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Researching Human Rights in Prisons

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Abstract

This paper examines two issues: the author's recent research on the capacity of prisons to incorporate human rights considerations into their routine management; and the methods employed in this research in prisons in two Australian jurisdictions. The first element examines the impact of formal human rights instruments on prison management and on the lived experiences of prisoners, and the potential for the practical application of human rights obligations in this environment. The second gives closer analysis to the specific use of qualitative methodologies in carrying out this research, and the potential implications of methodology for subsequent acceptance of research findings by governments.

Keywords

Prisons; human rights; research ethics; corrections management; public policy; monitoring.

Introduction

Origins of the research

This paper reports on one aspect of an Australian Research Council (ARC)-funded project on implementing human rights in closed environments.[2] The ARC project aimed to examine how human rights values apply in the daily operations of prisons, police cells, forensic and disability facilities and immigration detention, and to evaluate the influence of human rights legislation in these settings. This paper reflects on the methodological challenges of carrying out qualitative research on human rights specifically in the prisons sector.

The central questions in the prison-focussed work reported here were how prisons can be made more 'humane', and how 'human rights' concepts might be useful, and these were themes in the research interviews which will be discussed. The focus of this article is prison research in Victoria – a State which has a human rights instrument but also a patchwork of formal monitoring bodies for prisons – and in Western Australia (WA), which does not have a formal human rights regime but does have a robust prisons inspectorate drawing on human rights principles. Whilst we had a working hypothesis that formal human rights frameworks would have some identifiable impact on the operation of prisons for both prisoners and staff, we wanted to find out to what extent prisoners and staff found these frameworks relevant or effective.

A goal in doing qualitative prison-based research is often said to be to 'give voice' to the prisoner participants (Roberts and Indermaur 2008) as a response to the silencing of prisoners' voices once they are incarcerated, and this was an aim here. Reporting the research demonstrates respect for the value of their views as citizens and human beings. Contribution of their time and opinions to the research also creates ethical obligations. Further, in the context of human rights discourses, the method was seen as emphasising that people in prison are worthy of being listened to.

In addition, qualitative methods were used to better understand the views of prison management in the face of the current tentative community engagement with human rights principles in Australia. How staff in their range of positions see these values, and how prison managers incorporate human rights principles when they become a compliance requirement, are vital to assessing their usefulness.

The central focus in this methodology is the experience and perceptions of the participants in the research. It is about how prisoners, staff and management understand and apply human rights concepts. The research is important because it can highlight gaps between the 'virtual' (data-defined) prison and the 'real' prison, and also between the 'compliant' prison and how prisoners and staff experience human rights obligations in daily practice (Owers 2014).

The first part of this article outlines current human rights protection instruments in Australia, discusses the research methodology and briefly summarises relevant findings. The second part turns to the implications of the methodologies used for the value of the research and its potential impact, both in human rights debates in Australia and in prison policy.

Rights protections for prisoners in Australia

Australia has had ongoing debates about human rights and the need for formal human rights instruments. Whilst Australian academics and others highlight the successes of the formal human rights-based European scene and the consequent lifting of the level of debate through litigation and public discussion, this enthusiasm does not seem to have spread to the wider Australian community or to most governments in recent years (Dunn 2013).

Australia is a party to all key United Nations (UN) human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Of particular relevance to prisons, both Conventions include the prohibition against torture and any cruel, inhuman or degrading treatment or punishment. Whilst there are no mechanisms for enforcement of either the ICCPR or the CAT in Australian law, complaint of a breach of the ICCPR can be made to the UN Human Rights Committee, and to the Committee against Torture for breach of the CAT, and those Committees can provide views on the merits of complaints and make recommendations for effective remedies. These cannot be enforced, and there are obvious practical barriers to accessing a committee in the first place, especially for a person in detention: in fact only one Australian prisoner has taken a complaint to the UN HRC, in the case of *Brough*.[3] Australian governments have an embarrassing history of ignoring views adverse to their actions, as indeed was the case when the HRC found in favour of Brough (Eastman 2013; Naylor et al. 2015).

Australian public opinion research conducted almost a decade ago for the socially and geographically wide-ranging National Human Rights Consultation (NHRC) found little demand for formal protection of human rights, little knowledge of existing rights, and a general complacency with the current state of affairs (Colmar Brunton Social Research 2009: 9). This was despite the fact that Australia's 'patchwork [of protections] is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable' (Colmar Brunton Social Research 2009: 127). In 2009 the Labor federal government of the day rejected the proposal of the expert NRHC Committee for a formal Human Rights Act (despite most

submissions to the NRHC supporting this) and established a watered-down process under which proposed legislation is assessed against the ICCPR and a number of other human rights treaties.[4] Human rights are therefore not directly enforceable at a federal level.

Two jurisdictions have however passed legislation paralleling the ICCPR: Victoria, in 2006 – *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) – and the Australian Capital Territory, in 2004 – *Human Rights Act 2004* (ACT) (HRA). These instruments embody important rights for protecting people in detention, including the prohibition on torture and any cruel, inhuman or degrading treatment or punishment (s 10 Charte*r*; s 10 HRA), and the internationally recognised civil and political rights to (for example) humane treatment when detained (s 22 Charter; s 19 HRA), protection of family and privacy (ss 13 and 17 Charter; ss 8 and 12 HRA), and equality before the law (s 8 Charter; s 8 HRA).

The Charter articulates this set of rights without the direct mechanism for enforcement that can be found in the HRA (s 40C). The Charter however requires public authorities – which include public and private prisons – to act consistently with human rights. Conduct which violates Charter rights is deemed to be unlawful, a point that may assist in establishing the separate legal claim which is needed before a Charter right can be raised (ss 38-39).

For more indirect protection, prisoners – like any citizen – can rely on anti-discrimination laws, and specific rights are articulated in fragmented (if largely unenforceable) ways in Victorian corrections legislation (for example, *Corrections Act 1986* (Vic) s 47). Rights principles have also been drawn on by the courts in a developing body of cases on prison conditions.[5] They may in addition be articulated as contractual obligations on private prison providers, which again are not enforceable by prisoners in light of the doctrine of privity of contract in Australia.

