Human rights in closed environments: understanding the conflicts and tensions in applying human rights in residential institutions.

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ASID 2013 An ARC-funded project
The aims of the project

1. To assess the readiness of closed environments in Australia to incorporate and apply human rights obligations into their daily operations;

2. To evaluate the likely impact of human rights legislation on the functioning of closed environments and identify changes to the operation and functioning of closed environments required to achieve this;

3. To review the work of bodies who have specific responsibilities under human rights legislation and which scrutinise and monitor conditions and treatment of persons held in closed environments; and

4. To develop practical strategies to facilitate compliance with human rights obligations in closed environments.

Sites
Prisons, Forensic Services, **Disability Facilities**
Closed environments

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’.

Preliminary questions in Disability Facilities – Are they closed?

Being free to leave was not a freedom reflected in practice “Freedom, that’s a bit tricky”

... they are free to come and go but the door is locked. Do they have a key to get in and out of that facility? Well… no.

There’s probably guys in [names Unit] who don’t need the doors locked. And half a dozen that do, so the rest… the rest have got to live in the same environment.

Literature/Legislation

• Strong human rights based legislation: domestic, national and international

• Research questions capacity of disability service culture/models/practices to uphold rights (Griffiths & Owen, 2008; Vause et al 2008; French, 2009; French, Chan & Carracher, 2010)
Disability facilities study: Overview

Three ‘closed’ facilities/sites: 2 gazetted institutions; 1 congregate care facility

- Three sets of group interviews were undertaken in each site – residents, staff, managers - separately.

- 9 residents, 13 direct care staff and 8 managers

Reason for placement of residents

- Administrative – placed through planning; vacancy management and/or ‘best interests’ - guardianship

- Judicial – under orders eg STOs, Criminal

Findings

- Closed environments inherently restrict rights; physical environment, administrative, practice

- Regressive ‘where possible’ clause to rights

- ‘Best interest’ /’Duty of Care’ overrides rights
Human rights and their application in disability facilities


Article 12(1) Equality: ‘persons with disabilities have the right to recognition everywhere as persons before the law’; Article 12(2) requires States Parties to recognise ‘that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life

Article 14 Liberty: guarantees the right to liberty, prohibiting arbitrary interference with liberty; further ‘the existence of a disability shall in no case justify a deprivation of liberty’.

Article 19: Choice: States parties must ‘recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community including by ensuring that (a) persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.’

“In an ideal world, [a] balance would be struck for every individual. Ideally you’ve got every individual being assessed as to what level of liberty versus what level of protection…But as soon as you start grouping people together, not only in big institutions but in group homes there’s going to be impositions” (Service manager)
Article 19 CRPD – congregate care – a human rights violation?

Article 19 itself contains a very positive philosophy of independent living and being included in the community (community living). It builds on a more general trend toward restoring voice and power to the individual to determine where s/he wishes to live and with whom. In this sense it builds on Article 12 which requires a reform of traditional legal capacity laws to ensure that the wishes and preferences of the individual are predominant. ..

[I]t embodies a strong presumption that its objectives cannot be achieved in congerated or institutional settings … Congregated settings generally draw attention to the commonality of their residents (disability) rather than to their innate personhood and thereby militate against open intercourse with civil society. (Office of the United Nations High Commissioner for Human Rights Getting a Life – Living Independently and Being Included in the Community, April 2012, p.9)
Findings - restriction of rights: inherent in these environments

Geography and Physical Environment

Last week, [names colleague] and I were here. They were working. We got a phone call ‘Quick [names resident] jumped the fence’. And I said, ‘Where’s he going to go’. I mean, people are so old and exhausted now, they’d never get… never bother to get to the front gate (Direct Care Worker)

So they did put partitions up in those dormitory rooms..[describing the partitions that do not go to the roof that separate bedrooms] (Direct Care Staff)

Administrative/Practice

I call them institutions without gates. They’re very still… what’s the word I’m looking for? Routine (Direct Care Staff)

There’s still some of those institutional practices that create an environment that would near make it impossible [to uphold rights]. You know, the kitchen truck comes around and delivers the meals because the food inspector says that you can’t cook cooked meals in the unit (Manager).

