Monitoring Closed Environments: The Role of Oversight Bodies

Working Paper No. 3

Australian Research Council Linkage Grant,
Applying Human Rights Legislation in Closed Environments: A Strategic Framework For Managing Compliance

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1. Introduction

a. Background

In 2008, the Law Faculty at Monash University was awarded an Australian Research Council (ARC) Linkage grant entitled Applying Human Rights legislation in Closed Environments: a Strategic Framework for Managing Compliance. The research commenced in 2009 and was completed in 2012. The ARC project was conducted in conjunction with six Industry Partners in four Australian jurisdictions: the Commonwealth Ombudsman, Ombudsman Victoria, the Victorian Public Advocate, the former Victoria Office of Police Integrity, the Victorian Equal Opportunity and Human Rights Commission and the WA Office of the Custodial Inspector. All are formal oversight bodies, each with external scrutiny responsibilities, including for closed environments, that is, places where people are held in detention and are not at liberty to leave.

The ARC Monash project focused on the major categories of closed environments: prisons, police cells, forensic psychiatric institutions, closed mental health and disability units, and immigration detention facilities. Excluded from the research for practical reasons were juvenile correctional facilities, secure aged care units and military detention.

The aim of the ARC project was to understand how these closed environments, with their inherent risks for individual human rights of detainees, incorporate human rights considerations in managing the conditions and treatment of persons held in the facilities. The project sought information from the different types of facilities across four Australian jurisdictions, two of which have human rights legislation (Victorian and ACT), while two do not (Commonwealth and WA). For Victoria and the ACT, their legislation essentially adopts the rights articulated in the UN International Covenant on Civil and Political Rights (1966). Each Act requires public authorities to act consistently with these rights, and provides for scrutiny of new legislation for compliance with human rights. Government agencies have therefore also been required to review their policies and practices to ensure compliance with these principles. Findings from our interviews with senior policy makers were reported in Working Paper 1, Perspectives of senior management on applying human rights in closed environments.

Other information was collected as part of the project from civil society groups, such as volunteers or community visitors who access closed environments in a variety of ways and have important perspectives on human rights in these settings. Findings from this research were reported in our second Working Paper, The role of civil society in monitoring and overseeing closed environments. The critical role of oversight bodies in relation to closed environments and human rights was also investigated and is the subject of this Working Paper.

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1 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).
The findings are intended to inform ways to facilitate and strengthen the implementation of human rights practices within secure facilities. They will also inform the work of oversight and monitoring bodies, including formal external scrutiny bodies and civil society groups, such as independent visitor schemes and advocacy groups that play a role in relation to people held in closed facilities.

b. The importance of monitoring and oversight in closed environments

Closed environments, that is, secure facilities where liberty is restricted, are all subject to varying accountability arrangements; they are monitored and scrutinised by a range of oversight bodies. The key parameters to consider in relation to monitoring and oversight of these facilities are: who is accountable? For what? And to whom? Thus, in respect of prisons, an inspector of prisons may have a specific mandate to assess the treatment and conditions of prisoners, a health services commissioner would have oversight of the medical regimes provided, while auditors would have a specific role in relation to efficiency and financial matters of the prison. Mechanisms for accountability and oversight of places of detention have been established and expanded over recent decades, such as Ombudsmen’s offices, Public Advocates, and Human Rights Commissions, as well as audit and internal review bodies and grievance/complaint handling bodies. The courts also serve a crucial monitoring role in relation to closed environments by adjudicating alleged breaches of rights. The extent to which the courts are, or could be, used to rectify abuses and prevent future mistreatment of persons in detention is beyond the scope of this paper.

Primarily, external oversight provides an independent, impartial overview of integrity and accountability. External oversight provides a quality control mechanism for internal review processes. It offers guidance on how to deal with complaints and other concerns, on best practice across sectors and remedies. The need to investigate the key role of oversight bodies in more detail was highlighted at the Roundtable on Monitoring and Oversight of Closed Environments held in November 2010, where four themes were examined: formal monitoring bodies, volunteer or ‘civil society’ bodies, the choice and appropriateness of monitoring with a ‘human rights’ lens, and ways of achieving change. The papers from the Roundtable have been published and are available online at http://www.law.monash.edu.au/castancentre/research/hrce.html.

The international community has recognised the importance of external oversight to the prevention of human rights abuses in places of detention. The Optional Protocol to the Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment (“OPCAT”) came into effect in June 2006. It was introduced to bolster the protections provided by the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“the CAT”). It has two key platforms. Firstly, it creates the UN Subcommittee on the Prevention of

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8 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
Torture, an international body with a mandate to visit all places of detention in states parties and make confidential reports and recommendations. Secondly, it obliges states parties to establish one or multiple National Preventative Mechanisms and empower it/them to regularly inspect closed environments. This dual international and national approach represents best practice in the preventative monitoring of places of detention.

Whilst Australia has signed OPCAT, it has yet to ratify it. There were indications that the former Labor Government was moving to ratify. In February 2012, a National Interest Analysis on OPCAT was tabled in the Australian Parliament and referred to the Joint Standing Committee on Treaties. The Joint Standing Committee ultimately recommended in its 2012 report that Australia ratify the treaty as soon as possible. However, in light of the change of government in September 2013 it is unclear whether ratification will go ahead.

c. Overview of this Working Paper

This Working Paper presents the findings of the research conducted with a sample of Australian and New Zealand formal monitoring bodies with varying forms of responsibility for closed environments. It outlines their roles and activities in relation to monitoring the conditions and treatment of persons held in closed facilities. In addition, their role in relation to human rights is considered. The capacity of monitoring bodies to carry out their scrutiny independently and to bring about change is also examined, as are the inherent tensions and challenges that oversight agencies face when monitoring closed environments.