Finally, however, rights protections may be largely theoretical for prisoners. Not only are they difficult to enforce but they can be overridden by competing interests. The Charter's s 7(2) states that rights can be subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom', and the rights under the *Corrections Act 1986* (Vic) are subject to the needs of security and safety (s 21(1)).

The picture for protecting the human rights of prisoners in Australia is therefore not rosy. Nonetheless, it should be noted that human rights underpin the formal mechanisms for oversight of prisons in both Victoria and WA. In Victoria the Ombudsman has the statutory power to investigate whether a public authority's action is incompatible with a Charter right and to make public findings on that inquiry.[6] In WA the independent statutory Office of the Inspector of Custodial Services (OICS) has wide-ranging powers to monitor custodial facilities across the State.[7] Australia has signed, but not ratified, the Optional Protocol to the CAT (OPCAT); ratification would introduce both comprehensive national and international oversight of prisons and other places of detention, within a human rights framework. Such incorporation of human rights values, as part of the regulatory regime of accountability and audit, offer potentially significant protections and will be discussed further below.

The research project

The research discussed here involved individual interviews with prison managers, surveys of prison staff (custodial and non-custodial), and group discussions and interviews with prisoners at five sites in Victoria and four sites in WA. One Chief Investigator and a research assistant conducted all interviews and focus groups. Numbers were relatively small but the project aimed to obtain in-depth perceptions of prison life and human rights from the people most immediately engaged in the daily life of the prison, and allowed the gathering of rich qualitative information. The findings offer insights unique to the two Australian jurisdictions, whilst identifying themes that are consonant with other research in the field. In total we obtained the

views of 65 prisoners through 10 focus groups and one interview; received 43 staff surveys (eight non-custodial, 35 custodial); carried out one staff focus group (with four non-custodial staff), and interviewed 11 senior managers from executive teams. The research highlighted a range of methodological challenges widely identified in prison research, four of which are discussed here, drawing on the experience of this research. The first, and fundamental, factor in prison research is negotiating access to prisons and to participants; other issues discussed include recruitment and voluntariness, confidentiality and the use of focus groups, and the personal impact of prison research on the prison researcher.

Research relationships and access to prisons

It is widely recognised that prison research raises many ethical challenges. Most obvious is the power imbalance between prisoners as the researched parties, and researchers. These and other issues about protecting prisoner participants (and maintaining the safety of prisoners and researchers) are usually the focus of institutional ethics processes. There can also be power differentials between researchers and (at least) junior staff invited to participate, who may not feel free to refuse in their work environment.

In addition there is the power imbalance, less commonly discussed, between the researcher and the prison institutions and Corrections Departments themselves. The researcher depends on the agencies for access, and for this purpose need to establish their own credibility as researchers, and their capacity to offer usable findings. At the same time the researcher must be able to maintain their independence and integrity, and establish and manage expectations about their research (Jewkes 2012; Sutton 2011). This can influence both the way the research is carried out and the outcomes of the research.

Corrections ethics and research committees also play a gatekeeper role. In the present research project this involved the researchers' university Human Research Ethics Committee, and the committees of the two Corrections Departments. The Departmental committees operate as gatekeepers in terms of the design and scope of the research proposal, identifying any security risks, and overseeing the research ethics. For example, whilst researchers may identify preferred prison settings, the Departmental research/ethics committees will advise which prisons can be visited, in light of space, time, availability of staff, and the demands of other research in the prisons. All committees required annual reports on progress, and one expressly required submission of any written reports prior to publication.[8]

In practice, as many other researchers have noted, the conduct of research in a prison does not always follow the 'ideal', or what was officially agreed, due to the nature of the prison, security requirements , and so on (Liebling 1999). Being the subject of study inevitably puts pressure on a prison and its staff and poses potential safety risks (to participants and researchers) which need to be recognised and managed within the process. It also takes up time for managers and staff with many other priorities. In this project, prison managers (General Managers in Victoria; Superintendents and Assistant Superintendents in WA) were helpful with their own time, agreeing to be interviewed and also facilitating entry into the secure areas of the prisons and access to prisoners and staff. The support of prison management is of course vital, and greatly appreciated. Aspects of the process can however differ from what was originally envisaged. The reality can raise new ethical dilemmas, and may also affect the validity of the research, although the impact may be difficult to assess. Several such issues arose in this research and are discussed below.

Recruitment and voluntariness

Ethical issues for recruitment of participants include maximising the voluntariness of participation, minimising inappropriate inducements and pressures to participate, and managing issues of confidentiality. Prisons are of course highly coercive institutions, and

prisoners are likely to feel under pressure to participate (or not to participate) in research, or even simply to appear cooperative (Roberts and Indermaur 2008). In this research we proposed an 'opt in' process for both staff and prisoners, with advertising of the research at the prisons through presentations at staff and prisoner representative meetings, and through internal bulletins. We also proposed individual interviews with interested staff and prisoners, to allow participants to agree or refuse participation confidentially, and to allow them to provide their views in private. Whilst the research was intentionally framed around participants' opinions, and not personal experiences, it was recognised that it could still be sensitive and personal.

Turning first to staff, the proposed approach to this cohort led to a very small number of responses. We attended staff meetings to outline the study, distributed surveys, and invited participation in interviews. The aim here was to gather the perspectives of staff 'at the coal face' about whether and how human rights principles were being (or could be) embedded into day-to-day operations. We presented the research and distributed surveys to at least 300 prison staff, both custodial and non-custodial, across Victoria and WA, providing pre-paid envelopes for anonymous responses. The response to the survey was however disappointingly small. We received only 9 surveys from Victorian staff and 34 from WA. Only one focus group was conducted with staff and this was with non-custodial staff members. Thus there was a general lack of involvement by staff – for what may have been a range of reasons – with the research process.

In Victoria the site visits were often facilitated by senior management around regular staff meetings. This gave us the chance to highlight human rights research to a substantial number of staff, but the large group format and existence of other agenda items probably limited uptake. Our meetings in WA were smaller and more informal, with more time for questions, and this may have led to the larger response.

