.

The ACT HR Act is a dialogue model based on the *NZ Bill of Rights Act 1990* and UK

Human Rights Act 1998 - it recognises the sovereignty of parliament, rather than being constitutionally entrenched. It involves the three arms of the democratic Westminster system: Legislature; Judiciary and Executive. It includes scrutiny of laws, with the Attorney–General being required to issue a compatibility statement for government Bills (all positive so far). The Supreme Court has power to issue a Declaration of Incompatibility in respect of laws (none have been issued), which must be tabled by the Attorney-General in the Legislative Assembly; and the LA Legislative Assembly Standing Committee on Justice and Community Safety (and Scrutiny of Bills Committee). Government Departments and agencies must report on human rights measures in their annual reports, and include human rights impact statements in Cabinet Submissions. Victorian has a *Charter of Rights and Responsibilities 2006,* and Tasmania may be the next jurisdiction to have a Human Rights Act. At the Federal level the National Consultation on Human Rights is due to report to the Government on 30 September 2009.

Recent amendments to the ACT Human Rights Act from 1 January 2009 strengthened it make to apply directly to widely defined 'public authorities' (not just through the interpretative provision, relating to their legislative mandate and powers), and there is a direct right of legal action in the Supreme Court - wide remedies, eg declarations, but not compensation generally. There is no complaint handling function under the HR Act, but I have an inspection power under s.56 of the *Corrections Management Act 2008*. In the 5 year review of Act I recommended that the Commission be given complaint handling powers for civil cases, similar to discrimination jurisdiction (but not criminal cases before the courts, which are *sub judice*).

Some human rights are non-negotiable (non-derogable) eg torture. Others can have limits, using the s.28 proportionality test:
(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

In prisons there are legitimate restrictions on rights, such as liberty and freedoms of movement, assembly/expression, but **not all rights**, eg privacy, and dignity.

<u>Human rights & prisons</u>

The power of government is at its greatest where residents are detained in closed institutions by the state. Ironically prisons were established as a progressive measure in the

UK, away from public hangings, floggings and the stocks. People in detention are extremely vulnerable to abuses of power, and this power imbalance imposes a continual moral duty on authorities and officials to act justly, eg abuses of power - Guantanamo Bay and Abu Ghraib. Deprivation of liberty is an extremely severe penalty and creates an obligation to ensure that other rights are not also curtailed more than absolutely necessary. People in detention are drawn disproportionately from sectors of society that are already vulnerable, such as the mentally ill, indigenous communities, and women who have experienced violence and often sexual violence. A very high proportion of these detainees have already been victims of abuse or neglect whilst growing up, and we as a society should aim to halt the cycle (as so comprehensively portrayed by Eileen Baldry in her presentation). Human rights lawyer Philip Lynch puts forward four reasons why a human rights based approach is useful, the first of which alone in my view is sufficient justification.

1. Human rights are internationally agreed as a minimum benchmark standard that Australia has formally ratified;
2. A rights-based approach focuses attention on the conditions, capabilities and standards necessary for the realisation of human dignity and potential.
3. The debate is not only about entitlements - along with rights comes the responsibility to respect others' rights.
4. A rights-based approach enshrines key principles of good public policy - participatory, fair, non-discriminatory, reflective, responsive, transparent and accountable.

At the international level there are many UN Standards relevant to humane detention:

- International Covenant on Civil & Political Rights (**ICCPR**) – eg humane treatment in detention;
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**) – eg right to the highest attainable standard of physical & mental health;
- UN Convention Against Torture & Other Cruel, Inhuman & Degrading Treatment & Punishment (**CAT**) and Optional Protocol;
- United Nations **Basic Principles** for the Treatment of Prisoners – eg Principle 9 'prisoners shall have access to the health services in the country without discrimination on the grounds of their legal situation';
- United Nations **Body of Principles** for the Protection of All Persons under any form of Detention or Imprisonment – eg remandees should not be treated worse than sentenced detainees; and
- **Standard Minimum Rules** for the Treatment of Prisoners - eg solitary confinement must not be prolonged.

The Optional Protocol to CAT was signed by Australia in May 2009, and ratification will occur next – this is an improvement from Australia voting against it at the UN in 2002. The OP monitoring regime requires each State Party to establish or designate its own inspection body, called a National Coordinating mechanism eg the Australian Human Rights Commission. It will establish a system of regular visits to places of detention by

independent experts order to prevent torture and other forms of ill-treatment from occurring. The UN Special Rapporteur on Torture states:

> *The rationale for [the Optional Protocol] is based on the experience that torture and ill-treatment usually take place in isolated places of detention, where those who practise torture feel confident that they are outside the reach of effective monitoring and accountability.*

The inspection arrangements must cover all 'places of detention' within all parts of Australia, such as prisons, juvenile detention institutions, police stations, locked psychiatric wards and immigration detention centres. It also extends to prisoner transport, court security, military detention facilities and aged care hostels where residents are detained involuntarily. Important sources of jurisprudence are the findings of the European Committee Against Torture and UN Committees General Comments.

