Protecting human rights for people in police custody

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Introduction

A true test of any civilized society is how it treats those held in detention. While this statement usually refers to prison systems, it is even more pertinent to the treatment of detainees in police cells, where the majority of those in custody have not been convicted of any crime. In Victoria some detainees in police cells won’t even have been charged with an offence, they will be waiting for a mental health assessment. Others will be sleeping off the effects of alcohol intoxication.

From January 2008, Victoria Police have been required to act and make decisions having regard to the human rights set out in the *Charter of Human Rights and Responsibilities Act* 2006 (the Charter).

One of the Office of Police Integrity (OPI)’s functions is to oversee Victoria Police’s compliance with the Charter. OPI’s other functions are to:

- ensure that the highest ethical and professional standards are maintained in Victoria Police;
- ensure that police corruption and serious misconduct is detected, investigated and prevented; and to
- educate Victoria Police and the general community about police corruption and serious misconduct.¹

In 2005, OPI and Ombudsman Victoria conducted a joint investigation into the conditions for people in custody, in response to a number of complaints from people held in police cells or prison. This investigation followed a 2002 investigation by the Ombudsman into overcrowding in police cells.² The report of the investigation, *Conditions for persons in custody*, was tabled in the Victorian Parliament in July 2006.³ The report found conditions for detainees were unsatisfactory in several areas. In addition to overcrowding, there were problems with access to basic amenities, access to health services, inconsistent policies and procedures, and no mechanism for monitoring and auditing conditions in police cells. The report made 34 recommendations in relation to police cells, which were intended to address these problems. Victoria Police accepted the majority of recommendations and commenced a process for implementing the recommendations shortly after the report was tabled. OPI continues to monitor the implementation of these recommendations and earlier this year commenced a series of on-site inspections of police cells.

It is pleasing to note there have been significant improvements in a number of areas. The numbers and length of stay of people in police custody have reduced dramatically (See Figure 1).
Access to health services has also significantly improved.

But, the implementation of other recommendations has been sporadic. It’s important to note that in some areas, lack of progress in improving conditions in police cells has nothing to do with a lack of will at a local level. Some infrastructure problems such as access to fresh air or outside exercise cannot be addressed without significant capital investment to refurbish existing cell complexes or build new ones.

In other instances, it appears that local rules vary due to the attitude of the custody sergeant. There are no standard operating procedures for police cell complexes. This means things such as access to shaving facilities, or family visits will vary depending on where a person is detained. Some cell complexes have a blanket rule denying detainees access to shaving facilities, others permit shaving subject to an appropriate risk assessment.

The quality of food also varies substantially from location to location. In regional Victoria, the food is usually provided by a local hospital or hotel and equivalent to generally accepted standards. In contrast, in metropolitan Melbourne complexes, we have seen some particularly unappetising frozen meals, well past their use-by date. In one location, a member of management told us that in the past, they had lodged grievances concerning the food but there has been no change. A similar report to regional management from one officer stated that there:

… are continuing adverse comments in relation to the meals, from prisoners and staff… [The] quality of meals is less than I would ever accept. I would not eat the meals that are provided to the prisoners.
While these examples may seem somewhat petty, they demonstrate that people detained in police custody have unequal recognition of their rights. Restrictions on liberty and the right to be treated with dignity and respect vary, depending on where a person is detained in police custody. With the explicit legislative support now given to human rights principles in Victoria, the need for uniform measures to improve conditions for people in police custody throughout Victoria has become more urgent.

This paper aims to articulate a best practice model for managing detainees in police custody. It examines the conceptual framework, local legislative context and international covenants to identify an appropriate mechanism for monitoring and improving custodial conditions using a human rights framework.

The nature of rights

Conceptual framework & the codification of rights

Historically, categorising human rights has happened in the context of dramatic social and political change. While there has been much debate over the specific origins of human rights ideas, modern conceptions of human rights began appearing alongside concepts of liberty and democracy in the European Enlightenment, being clearly articulated in the American Declaration of Independence (1776), and the French déclaration des droits de l’homme et du citoyen (1789). These codifications were established in the context of civil war and revolution respectively. In the first half of the twentieth century human rights again came to the forefront. Resultant from the horrific events surrounding World War II, the international community established the United Nations and enacted The Universal Declaration of Human Rights. Through the second half of the twentieth century this non-binding declaration was given a robust grounding through the enactment of two international rights covenants. This body of international treaty law and a series of other rights related resolutions by the international community provided a legal basis and an obligation on states to enforce these rights.