Moving now to the research with prisoners, this took a different path to the one initially proposed. Our meetings with prisoners usually occurred on the same day as our staff presentations and management interviews, and in practice usually involved meetings with groups of prisoners invited by the prison management. This raised issues about consent and voluntariness that are fundamental to the ethics of prison research: it was unclear whether the prisoners were given the option of being in the room. Whilst no-one said they would have preferred not to be present, we addressed this possibility by telling participants that they could in practice opt out without consequences, by not speaking. A number of participants spoke rarely or not at all, although it is not possible to know whether this was due to our invitation, or because they simply preferred not to talk. In some cases prison managers arranged for these group meetings without specific consultation with the researchers, and in others it was proposed (and agreed to by us) as a practical way to carry out the research. Given the logistical challenges for prison management of arranging for us to talk to prisoners, it was recognised that such compromises can make research possible, and we concluded that they were unlikely to significantly affect our findings, given the general nature of the questions being discussed.

There were several reasons for, and consequences of, this approach. We generally entered the secure part of each facility only once, and therefore wanted to talk to as many people as possible on that day. This was in most cases due to the geographic isolation of most of the prisons, as well as the time taken and logistics involved in entering and exiting the prisons. Further, the group usually comprised peer mentors or unit representatives, who may have been more readily available or more practically accessible. We had sent flyers, publicising the research and inviting participation, in advance of our visits, but it was not always clear whether these had been displayed.[9] This meant that our participants were in most cases people with official or trusted roles in the prison. They were likely to be knowledgeable about the prison system; they may also have been more likely to reflect positively on management (especially where a staff member was present) although they could equally have been more critical given their exposure

to complaints. It was certainly our experience that some participants were extremely forthright in their observations in the focus groups, whether or not staff were present. Such selection of prisoners for participation in research - people who are trusted and pose least risks – is common in prison research.

We also had few culturally and linguistically diverse (CALD) or Indigenous prisoners in our groups. Prisoners from Anglo-Australian backgrounds sometimes spoke on behalf of CALD prisoners about management's protection of cultural and religious rights in the absence of anyone directly affected by the issue. In some focus groups in WA, even where there were Indigenous prisoners present, some non-Indigenous prisoners spoke about issues experienced by Indigenous prisoners. Indigenous prisoners are significantly over-represented in Australian prisons as discussed by Rynne and Cassematis (2015) in this volume, and issues of particular concern to Indigenous prisoners included funeral attendance and geographical separation from community, particularly in WA. We therefore recognised that the groups were unlikely to be representative of the prison population as a whole but they brought their own expertise and the broader knowledge of the prison system which was particularly useful for this project.

Confidentiality and focus groups in prison research

Group discussions or focus groups are obviously a valuable way of meeting and talking to a number of people in a short time and can function interactively as a 'collective conversation' (Farnsworth and Boon 2010; Liamputtong 2011: chapter 1). This may be more problematic in the prison setting, given the internal dynamics, histories and relationships (often unknown to the researchers) which will affect who speaks, and about what. As Farnsworth and Boon (2010) also note, the focus group can play out the themes being examined, in this case the lack of autonomy of detainees in the 'total institution' and the anxiety and risks of relations between prisoners, and between prisoners and staff.

Prison research may carry risks for participants who may fear retribution – including from other prisoners – if they are even seen to participate (Drake 2014). Confidentiality in public *reporting* of research is protected by not recording people's names or identifying information. In this research, the participants could opt out of the research by not speaking but, when they chose to speak, there could be no guarantee of confidentiality given the presence of others in the room. Signed consent forms can be fetishised in research ethics processes but can put participants at risk (Roberts and Indermaur 2008). Where a discussion is audio-recorded, these risks can be reduced by recording verbal consents. In this research recording was permitted in some prisons but not all. Where consent forms were signed, prisoners used their own name or a pseudonym; we did not attempt to verify names. Other prison research has noted the numbers of participants who use pseudonyms.

Further, a staff member was present in three of the focus groups, for security or supervision. In all these meetings staff members made informative contributions to the discussion but their presence could be seen as problematic. It clearly reduced any confidentiality of the discussion and probably influenced its nature. Roberts and Indermaur (2008) state that they would not proceed with individual prison interviews if staff were present. In this research, using focus groups (by definition not internally confidential as noted above), we concluded that, whilst the staff presence may have constrained some prisoner participants, the discussions between and among the prisoner and staff participants made significant contributions to the research questions. We did notice that, where staff were present, prisoners sometimes linked their more robust criticisms to other prisons of their experience, perhaps thereby making the point they wanted to make whilst managing their immediate relationships in the prison.

The way the present research was ultimately conducted therefore raised issues commonly faced by prison researchers about access, about recruitment and the voluntariness of participation, and about the use of focus group discussions.

The impact of prison research on the researcher

Finally, comment is needed on the personal and ethical aspects of prison work such as this. Prison research risks being exploitative, or appearing to be so. We tried to minimise this by explicitly formulating the research as focussing on opinions about human rights. We aimed to recruit both prisoners and staff as 'consultants' or experts, not as 'objects' of research (Sutton 2011: 51). Nonetheless researchers are faced with the ambiguities of their role as noted earlier: they rely on prison management to grant access to the prison; they need to balance expectations of participants; and all the while they must maintain their independence and research integrity. The researcher claiming to promote participants' voices has a clear obligation to use their data with integrity and with respect for the expectations of the people who contributed (Pittaway et al. 2010; Scheirs and Nuytiens 2013; Sutton 2011).

In prison research the interactions with prisoners (and some staff) can also challenge the researcher. Despite self-perceptions as well-intentioned and scientific, researchers may discover that they are seen by some in the prison as annoying or irrelevant (Briggs 2011; Sutton 2011). In the present research prisoners were at times explicitly sceptical about the research and its premise, and about whether there would be any genuine outcomes. They were also well-informed about the academic purposes of prison research. As one participant said knowingly as we closed our meeting, 'will you get your PhD for this, Miss?'[10]

Indeed, whilst the ethical obligations on researchers in this area focus on managing their own power *vis-à-vis* that of the participants, it was clear that, as Liebling also noted in her UK research, participants 'did not want to be "subjects" but acted as agents' (Liebling 1999: 158). The prisoner participants in this research exercised agency in their engagement with the research: they were often familiar with research processes, and engaged or (politely) refused to engage in this project.