The ICCPR is the basis for the ACT *Human Rights Act 2004* – rights relevant to detainees include:

- Section 10: '(1) No-one may be tortured or treated or punished in a cruel, inhuman or degrading way.
  (2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.'
- Section 19: '(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
  (2) An accused person must be segregated from convicted people except in exceptional circumstances'
  (2) An accused person must be treated in a way that is appropriate for a person who has not been convicted
- Subsection 20(1) An accused child must be segregated from accused adults.
- Subsection 22(1) 'Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- Others – s.8 equality (eg women), s.11 family (eg conjugal visits), s.12 privacy, s. 14 religion/belief (eg Halal food), s.15 association, s.16 expression and information, s.18 liberty and security of person, s.26 freedom form forced work, and s.28 minority cultures and languages.

Human rights in international law must be respected, protected and fulfilled, consisting of both positive and negative obligations on the state. The right to life in a corrections context means that it must be respected by the state – ie correctional authorities cannot physically harm a detainee. There is also a positive obligation to protect rights by preventing the loss of life, eg providing the right medical treatment to HIV positive detainees, so that lack of action by correctional authorities does not result in loss of life. The right to life has been found to be violated by the European Court of Human Rights under the European Convention on Human Rights when a prison failed to protect a detaineee with a mental illness from another prisoner in a shared cell with a history of violence who stamped and kicked him to death: *Edwards v United Kingdom*. Similarly there is a requirement to

investigate such cases – the House of Lords recognised this in a case where a Pakistani prisoner was murdered by a racist cellmate with a history of violence: *R v Secretary of State for the Home Department Ex Parte Amin.* Other measures could include training all staff in correct procedures for the proportionate use of force. A human rights based approach to corrections may not always be politically popular. Criticism of government expenditure on prisons has been a recurring theme in local ACT media and Letters to the Editor of the Canberra Times, usually accompanied by claims that there are much more worthy things for the government to spend their money on than flat-screen TVs, state of the art security ('SOTR' electronic X-Ray and iris scanning), glass artworks etc.

The ACT has enacted the *Corrections Management Act 2007* (ACT) ('CMA') as part of the AMC's 'healthy prison' philosophy, with many references to human rights. Section 9 of the CMA provides that the Act must be exercised to respect and promote the detainee's human rights. Section 10 of the CMA explicitly recognises that remanded detainees are to be presumed innocent and that detention of remandees is not imposed as punishment. Minimum conditions (not privileges, as they cannot be taken away for any reason, including discipline) of detention in s.12 specify that detainees have access to:

- sufficient food and drink;
- suitable clothing;
- suitable facilities for personal hygiene;
- suitable accommodation and bedding;
- reasonable access to open air and exercise;
- reasonable access to telephone, mail and other facilities for communicating with other people;
- reasonable opportunities to communicate with their lawyers;
- reasonable access to news and education services and facilities;
- access to suitable health services and health facilities; and
- reasonable opportunities for religious, spiritual and cultural observances.

Privileges are benefits such as buy-ups of snack food, or extra visits.

<u>Human Rights Audit</u>

A human rights compliant prison requires more than a new gaol (the Alexander Maconochie Centre) and new legislation – there must be a human rights culture, especially in management and staff. In the ACT we have half the national average (169 per 100,000) rate of incarceration (about 70 per 100,000), but Victoria is lower. Our rate of incarceration of Indigenous people is also lower – the national average is 2000, and the ACT is 500, per 100,000. As in most jurisdictions detainees have lower: education, socio-economic status; & higher: incidence of mental illness, unemployment, unstable housing, health problems, alcohol and drug use and smoking. I note Professor Eileen Baldry's figures of 86% of female and 72% of male prisoners have had a psychiatric disorder, compared to 22% in the general population.

The methodology for the audit involved looking at all aspects of life in detention, from the legislation and policies governing the remand centre, to physical layout and conditions. Interviews were conducted over 2006/07 with 36 detainees, and 20 custodial and other staff, in order to get an understanding of the operational framework and culture. I and Commission staff visited some facilities in NSW (but were excluded from Goulburn) and WA to get a basis for comparison, and held forums with stakeholder groups. The Commission also surveyed some of the corrections documentation and video footage concerning critical incidents, for example uses of force. Other ways of obtaining information was through detainees ringing the Commission about systemic issues. One major issue we discovered through regular visits to the facilities, including periodic detention on weekends, ie the practice of bussing women between facilities on weekends. This amounted to systemic sex discrimination as women were subjected to more strip searches, had difficulty making appointments, with fewer visits (eg family) and work opportunities, and were required to clean out their cells when they relocated due to some weekend male detainees detoxing there, eg leaving vomit behind.