In recent years, there has been a popular tendency to codify human rights in many parts of the world. Rights have been popularly articulated at national, trans-national and international levels. This has taken many forms, through legislation and treaties such as the United Kingdom’s Human Rights Act 1998, Victoria’s Charter of Human Rights and Responsibilities Act 2006, the European Charter of Human Rights, and the United Nations Convention on the Rights of the Child and Convention on Elimination of Discrimination Against Women.
The Victorian context

Prior to the proclamation of the Victorian Charter, many of the human rights articulated in United Nations instruments were already incorporated in State legislation. Issues relating to the integrity of legal proceedings and rights to a fair trial were covered by, for example, the Evidence Act 1958 (Victoria) and the Crimes Act 1958 (Victoria). Declarations of the rights of children and protections for the family unit were later made in legislation as varied as the Community Services Act 1970 (Victoria), Crimes (Family Violence) Act 1987 (Victoria) and the Children, Youth and Families Act 2005 (Victoria). So, too, broader equal opportunity legislation was introduced in 1975. In 1986, there was a suite of legislation relating to protection of the rights of prisoners and people who have a disability or mental illness.

By 2006, many of the rights described in the Victorian Charter were already covered by other pieces of local legislation. What is unique about the Victorian Charter is the provision of a clear Parliamentary intention that all public servants, including police, must adopt a human rights framework when carrying out their day-to-day activities.

In terms of specific protections for detainees, the Charter does not dictate a specific set of rights. Rather it insists that people should receive “humane treatment when deprived of liberty.” Of specific significance for people detained in police custody, the Charter provides that:

An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

There are a number of other protections for detainees in other legislation, such as the Corrections Act 1986 (Victoria).

Implementing a human rights framework

The number of people held in police cells is a very low proportion of the total population. On 1 July 2008 for example, 75 people were held in police cells. This means less than 0.0015% of the Victorian population were held in police custody. Because of the small number of people in police custody at any one time there is little chance of having a strong voice in having grievances heard publicly. However, the power imbalance that exists between police and detainees in cell complexes and the obvious inability for detainees to alter their physical environment, creates the conditions in which rights abuses can and have historically occurred.

As people become more conscious of the rights that they are entitled to, they are more likely to complain about their treatment in custody. Such complaints about police need not be seen as an attack, but rather acceptance of the “civic importance” bestowed on them. The challenge for police is to learn from
complaints and incidents to ensure they maintain best practice and to continue to deliver services that fulfil the community’s expectation. These expectations will not remain static and will be constantly evolving.xvi

Case study

The following case study has been included to demonstrate some of the matters that have arisen in police cells since the 2006 report. While we are confident that they do not represent the experience of the majority of people in police custody, they are not isolated incidents. OPI has successfully prosecuted several police for assaulting people in police custody. Victoria does not currently have a stand-alone legal claim for breach of human rights. However, custody officers need to be aware, breaches of human rights can be taken into account in determining damages for future successful civil claims for negligence or assault.

Use of force in custody while detained under Section 10 of the Mental Health Act 1986 (Victoria)

Police attended the premises of a complainant who had reported her two children were missing. A short time after police arrived, staff from the Department of Human Services attended and ascertained that one of the children was at school and the other was in day care. The complainant was intoxicated and allegedly became violent, making threats to police and other people present, and threatening self-harm. Police apprehended the complainant under Section 10 of the Mental Health Act 1986 (Victoria).

Section 10 of the Mental Health Act allows the police to take someone into custody if they reasonably believe that that:

a. the person has recently attempted suicide or recently attempted to cause bodily harm to herself or himself or some other person, or

b. the person is likely by act or neglect to attempt suicide or to cause serious bodily harm to herself or himself or to some other person.