Prison research can also challenge researchers' preconceptions about prisons, prison management and prisoners (Jewkes 2012; Liebling 1999). In this research many of the prisoner participants and senior management interviewees were generous with their time and opinions and contributed insights into the life of the prison which provided the researchers with more than mere 'data gathering'.

Research findings

Findings from the interviews and focus groups are discussed first. We employed semi-structured questions in discussions with prisoners and managers, asking interviewees about their understandings of rights, and about what they saw as giving rise to rights issues in prison experiences. Such qualitative methodology was designed to assist the researchers 'to appreciate the way people see their own reality' (Liamputtong 2011: 4) rather than to gather facts or obtain generalizable findings, such as rights breaches or whether managers were implementing human rights initiatives. It is important that this aim, and the way the qualitative research will be used, is understood by the parties to the research – departments, participants, funding agencies – so that all parties' expectations are realistic and informed.

For this research we transcribed all interviews and the notes from interviews and focus groups, and coded the transcripts into NVivo, developing categories based on the issues identified from the data (Braun and Clarke 2006). Initial coding was carried out by the research assistant, who had conducted the interviews with either the author or one other Chief Investigator, and codes were reviewed and refined by the two researchers (the author and the research assistant)

collaboratively. The categories were then coded into themes informed by the questions asked which, for this paper, were about what were seen as 'rights' in prisons, and how 'rights language' was used and understood.

Prisoners

Perceptions of rights and understandings of rights language are the focus of this article. First, all prisoners were asked 'what is most important or what matters most' to them and other prisoners, and which 'rights' they saw as important for people in prison.[11] Being treated with respect and dignity by staff, and having decisions affecting their daily lives made with fairness and justice, were key themes in responses at all facilities (Naylor 2014). Across both Victoria and WA, all focus groups talked about negative staff attitudes towards, and treatment of, prisoners. They identified an attitude of contempt amongst a proportion of staff, and in certain prisons. Comments included prisoners feeling that they were not treated as human beings.

The centrality of staff-prisoner relationships to the prisoner experience, and the personal and emotional experience of that power relationship, has similarly been identified in other prison research (Liebling 2013; Sykes 1958). This parallels the issue most commonly raised when participants used 'rights language', which was the right to humane treatment when detained, and the right to protection from inhuman and degrading treatment. Human rights language clearly had power for people detained in prisons. Some prisoners felt extra potency could be given to a claim described as a right, such as the right to humane treatment, or more general claims under the protection of 'the Geneva Convention' or similar. Others chose terms such as fairness and justice and respect to describe the desired entitlement.

The 2009 Colman report (Colmar Brunton Social Research 2009) and, more recently, Rice, Meyerson and Ogg (2014) found neither the general public nor involved professionals in Australia has a detailed understanding of rights. The object here was not however to 'test' prisoners on their knowledge but gain insights into their ideas, as detainees, about rights and their relevance. As in the general community, prisoners were not sure what rights they had, let alone when and how the prison could limit them. It was difficult for a prisoner to know when a negative decision was given because the prison officer was being obstructive, and when the limitation was genuinely justified for security or safety reasons. Security concerns were seen as an excuse for a refusal on occasions, but prisoners also identified what they believed were removals of rights as punishment, or where they were offered as a privilege to be earned. They noted, for example, restrictions on freedom of movement in 'punishment' cells, restrictions on visits, and exclusion from reduced security classification.

There were different experiences of access to the Charter (in Victoria) and to human rights information. Some said that some prisons provide a copy as part of orientation procedures. Some reported that their attempts to access the Charter were blocked, or for such requests to cause problems for them in the prison. These observations reflected a belief in the power of the Charter, but also their perceptions of a broader trend of recriminations for making complaints. When asked what Charter rights they had heard of, one respondent wrote (in the preliminary background survey used in the prison groups) 'Not sure, we have asked for the book on human rights to be provided in gaol but it was not only refused but we were also given a hard time if we pushed the point'.

These findings raise important questions about, for example, staff attitudes, rights awareness in prison, and the capacity of prisons to be really rights-compliant. The core 'right' claimed by prison participants here was to be treated with respect, as an equal human being.

Prison staff and management

As noted, we had a limited response from staff to the invitation to participate in the survey, especially in Victoria. This may reflect scepticism about research, or at least about this research. Whilst the respondent numbers are small, the findings are of interest as this research is the first to address the issue in these two jurisdictions. The dominant theme in the surveys returned by staff was, significantly, one of scepticism about human rights. There was clear recognition of the principles of human rights, but anxiety about their application. Some WA respondents, for example, saw a conflict between rights for prisoners and rights for staff, observing that prisoners' rights were being emphasised at the expense of victims and/or prison staff rights.[12] Some WA staff instead saw the loss of rights as part of prisoners' punishment, and suggested that they should be given only the basic minimum of entitlements and/or should have to relinquish certain rights as a part of their punishment for committing a crime.[13] The few Victorian non-managerial staff who commented on the Charter were not positive about its introduction into prisons. Some criticised it as an unnecessary 'stage and craze', some felt it only added 'motherhood statements' to existing local operating procedures, and others feared that prisoners would abuse it with frivolous claims. One respondent, for example, asserted that the Charter was used 'to negate rules and obligations expected of prisoners'.

Discussion of human rights and formal rights instruments triggered concerns amongst both staff and management participants about illegitimate claims by prisoners, and the privileging of prisoners' interests over interests of staff and community. As in the staff responses, managers in both Victoria and WA saw prisoner misuse of the language of rights by making unfounded claims as a risk. There seemed to be concerns that prisoners would label all claims, no matter how minor, as 'rights issues' and that this would undermine management and security regimes. One WA interviewee observed that rights legislation would at least be a 'bolt on' for further strengthening human rights, but another WA manager thought that staff would see a rights instrument as a way of catching them out doing something wrong.