The timing was strategic, as the ACT Government had already made the decision to build the new prison (the main facility, the Belconnen Remand Centre was modelled on Katingal, only worse with many additions giving it the feeling of being in a rabbit warren) – the Audit was a chance to benchmark existing facilities, and prevent the transfer of a negative culture to the new facility. Several earlier inquiries had already found that ACT remand facilities were worse than prison, especially the lack of space and activities. We found that the majority of staff were professional and committed to their work, but there was evidence of a bullying culture. There was some agreement that humane treatment of detainees was a core competency for staff. Criticisms attempted to be constructive, but there was great sensitivity to the Audit, to the extent that the Commission was not allowed to debrief staff about our findings. However, human rights training of new and existing staff presented an opportunity to discuss some issues in depth.

<u>Audit recommendations</u>

1. Urgent matters – overcrowding; mental health care; time-out of cells (many ‘lockdowns’ in 2006/07); and need for organised activities for detainees.
2. Humane treatment – cells; searches; drug testing; welfare; education; work; clothing; hygiene; contact; legal advice; media and library; information about rights.
3. Health care – services; infection control and harm minimisation (which is discussed in more detail later); general health (equivalence availability of allied health, dentistry, external consults and hospitals); limits on use of restraints in hospitals; treatment of prisoners at risk.
4. Oversight – monitoring using WA model of Inspector of Custodial Services.
5. Systemic discrimination – sensitivity to special needs of women and minorities; good awareness of Indigenous issues and cultural activities; servicing culturally and

linguistically diverse populations, eg interpreters, religion and food.

6. Corrections Culture – training in de-escalation & anti-bullying.
7. Monitoring custody rates – keep a watching brief on whether incarceration rates increase (especially ATSI), and need for review of fine default system.

The following recommendations were made in relation to humane treatment:

- Shared cells – careful assessment criteria (eg a sexual assault was prosecuted);
- Cell searches pat-down, & strip searches – need for reasonable suspicion;
- Drug testing - more dignity if conducted on half body;
- Education - assess for literacy & numeracy; and drug & alcohol program;
- Work - meaningful tasks offered, eg more than 'dixie' and cleaning;
- Hygienic cells on arrival – remove soiling by urine, vomit, blood etc;
- Visits by family – need for flexibility, eg accommodate lateness;
- Legal advice messages passed to detainees on same day;
- Media – need for reasonable access, not blanket ban;
- Library – range of materials available;
- Clothing – need for better quality, eg shoes, and warmth; and
- Rights information etc – should be available in written, verbal and visual formats.

The most controversial recommendation in the health care and services area in the Audit was to pilot a Needle and Syringe Program ('NSP'). The recommendation is based on a harm minimisation approach that protects the rights to life and health. Drugs and equipment have, not unexpectedly, already been found in the AMC. NSW Research indicates that 63.3% of males and 74.5% of females abuse or are dependent on drugs or alcohol. We know that injection of drugs usually correlates with higher levels of addiction, and that there is a risk of transmission of blood-borne diseases such as Hepatitis & HIV/AIDS in prisons. The rate of Hepatitis C in the general community is 2%, but the rate for male inmates is 35-40% and for female inmates 55-56%). The rate of spread could be exponential when you consider that detainees return to the community fairly quickly – the average length of stay is only 7 months.

A strong human rights argument is that of 'equivalence' - there are already ACT community-based needle & syringe programs, and numerous studies have demonstrated the efficacy of exchanges in communities around the world, as well as prisons in some countries. To deny protection against disease transmission in such a high-prevalence and closed population in prison may be viewed as inhumane. Evaluations of NSPs show reduction of needle sharing and infections, and do not increase drug consumption or demand. NSPs are also an opportunity to include safer sex education & means (eg condoms, dental dams). In the prison context they can be tailored to suit individual prison, eg Spain excludes violent prisoners. Nine countries have NSP programs – Spain, Switzerland, Germany, Luxembourg, Moldova, Kyrgyzstan, Armenia and Iran. The ACT has Methadone maintenance programs similar to the community, but like most prisons bans

alcohol and products to make it, such as sugar and yeast (eg Vegemite).

