Why closed environments need external scrutiny - the role of the Victorian Ombudsman in dealing with human rights issues

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Abstract
The Victorian Ombudsman was established 37 years ago as an independent statutory authority reporting directly to Parliament. Its current mission is to promote fairness, integrity, respect for human rights and administrative excellence in the public sector. Since 2008 we have 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’ (Section 13(1A) Ombudsman Act 1973). 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 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 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.

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 was enacted in January 2008. The values underpinning the 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 in accessing much what we take for granted; this has the ever present potential for abuse. It imposes a responsibility on those charged with 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 Charter have identified a range of human rights issues. These have led to public reports, including:

- *Investigation into prisoner property* (2005)

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 in custody report (July 2006)**

Issues identified included:

- Substandard conditions eg Kyneton police cells, Ararat prison
- Significant overcrowding eg double bunking, non segregation of categories
- Safety issues eg hanging points, duress alarms not working, searches, assaults
- Limited access to telephones, visiting arrangements, programs
- Health risks eg communicable diseases (still no condoms in Victorian prisons), self harm
- Inadequate level of internal monitoring eg Independent prison visitors, Office of the Correctional Services Review (formerly the DoJ 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, in two recent reports on the implementation of the recommendations (February 2010, October 2010) demonstrates considerable progress (94 per cent of recommendations in 10 reports were

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1 Conducted jointly by Ombudsman Victoria and the Office of Police Integrity.
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 enactment of the 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 eg 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 breaches of non compliance with human rights principles, as well as 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 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 eg 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 Charter in Victoria; it provides added impetus to making improvements to public administration. In addition, the ARC project will inform us more about how the Charter is making a difference in relation to human rights in closed environments particularly in those where external scrutiny may be less visible, such as in the disability and psychiatric sectors.
More or less reliance on internal oversight processes?

Victoria does not have a specific investigatory body for closed environments (unlike the UK which has a Prison and Probation Ombudsman and WA 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 let to significant changes in that organisation, but not to any transparency or independence in its operations.

So how to strengthen the internal monitoring arrangements?

- **Closed environments should be subject to independent scrutiny**
  The landmark UK Wooll report on prisons 1994 (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 the international standards for places of detention (see for example OPCAT requirements – 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 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 Charter.

  The Victorian Ombudsman has the specific function under the 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 an 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 accessed 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 that 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 contrary to the spirit of the Charter, need to be identified, in particular in relation to
settings where there 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 Charter, which provide for 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 receive by the Ombudsman indicate that many of these standards appear not to be met or complied with in Victoria.