For managers, human rights were discussed in terms of operating procedures and extra rules; in Victoria there was of course the statutory requirement for managers to ensure decisions were consistent with the Charter (as required by s 38). Managers talked about staff attitudes, staff training, and the inevitable issues about balancing security and human rights. It was made clear that prisons in both Victoria and WA had been using a human rights-type language of respect and decency for a long time, for example, in values statements and in the incorporation in both Victoria and WA of the concept of the 'healthy prison' and a 'decency agenda' (see for example OICS 2013). A number of WA prison managers doubted the utility of formal rights protection, arguing that it would not add anything to existing policies and codes of conduct, which were already based on principles of respect. Many preferred more applied language. Prison managers employed varied terminology when discussing conditions of detention and the treatment of prisoners. These other concepts – such as decency, integrity, respect, cooperation, fairness, wellbeing, safety, livability, 'best interests', impartiality, empathy, and what is proper or right – align with human rights principles and concerns, although interviewees did not generally make that connection explicit. This reframing is an important part of making human rights implementable at a practical level.[14]

Most Victorian prison managers said that the Victorian Charter provided a useful framework or lens through which to develop policies and pointed to the embedding of principles in Directors' Instructions and local operating procedures. Many however were dubious about the Charter's day-to-day application to their own decision-making and to the decision-making of their frontline staff. One Victorian manager noted that human rights cases offered a powerful training tool to achieve behavioural change amongst staff, but it was accepted, in both Victoria and WA, that it was not sufficient simply to pass legislation requiring prison operations to be human rights- compliant.

Not surprisingly, managers addressed human rights in managerial terms, as something on which they were required to provide regular reports, and to establish staff training. The embedding of human rights principles in performance indicators, in monitoring standards and in private prison contracts can be seen as compliance-driven managerialism, but it can also be powerful in supporting change and establishing accountability (Naylor and Harrison 2014). These are points that will be taken up below.

How might such research be used?

As already noted, the aim in conducting this research was to contribute both to the body of prison research and to human rights practice.[15] Some practical efforts to achieve these aims will be mentioned before turning to the more challenging question of the possible broader impact of such research.

As the research data was analysed, we made presentations on findings to groups 'researched', including government and regulators, and prison staff and managers. We have also been publishing papers and comments in various academic and generalist fora, and in scholarly, online and blog formats. It has not been possible at the time of writing to disseminate the findings in the same way to prisoners, aside from the fact that it would be impractical and unethical to recontact identified prisoner participants, but we have been invited to provide summary findings for distribution in prisoner bulletins.

We also came to recognise the educative role we might play when on site in the prisons. The explanatory material sent to all potential participants, and the overview of the research presented at staff information sessions, identified the importance of the issue and outlined some key rights that might be at issue in the prison setting. At interviews and focus groups we presented a summary of human rights, in the form of a chart (referring to the Charter in Victoria and ICCPR in WA) as a focus for discussion, summarising what human rights instruments cover, and the ways in which rights can lawfully be restricted. This was especially relevant to our group meetings with prisoners, who often mentioned having difficulty in simply obtaining information on human rights. We have no way of knowing whether this exposure to rights information was meaningful but speculate that it may have been useful to at least some participants.

The broader question is the perennial issue of whether and how such research can influence policy makers and make a difference to views of the wider community (Morton et al. 2012). Governments since at least the 1990s have emphasised the importance of 'evidence-based policy' (Freiberg and Carson 2010: 153-54). More recently 'popular punitivism' has arguably replaced evidence as a driver of policy in the correctional field, as political parties engage in 'law and order auctions' at election time to see who can promise the toughest penalties.

The impact of any research depends of course in part on its subject matter. It is more likely that governments will disregard evidence when it challenges aspects of the criminal justice system to which they are most ideologically committed, such as the current reliance on the increasing use of incarceration in the interests of 'community safety'. Nonetheless, governments do on occasions draw on expert evidence. They may be more likely to base decisions on expert advice if it is specific and can go under the media radar. For example in recent years Victoria has introduced family group conferencing for young offenders, Drug Courts, specialist Koori Courts for Indigenous offenders which allow greater participation by the Indigenous (Koori) community, and successful programs for sex offenders, with little or no public comment.

Ian Loader (2010) has warned against a belief that penal excess can be moderated by such 'indirect' responses, arguing that governments risk exposure and ridicule if discovered to have been talking tough but being soft 'behind the scenes' (Loader 2010: 361). However such policies

may also be able to tap into alternative emotional and ideological discourses. Support for the Victorian youth justice reforms may reflect community sympathy for young offenders (Gelb 2008, 2011). Alternative sentencing pathways may be acceptable for at least two reasons: firstly, the widely-identified discrepancy between 'top of the head' public punitiveness and the more considered responses elicited when people are provided with additional detailed information (Gelb 2008; MacKenzie et al. 2012) and, secondly, the lack of confidence in the effectiveness of imprisonment and support for alternatives also identified by many researchers (Gelb 2011).

Research findings can also feed into existing agendas, for example, supporting the managerialist priorities of the public service. This reorientation occurred in Australian corrections as part of a shift across the public sector to prioritise 'efficiency' in financial terms, employing for that purpose corporate planning and performance management using key performance indicators (KPIs), and audit and evaluation (Freiberg 2005: 14). It coincided with moves to private prisons (and privatisation of other government activities) and the necessity of managing private providers through contracts and detailed service delivery outcomes.

It has been pointed out that managerialism in corrections risks a focus on quantifiable 'outcomes' and a disregard for what may be important features which are difficult to measure. As Freiberg notes: 'Some of [the criminal justice system's] values, such as "justice" and "fairness", may not be quantifiable, or perhaps even measureable' (2005: 33).