As soon as practicable after apprehending someone under this provision police must arrange for a medical examination or mental health assessment.

Rather than taking the complainant to a mental health facility for assessment, the complainant was taken to the local police station and detained in police cells. After she had been in custody for approximately half an hour, a Leading Senior Constable and Sergeant opened the flap on the cell door to check on her. The complainant placed her hands through the flap on the door. The officers made a decision that the flap needed to be closed, for safety reasons. Their attempts to have the complainant retract her hands from the flap were unsuccessful. The two officers formulated a plan in which it was agreed that
they would open the door of the cell and ask the detainee to “back off”. If she refused, a “front kick” would be administered to provide the officers with an opportunity to close the door and the flap. The Leading Senior Constable opened the door and applied a forceful kick to the complainant, striking her in the midriff. The complainant was 152 centimetres tall and weighs 45 kilograms. The Leading Senior Constable, by comparison was 180 centimetres tall and of larger stature. The complainant was propelled backwards across the cell striking her head on one of the walls.

A Mental Health Crisis Assessment and Treatment Team arrived within one hour of the incident. A member of this team noted that the complainant was ‘uncooperative and surly’, but did not identify any mental health issues.

An internal police investigation found that the use of force in this instance was lawful, justified, proportionate, and consistent with police practice and procedure. The internal investigation concluded that:

This is considered by Victoria Police to have been an appropriate use of force in the circumstances in which the amount of force was minimised.

The case raises a number of issues from a human rights perspective; firstly, the appropriateness of taking the woman to a police station rather than a mental health facility. While depriving the complainant of her liberty in this manner was legally sanctioned, holding her in police cells raises concerns. For years people who have a mental illness and their advocates have fought against the stigma that associates mental illness with criminality. While generally one might see police cells providing a safe environment for someone at risk of self-harm, it didn’t work out that way in this case. Police advise that some mental health workers prefer to assess people in police cells to avoid security issues and the waiting time at hospital emergency departments. Police definitely don’t want to tie up resources in queues behind those with acute physical health needs. They report health workers giving low priority to people who appear to be mentally ill.

The second human rights issue relates to the officers’ ‘planned’ use of force. We note Victoria Police’s use of force training that the officers relied on is under review but surely, there were less intrusive ways to achieve the same goals. Sufficient staff were on duty at the time, which would have allowed constant monitoring to take place until the complainant calmed down and removed her hands. The only possible risk to the complainant was that she might use the open flap as a hanging point. In the circumstances, constant monitoring would have prevented her from harming herself in this manner.

This incident took place last year prior to the Charter coming into effect, but they hold some salutary lessons. Hopefully cases like the ones depicted in this paper can be consigned to history.
Setting the standards

The restrictive nature of custody facilities means that encroachment on individual rights is unavoidable. The challenge for watch-house staff, administrators and policy makers is to ensure that rights are only interfered with where it is absolutely necessary. This is in line with Article 57 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, which dictates that imprisonment is:

…afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.\textsuperscript{xix}

This standard is also reflected in other trans-national standards and treaties. The recommendations of the Council of Europe’s Committee of Ministers on European Prison Rules, also explicitly states the importance of not arbitrarily restricting detainees rights. Article 3 stating:

Restrictions placed on persons deprived of their liberty shall be the minimum necessary…\textsuperscript{xx}

The Office of Police Integrity has developed a toolkit with a set of standards against which the human rights of people in police cells can be monitored. They are based on standards set out in the Charter, United Nations instruments and publications,\textsuperscript{xxi} and state legislation and regulations.\textsuperscript{xxii}

Studies of police cells and custody conditions in other Australian and international jurisdictions, including Western Australia,\textsuperscript{xxiii} Australian Capital Territory,\textsuperscript{xxiv} the Netherlands\textsuperscript{xxv} and the United Kingdom,\textsuperscript{xxvi} have also been taken into account and adapted to this jurisdiction.

The Standards and Indicators in the toolkit are not intended to be prescriptive or exhaustive. They are designed to assist OPI’s audit process and to be used by custody sergeants and internal auditors within Victoria Police to assess their progress in the ongoing improvement of the treatment and care of people in police custody.