A case by a UK prisoner about lack of access to a NSP failed in the European Court of Human Rights, mainly because there was no evidence that he was an injecting drug user himself, as well a technical legal issue that is not applicable to UN jurisprudence (the doctrine of the 'margin of appreciation' which allows countries a large amount of latitude in the practical implementation of human rights). Some unionists, ACT Corrective Services staff and others oppose the NSP due to occupational health and safety concerns, based on the assault of the prison officer Geoff Pearce in 1990 at Long Bay (but no NSP was in operation). A term of the current Corrections staff Certified Agreement is that there must be consultation if the ACT Government is considering introducing an NSP. The political driver for change may be not only the HR Act, but the legal duty of care to detainees if infection cases are proven, ie if a detainee tests negative on admission, but positive on release. This was the case in NSW where a negligence class action by prisoners in the mid-1990s concerning access to condoms led to reform. The ACT was the first jurisdiction to allow distribution of condoms to detainees, and in Victoria condoms are still contraband.

ACT Government response

The Human Rights Audit made 98 recommendations and the ACT Government's formal response was to:

- agree with 70 (eg activities officers were appointed quickly, and bussing of women ceased in December 2007, there has been no urgency in establishing a new forensic mental health facility);
- agree in principle with 10 and in part with 4;
- note 10, including NSP - 'ACT Government policy does not support a needle & syringe exchange at this time. It is an ongoing matter for policy consideration' (18 months after AMC in operation from March 2009, ie end 2010); and
- not agree with 4 – limits on handcuffing of detainees in hospital beds; need for only women staff to guard women prisoners at night; use of remandees' own clothing; and need for more information, eg human rights, on induction.

Alexander Maconochie Centre

The AMC is designed to operates under the WHO Europe and UK Prison Inspectorate 'Healthy Prison' concept whereby: prisoners are held in safety; they are treated with respect and dignity as human beings; they are encouraged to improve themselves and given the opportunity to engage in purposeful activity; and they are enabled to maintain contact with their family and prepare for release, and thereby reduce the likelihood of reoffending. The AMC became operational in March 2009 and now has approximately 160 detainees, with a capacity for 300. Hopefully the ACT rate of recidivism will be an improvement on NSW, with the national worst of 68%. Unfortunately one prisoner has died and a coroner's reporting is pending, but it appears to be of natural causes. There have been teething

problems at the AMC, eg problems with in-floor heating, and visiting delays with establishing iris scanning security. The features of the AMC are:

- normalised environment - pleasant outlook & open design;
- proper physical care, eg natural light, air quality and temperature, cell size (8.7-10.5 square metres) and sanitation;
- half of accommodation is 'cottage' style (eg women and low security men) with an emphasis on living skills , but there are some cells for sentenced and remand males;
- layout is a campus style with buildings for Medical Centre, Education and Programs, Admissions, Visits and Transitional Release buildings
- there are rooms designed for mothers with infants, and another for conjugal visits, one of which has already occurred;
- it incorporates many Royal Commission into Aboriginal Deaths in Custody recommendations eg buddy cells, and no hanging points;
- it bans smoking indoors – detainees in cells are given free lozenges, but cottages have designated veranda areas. About 80% of prisoners smoke (men 78% & women 83%) – ATSI figures may be higher. Unlike NSW, nicotine patches are not free, but are available at subsidised rates.

It is a stark contrast to the inhumane conditions of overcrowding at the old remand centres I inspected where there were 112 inmates, of whom 52 were sentenced due to NSW prisons being full. At the old Belconnen Remand Centre we found: there was a general lack of ventilation, and old police cells were stifling and hot, with foul smelling plumbing leaks in one in cell; the library/activity room was used as dormitory, meaning that access was very difficult, and alcohol and drug courses could not be held except on an individual basis; and D-Yard where detainees with mental health problems were kept, was not a therapeutic environment. At the Symonston Temporary Remand Centre double cells were overcrowded by having a third detainee, who slept on the floor next to the toilet.

Conclusion

The development of human rights culture in the ACT is a long term process of step by step continuous improvement. It is important that people know what their rights are and how to enforce them if there are problems, and that agencies know exactly what their responsibilities are. The AMC is a unique opportunity to design a human rights compliant prison - you will hear from John Paget that this was an arduous, but worthwhile process. Its focus on rehabilitation with vocational education and training, and family contact will hopefully prepare prisoners for life after release. There is a huge need for joined up services on release so that detainees have the support to turn their lives around, rather than being set up to fail again. The largest gap is in relation to mental health treatment and care, including the lack of a forensic facility with a therapeutic environment. The recommendation to pilot an NSP requires partnership between staff, unions and management, the community, government and experts (eg public health and drug & alcohol). The Government has requested that a further Audit be undertaken by the Commission, but this will only occur if

we are given more resources.

The aim is creation of an environment that is better for detainees, better for staff, better for management and better for the community, as we know that most detainees will eventually return to the community. As Nelson Mandela, with his experience of 27 years at Robben Island, said:
‘It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest’.