It is however possible to require attention be given to such values (including human rights values) within the managerialist paradigm. Steps have been taken to bring the unquantifiable – quality and values – into accountability frameworks. For example, the English Prison Service has routinely surveyed prison inmates and staff using the Measuring the Quality of Prison Life (MQPL) instrument since 2004. The MQPL evaluates responses to issues such as 'respect', 'staff-prisoner relationships', 'humanity', 'fairness' and 'well-being', addressing what the authors refer to as the 'moral performance' of the prison (Liebling et al. 2012: 366-67). The dimensions clearly aim to identify the sorts of values which would also be called 'human rights' values. Not only are such features both quantifiable and usable across the prison estate in the UK, but better results are also indicative of better outcomes of imprisonment, such as lower recidivism rates and higher rates of wellbeing (Liebling 2014).

The UK Prisons Inspectorate developed criteria for assessing the treatment of prisoners and conditions in prison – published in its document 'Expectations' (HMIP 2012) – and framed around the 'Healthy Prison' tests of safety, respect, purposeful activity and resettlement tests originally identified by the World Health Organisation (WHO 2007). The Expectations are also explicitly linked to human rights principles. A related form of prisoner experience survey is in use in Victorian prisons, according to an interview with one prison manager. The survey, based on the themes of safety, respect, constructive activity, and family and community support, also draws on the Healthy Prison tests, and its results are used to encourage changes in staff practices. The Healthy Prisons criteria have been adopted to varying degrees in a number of Australian jurisdictions (ACT Corrective Services 2010; Queensland Corrective Services 2007).

Together with the general shift to managerialism in the public service, corrections management in Australia has also shifted its focus to reducing reoffending as a goal in itself, in response to high rates of prisoners returning to prison. Such concern should drive a demand for evidence-based strategies for improved and effective prisons and successful transition back into the community. This would also be consistent with a human rights-driven focus on humane conditions.[16]

Unfortunately the 'efficiency' agenda has coincided with a demand for reducing expenditure. This brings with it the risk that the focus will be on prisons as expensive (so the expenses

should be reduced) rather than on prisons as harmful (so that the harmful effects should be addressed with programs and staffing resources). As Liebling and Crewe (2012) found in the UK context: 'Prison governors (and now, private companies) are given clear aims, based around reducing reconviction rates, but are provided with diminishing resources to meet them (including cuts to offending behaviour programmes)' (2012: 297). This will undoubtedly be an increasing problem in Australia in the face of escalating overcrowding in prisons.

Some optimism may still be warranted, however, for the influence of research on corrections policy. The managerialist focus on cost can also mean that empirical data – both quantitative and qualitative – can drive arguments that imprisonment is costly and inefficient, and therefore that alternatives should be prioritised by governments. For example, the relatively recent 'justice reinvestment' argument – that money invested in prisons should be redirected to community-based programs – has attracted enthusiasm internationally (at least in principle) from both the left and right of politics. The Australian Senate (under the previous Labor federal government) supported development of such programs in its review of Justice Reinvestment in 2013 (Senate Legal and Constitutional Affairs References Committee 2013).

No doubt this strategy only works if the community and the 'decision makers' prioritise cost. If they simply and viscerally want punishment at any cost, the economic argument fails. Michael Tonry rejects advocacy about reducing incarceration based on cost, and calls for an explicit moral claim based on principles of justice: 'What is needed is a widely shared belief that high imprisonment rates are undesirable, unjust, and destructive. ... Focusing on cost savings and small reductions in reoffending rates may win a few small victories, but it will not win a war' (Tonry 2011: 647-48).

A strategic focus on managerialist concerns of cost, KPIs and recidivism rates should logically also lead to more qualitative concern to make prisons less damaging, to provide better programs addressing drug and alcohol problems, and to improve programs for transition and re-entry with a view to reducing the chances of ex-prisoners reoffending. The present research highlights the primacy given by prisoner participants to being treated with respect. A discourse based on human rights can motivate such change. Human rights litigation in other jurisdictions demonstrates the practical relevance of human rights values in the corrections field. Human rights litigation, and monitoring against human rights principles, can drive both individual improvements, and systemic change, including resourcing decisions.

This research also highlights the limits of formal human rights instruments on their own, directing government attention to the importance of protocols and guidelines, and to effective monitoring bodies applying clear, practical and accountable standards. Its findings support other research worldwide on the need for ongoing prison officer training and culture change, to give practical effect to values of 'decency', 'respect' and, most broadly, 'humane detention' (Mackay 2014).

Conclusions

The research project reported on here asked how prisons can be made more 'humane', and how 'human rights' concepts might be useful in this task. This article outlined and evaluated the findings of this research on the meaning and relevance of human rights to prisoners, staff and management. It then considered whether and how such research offers value to governments and policy makers.

As this research project, amongst others, has demonstrated, human rights are not well protected under Australian law (Naylor et al. 2014). There are also specific challenges to protecting rights in prisons (and other closed environments). Indeed where human rights

instruments were in place, it was routinely pointed out by participants that these were only a beginning: they did not provide the detailed applied guidance needed by staff (and detainees). Whilst it is argued here that formal human rights instruments are necessary, and valuable as a starting point, they are clearly not sufficient on their own. Fuller elaboration is needed for staff and management in terms of practical guidelines and protocols. Incorporation of human rights principles for monitoring bodies can ensure continued auditing of human rights values and quality of prison life. Public reporting of the findings of monitoring bodies – such as the Victorian Ombudsman and the OICS – can provide both education and sanction. Ratification of OPCAT would further enhance the capacity of monitoring bodies, bringing human rights principles to bear on the daily practice of prisons.

In addition, human rights instruments were recognised by participants in this research as requiring the balancing of competing rights. Rights restrictions are no doubt inevitable given the *raison d'etre* of a place of detention. Prisoner interviewees noted the 'override' provisions with resigned shrugs, clearly unsurprised that security and 'good order' could take priority over rights interests. The justification for these limitations needs however to be spelt out to ensure the lawfulness of such limits (for management) and the degree of protection available (for prisoners).

At the same time it was abundantly clear that the key rights issue for prisoners was the way they were treated in prison. Respectful treatment – as a human being and fellow citizen – is not challenged by claims of security or safety: it should always be possible.