Staffing/Staff practice

You can put all the policies in place and all the frameworks but if you get two arseholes working on shift… …and don’t want to let people… and you know, sit there and eat this and do this and do what... Put you to bed at 5.30 pm, have your tea at 4.00 pm (Manager).

I had a comment passed on, made by somebody about this when we were trying to initiate a fair bit of change. [They said that] There’s too much focus on the client...and stuff and not enough focus on what the staff need (Manager).
Findings - human rights applied ‘where possible’

Ownership of universal human rights not applicable to people with an intellectual disability – subject to regressive clauses eg. ‘where possible’ (Quinn & Degener, 2002 in Griffith & Owen, 2008)

Essentially, in practice, if people were viewed to be too old, too frail or too ‘dangerous’, upholding all of the persons rights was ‘less possible’ (Frawley & Naylor, under review).

Age and History of the resident

Most of the clients here, or residents here have been long term residents who have lived here since the closure of a number of institutions – It’s all they have ever known (Manager)

Containment and Therapy

We have four of our thirty six clients are under [civil orders]. So, so they’re the ones that can’t really walk out the door (Manager)

It’s a massive difference .. because there is no IMI’s, …and saying ‘Injections are more restrictive …’ and us saying ‘Well, if we give an injection, we’re less likely to have them in seclusion’ and you’re saying ‘Seclusion’s worse than injections’. So, we want to keep our injections…’. So, we had that argument for quite a while (Direct care staff)
Findings - rights restricted to protect; duty of care/risk management

Moderating human rights practice to ensure the safety of residents from themselves and from others.

However, there are times when a resident may not make an informed choice about something or may not know of all the repercussions or consequences of a decision ok? And that’s mainly around safety... Or I had a female resident once who the minute she got out that door, she was out there offering herself up for a cigarette... Yeah. So, while she could access the community, she needed to have supervision in the community (Manager)

Staff had very low expectations of the capacity of residents to make informed and safe decisions.

If the door’s left open at nine o’clock at night for instance, they’ll be outside in the middle of winter and I wouldn’t like to be finding them the next morning they’d be like an ice block (Direct Care Staff).

Duty of Care not necessarily well understood ‘all or nothing’ approach not tempered by human rights considerations.

Since 2006, since I’ve been in [high care unit] we have noticed that extra push to create greater liberty for the clients. ...It’s... it’s creating a lot of tension for people who are trying to walk the tightrope between duty of care [and rights] (Direct Care Staff)

When I’m saying duty of care. ...because duty of care must override all that. I’m not talking about rights as such being trodden upon… However, as employees of the department and... as workers we need to be mindful that as a worker I can’t [do] this and I can’t… well, hey you chose to go out. He chose to cross the [highway], what do you want me to do? That’s his right. It’s not his right to get run over and killed (Manager)
Conclusions: Forming and ‘realising’ a human rights approach in disability services

Rights discourse is in its early stages with regards to [intellectual disability] and there is still much to be done both to understand the practical implications of a human rights approach and how it is to be effectively realised (Stainton & Clare, 2012)

Our research: two levels rights must be discussed

1. Rights ‘within’ disability facilitates
   • Fundamental tension between general statements and implementation
   • Look at actual application of rights to issues like; choice of residence; physical environment; administrative practices – from legal and practical perspective. Is the right engaged? Whether/why needs to be limited? Is the limitation justifiable according to legislation (Vic Charter; Disability Act; CRPD) (Frawley & Naylor, under review)

2. Right not to be placed in disability facilities that restrict rights
   • Article 19 – immediate implementation; equal to other articles and not modified by ‘to the extent possible”
   • Domestic legislation (Victorian Charter; Disability Act) legitimates the continued use of residential institutions

+ Focus on developing ‘rights based’ cultures; link up research to strengthen argument, improve practice and abolish rights limiting models and practice
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Publications

Frawley, P & Naylor, B (under review) Human rights and people with disabilities in closed environments

Literature, cases and legislation: http://www.law.monash.edu.au/castancentre/projects/hrce-resources.html

References