A number of the criteria are certainly subjective in nature. This is deliberate. It is expected when assessing the condition of cells against human rights norms that the dignity of the person will be automatically considered.

While there may always be sets of exceptional circumstances that mean a particular standard cannot be met, they are intended to be an indicator of best practice.

The standards cover eight key areas.
Admission & Assessment
On admission, police take steps to ensure the health, safety and welfare of detainees.

Accommodation
The physical conditions of the cells and cell complex provides for the humane and dignified treatment of detainees. Detainees are provided with an adequate standard of accommodation that ensures their safety and welfare, and balances individual rights with the rights of others.

Health and hygiene
Detainees are held in a clean environment that enables them to comply with the needs of nature in a clean and decent manner, maintain a good appearance compatible with their self-respect and provides for their physical and mental health and well-being.

Food
Detainees are provided with quality food that takes into account individual religious or dietary needs, is of good nutritional value, and is well prepared and presented.

Psychological well being
Detainees are treated with dignity and respect. At all times, custodial officers act professionally and with integrity to maintain and uphold the human rights of detainees. The conduct of custodial officers provides a good role model for detainees and encourages detainees to have self-respect and a sense of responsibility.

Discipline
Detainees are not discriminated against and are provided with equal protection under the law.

Restraint
Detainees are protected from torture and cruel, inhuman or degrading treatment.

Treatment of detainees with specific needs
Every person is equal before the law and has legal protection to enjoy his or her human rights without discrimination.

The application of this standard varies between a diverse range of detainees in Victoria. Specifically,

Particular care is taken to protect the rights of children and young people detained in police custody.
People of Aboriginal or Torres Strait Islander descent are recognised as having distinct cultural rights. These include the right to maintain their kinship ties and their distinct relationship with the land and waters under traditional laws and customs.\textsuperscript{xxxv}

Those with health needs too should not be discriminated against because of their detention.

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\textit{Detainees with health needs are provided with services equivalent to those available to the community as a whole.}\textsuperscript{xxxvi}

\section*{Conclusion}

While a prescribed set of standards are useful as a self-check mechanism within cell complexes the toolkit alone will not produce effective change. A multi-faceted approach to detainee management is required. Victoria Police men and women who deal with detainees need to incorporate a human rights framework in their daily interactions with people in custody and their associates. Those responsible for determining standard operating procedures and watch house rules need to re-examine their policies and procedures. They need to examine what rules can be dispensed with to accommodate individual freedoms, and what rules are necessary for the protection of all. There needs to be ongoing internal and external monitoring that is transparent and accountable. Appropriate training and ongoing professional development programs need to be developed to achieve a human rights culture within police cell complexes to give sustained effect to the intention of Parliament.

\section*{Endnotes}

\begin{enumerate}
\item \textit{Police Integrity Act} 2008 s 8
\item Ombudsman Victoria, \textit{Twenty-night report of the Ombudsman (Victoria)}, June 2002
\item Office of Police Integrity, “Cell Inspection Report” (DOC/08/4476), 20 February 2008.
\item POL/06/752 folio 20.
\item Declaration of Rights of Man and Citizen
\item The \textit{Universal Declaration of Human Rights}, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948
\end{enumerate}

Equal Opportunity Act 1975 (Victoria)

See Corrections Act 1986, Mental Health Act 1986 and Intellectually Disabled Persons’ Services Act 1986

Charter of Human Rights and Responsibilities Act 2006 (Victoria), Section 22.

Charter of Human Rights and Responsibilities Act 2006 (Victoria), Section 22 (3).

Corrections Act 1986 (Victoria), especially section 47.


See for example, Office of the Inspector of Custodial Services (Western Australia), Code of inspection standards for adult custodial services, April 2007, p.7.


See in particular Corrections (Police Gaols) Regulations (Vic) 2005

Office of the Inspector of Custodial Services (Western Australia), Code of Inspection Standards (Draft), updated 05/02/2007.


Office of the Inspector of Custodial Services (Western Australia), Code of inspection standards for adult custodial services, April 2007, pp.5-7;


xxxiv *Charter of Human Rights and Responsibilities Act* 2006 (Victoria) section 23