The challenges of understanding and operationalising human rights highlighted in this research demonstrate that a more informed and nuanced discussion about human rights and corrections is needed in the general community, from which prisoners, staff and management all come. The obligation to educate communities about rights, as a prerequisite to democratic citizenship, is spelt out in all international treaties. It is not clear which would come first in the Australian context. Do we need a better-informed and less punitive community, before we achieve support for human rights? Or would a more human rights-aware community demand a more humane approach to imprisonment? Research evidence does have a role in this debate, with potential influence ranging from raising awareness, at a conceptual level, all the way to triggering practice and policy changes (Morton et al. 2012). As Freiberg and Carsons observe: 'Evidence circulates back into the policy-making process through a communicative, discursive or dialogic approach that seeks to democratise knowledge and its use' (2010: 161).

The research discussed here does not provide answers to immediate problems. However it ought to contribute to the ways in which imprisonment and human rights values are discussed, and influence the context within which decisions about each are taken in this country. It will have been valuable if it has provided 'a frame for thinking' about these issues (Freiberg and Carsons 2010).

A final point is that, for the 'democratisation of knowledge', it matters where the research is published. Universities (and granting bodies) prioritise academic publications as signs of the worth of research. However research may have more impact when it forms part of community dialogue. It might then change the priorities of the community and, ultimately, the parliaments from which they are elected. We need a more mature and developed community understanding of both crime and human rights if our punishment practices are genuinely to be challenged.

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2 ARC Applying Human Rights in Closed Environments: A Strategic Framework for Managing Compliance (LP0883295). The project was carried out in partnership with the Commonwealth Ombudsman, WA Office of the Inspector of Custodial Services, Ombudsman Victoria, Office of the Public Advocate (Victoria), Victorian Equal Opportunity and Human Rights Commission and the Office of Police Integrity (Victoria). A 'closed environment' was 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.' This definition parallels the definition of the locations covered by *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* art 4.

3 *Brough v Australia* (UN Human Rights Committee, Communication No 1184/2003). The Australian government responded that they did not accept that there had been a violation of the relevant provisions of the ICCPR in this case.

4 See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

5 See the Victorian cases of *Dale v DPP* [2009] VSCA 212 and *DPP v Tiba & Ors* [2013] VCC 1075. See also the reference to international conventions in Queensland prison cases such as *Callinan v Attendee X* [2013] QSC 340.

6 *Ombudsman Act 1973* (Vic) s 13(2). The Department of Justice internal Office of Correctional Services Review is also subject to Charter obligations.

7 *Inspector of Custodial Services Act 2003* (WA). The OICS monitors against public inspection standards based on international conventions, and national and international rights-based frameworks (OICS 2007). It also draws on wider principles (Naylor and Harrison 2014: 35).

8 The WA Research and Evaluation Committee reserved the right to refuse publication for 'factual inaccuracies' and for any security concerns (Government of Western Australia, Department of Corrective Services 2013).

9 Some focus group participants mentioned seeing flyers; we also received some expressions of interest by mail from prisoners who had heard about the research formally or informally, and conducted one additional individual interview.

10 On the ability of research participants to unsettle the prison researcher, see Jewkes 2012. On the need to expressly address prisoner expectations of what research can deliver, see Roberts and Indermaur 2008: 319.

11 Each discussion began with participants completing demographic background information, followed by the researchers outlining relevant rights – Charter rights in Victoria and international human rights based on the ICCPR in WA. The discussion then opened with general questions about perceptions of 'rights' issues, complaints avenues, information about rights in the prison, and views on 'rights' language.

12 It is not possible to conclude anything from the absence of such sentiments in Victorian presentations and/or surveys given the relatively small number of responses and the general nature of the prompt questions.

13 Eleven respondents: 26 per cent of all respondents; 32 per cent of WA respondents; nil in Vic.

14 For protocols employing such terminology, see, for example, HMIP 2012; Coyle 2009.

15 Partner organisations in the research were monitoring bodies with a human rights interest in closed environments.

16 Victorian Corrections documents expressly link offender management frameworks to human rights obligations: see State Government of Victoria, Department of Justice 2014.

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References

ACT Corrective Services (2010) *Operating Philosophy.* Available at http://www.cs.act.gov.au/page/view/867/title/operating-philosophy (accessed 20 August 2014).

Braun V and Clarke V (2006) Using thematic analysis in psychology. *Qualitative Research in Psychology* 3(2): 77-101.

Briggs D (2011) Tales from prison: Reflections on a decade of offender research. *Safer Communities* 10(4): 31-35.

Colmar Brunton Social Research (2009) *National Human Rights Consultation – Community Research Phase Final Summary Report.* Canberra: Attorney General's Department, Commonwealth of Australia.

Coyle A (2009) *Human Rights Approach to Prison Management* (2nd edn). London: International Centre for Prison Studies.

Drake G (2014) The ethical and methodological challenges of social work research with participants who fear retribution: To 'do no harm'. *Qualitative Social Work* 13(2): 304-319. doi doi:10.1177/1473325012473499.

Dunn K (2013) Do Australians care about human rights? Awareness, hierarchies of sympathy and universality. In Gerber P and Castan M (eds) *Contemporary Perspectives on Human Rights Law in Australia.* Australia: 515-530. Sydney: Thomson Reuters.

Eastman K (2013) Australia's engagement with the United Nations. In Gerber P and Castan M (eds) *Contemporary Perspectives on Human Rights Law in Australia*: 97-124*.* Sydney: Thomson Reuters.

Farnsworth J and Boon B (2010) Analysing group dynamics within the focus group. *Qualitative Research* 10(5): 605-624. doi: 10.1177/1468794110375223.

Freiberg A (2005) Managerialism in Australian criminal justice: RIP for KPIs?. *Monash University Law Review* 31(1): 12-36.

Freiberg A and Carson W (2010) The limits to evidence-based policy: Evidence, emotion and criminal justice. *Australian Journal of Public Administration* 69(2): 152-164.

Gelb K (2008) Myths and misconceptions: Public opinion vs public judgment about sentencing. In Freiberg A and Gelb K (eds) *Penal Populism, Sentencing Councils and Sentencing Policy*: 68-82*.* Devon: Willan Publishing.

Gelb K (2011) *Alternatives to Imprisonment: Community Views in Victoria.* Melbourne: Sentencing Advisory Council.

Government of Western Australia, Department of Corrective Services (2013) Code of Conduct for Researchers. Research and Evaluation Committee. Available at: http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/students-researchers/research-code-conduct.pdf (accessed 14 June 2014).

Her Majesty's Inspectorate of Prisons (HMIP) (2012) *Expectations: Criteria for Assessing the Treatment of Prisoners and Conditions in Prisons* (version 4). Available at: http://www.justice.gov.uk/downloads/about/hmipris/adult-expectations-2012.pdf (accessed 18 July 2014)

Jewkes Y (2012) Autoethnography and emotion as intellectual resources: Doing prison research differently. *Qualitative Inquiry* 18(1): 63-75.

Liamputtong P (2011) *Focus Group Methodology: Principle and Practice.* London: Sage Publications.

Liebling A (1999) Doing research in prison: Breaking the silence? *Theoretical Criminology* 3(2): 147-173.

Liebling A (2013) Identity and emotion in a high security prison. *Criminal Justice Matters* 91(1): 22-23.

Liebling A (2014) Prison quality, moral performance and outcomes. Paper delivered to the *19th Council of Europe Conference of the Directors of Prison and Probation Services*, 17-18 June. Helsinki, Finland.

Liebling A and Crewe B (2012) Prisons beyond the new penology: The shifting moral foundations of prison management. In Simon J and Sparks R (eds) *The Sage Handbook of Punishment and Society*: 283-308*.* London: Sage Publications.

Liebling A, Hulley S and Crewe B (2012) Conceptualising and measuring the quality of prison life. In Gadd D, Karstedt S and Messner S (eds) *The Sage Handbook of Criminological Research Methods*: 358-372. London: Sage Publications.

Loader I (2010) For penal moderation: Towards a public philosophy of punishment. *Theoretical Criminology* 14(3): 349-367.

Mackay A (2014) Operationalising human rights law in Australia: Establishing a human rights culture in the new Canberra prison and transforming the culture of Victoria Police. *Law in Context* 31: 261-294.

Mackenzie GI, Spiranovic C, Warner K, Stobbs N, Gelb K, Indermaur D, Roberts L, Broadhurst R and Bouhours T (2012) Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing. *Australian and New Zealand Journal of Criminology* 45(1): 45-65.

Morton S, Phipps D and Nutley S (2012) Using research to influence family services and policies: Issues and challenges. *Families, Relationships and Societies* 1(2): 243-253.

Naylor B (2014) Human rights and respect in prisons: The prisoners' perspective. *Law in Context* 31: 84-124.

Naylor B, Debeljak J and Mackay A (eds) (2014) *Human Rights in Closed Environments.* Special issue, *Law in Context* 31. Sydney: Federation Press.

Naylor B, Debeljak J and Mackay A (forthcoming, 2015) A strategic framework for implementing human rights in closed environments. *Monash University Law Review*.

Naylor B and Harrison L (2014) *Monitoring Closed Environments: The Role of Oversight Bodies*. Melbourne: Working Paper No 3, ARC Applying Human Rights in Closed Environments: A Strategic Framework for Managing Compliance.

Office of the Inspector of Custodial Services (OICS) (2007) *Code of Inspection Standards for Adult Custodial Services.* Perth, WA: OICS. Available at: http://www.oics.wa.gov.au/wp-content/uploads/2013/11/WA_Code_of_Inspection_Standards_v11.pdf (accessed 14 June 2014).

Office of the Inspector of Custodial Services (OICS) (2013) *Vision and Mission*. Perth, WA: OICS. Available at: http://www.oics.wa.gov.au/about-oics/vision-and-mission/ (accessed 14 June 2014).

Owers A (2014) Comparative experiences of implementing human rights in closed environments: Monitoring for rights protection. *Law in Context* 31: 209-227.

Pittaway E, Bartolomei L and Hugman R (2010) 'Stop stealing our stories': The ethics of research with vulnerable groups. *Journal of Human Rights Practice* 2(2): 229-251.

Queensland Corrective Services (2007) *Healthy Prisons Handbook.* Brisbane: Queensland Government.

Rice S, Meyerson D and Ogg K (2014) 'Are we there yet?': Measuring human rights sensibilities. *Australian Journal of Human Rights* 20(1): 67-98.

Roberts L and Indermaur D (2008) The ethics of research with prisoners. *Current Issues in Criminal Justice* 19(3): 309-326.

Rynne J and Cassematis P (2015) Assessing the prison experience for Australian First Peoples: A prospective research approach. *International Journal for Crime, Justice and Social Democracy* 4(1): 96-112. doi: 10.5204/ijcjsd.v3i2.208.

Scheirs V and Nuytiens A (2013) Ethnography and emotions. The myth of the cold and objective scientist. In Beyens K, Christiaens J, Claes B, De Ridder S, Tournel H and Tubex H (eds) *The Pains of Doing Criminological Research*: 141-160. Brussels: Brussels University Press.

Senate Legal and Constitutional Affairs References Committee (2013) *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*. Canberra: Commonwealth of Australia.

State Government of Victoria, Department of Justice (2014) *Sentence Management Manual.* Available at http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/sentence+management+manual+-+part+1 (accessed 16 March 2015)

Sutton J (2011) An ethnographic account of doing survey research in prison: Descriptions, reflections, and suggestions from the field. *Qualitative Sociology Review* 7(2): 45-63.

Sykes G (1958) *The Society of Captives.* Princeton: Princeton University Press.

Tonry M (2011) Making peace, not a desert: Penal reform should be about values not justice reinvestment. *Criminology and Public Policy* 10(3): 637-649.

World Health Organisation (WHO) (2007) *Health in Prisons. A WHO Guide to the Essentials in Prison Health.* Denmark: World Health Organisation.