The Working Paper also provides some perspectives on the application of OPCAT, looking at the experience of New Zealand, which has implemented OPCAT, and highlighting some of the differences in the way oversight is conducted under an OPCAT-based scheme.

The project’s focus on five different sectors, namely corrections, immigration, forensic psychiatry police cells and disability, across a number of jurisdictions offers a unique opportunity to look comparatively at the approaches to oversight. The diversity of oversight bodies and their different jurisdictional reach made the analysis a complex task. This paper seeks to identify similarities and differences in approaches to oversight, and to draw out common issues that arise as a consequence of detaining people in a ‘closed environment’.

d. Method

In this Working Paper, responses are analysed from surveys completed by 42 oversight bodies across ten jurisdictions: New Zealand, Commonwealth of Australia, Victoria, Tasmania, Australian Capital Territory, New South Wales, Queensland, Northern Territory, South Australia and Western Australia.

The paper also incorporates analysis of 19 in-depth interviews and focus groups conducted with 23 individuals, the heads/senior officers of 16 oversight agencies working across Victoria, Western Australia and the Commonwealth, with roles
monitoring various different closed environments. The Monash University Human Research Ethics Committee provided approval for both components of this study.

To identify the oversight bodies in Australia and New Zealand that have a role in relation to closed environments, an initial search was conducted with the assistance of staff at the Victorian Equal Opportunity and Human Rights Commission. This raised a number of definitional issues. In particular it was necessary to reach a definition of ‘closed environment’ and to identify the bodies which – directly or indirectly – carried out a role in this field. In conjunction with the Project’s Advisory Group, 85 oversight bodies were identified and invited to participate in the survey. A list of oversight bodies identified to have some role in relation to closed environments is published at the research project website: http://www.law.monash.edu.au/castancentre/research/hrce-monitoring-bodies.html. An earlier report by Richard Harding and Neil Morgan prepared for the Australian Human Rights Commission in 2009 identified places of detention and was also a useful point for commencing the current task. That report noted significant methodological problems in describing the relevant inspection and accountability mechanisms for places of detention in Australia and also found that many accountability mechanisms were not readily ‘visible’.

This paper does not attempt to catalogue comprehensively all the relevant bodies and their current functions. It offers a snapshot of the monitoring landscape in relation to closed environments, a landscape which is inevitably subject to change over time.

i. Surveys

The survey was distributed online in August 2010. A web link to the survey and accompanying explanatory statement was originally sent out to the eighty-five organisations across ten jurisdictions. Hard copy surveys were then sent to any of those organisations that requested this. This was followed up with a reminder call to organisations that had not responded by the deadline. The survey had been developed and piloted in conjunction with the Advisory Group and contained both closed and open questions. These included questions about the source of powers and responsibilities, monitoring roles and activities, human rights issues, and whether recommendations were acted upon. Respondents were also asked about structural independence and accountability, and their perceptions of the oversight body’s effectiveness.

Survey responses were obtained from representatives of almost half the oversight bodies initially identified (42 out of 85 contacted responded – 49% response rate) between Jan 2010 and July 2011. A list of participating organisations is contained in the Appendix. In accordance with the explanatory materials provided to participants before completing the survey, participating organisations agreed to be identified by name. Survey responses were compiled, and the free text responses analysed. The findings of that analysis are presented below. Quotes from free text responses have been utilised throughout the paper to illustrate key points and are identified by organisation name.

13 Harding et al, above n 5.
ii. Interviews

Interviews and focus groups were also conducted with representatives from 16 oversight bodies between January 2010 and July 2012. A list of participating organisations is contained in the Appendix. All interviewees were from agencies that had been invited to complete a survey, although not all these agencies in fact completed the survey. Of the 19 interviews, interviews were conducted with representatives of seven agencies that did not ultimately return surveys.

The aim of the in-depth interviews was to provide a fuller understanding of the role and activities of the oversight bodies, and perceptions and practice of monitoring of human rights compliance in these settings. The taped interviews were transcribed and analysed thematically; material from the interviews is included in the following discussion.

Quotes from the interviews appear below. Participants were given the option to remain anonymous or to identify themselves by name or position, i.e. as representative of their organisation. Quotes have been de-identified unless participants gave consent to be identified.

2. Bodies with jurisdiction to monitor closed environments

A range of oversight bodies have jurisdiction to monitor closed environments in Australia and New Zealand. Oversight bodies working in this space differ greatly in who and what they monitor, although there is clear overlap in their coverage. Some work locally while others have a national focus. Of the 42 survey respondents, 86% operated locally in a state or territory, with the greatest proportion of respondents working exclusively in Victoria (19%), followed by WA (14%), NSW, QLD and SA (10% each), and ACT and NT (7% each). Some focus on only one sector whereas others have a role in relation to multiple closed environments.

Most of the agencies surveyed confirmed that they had specific responsibility to monitor one or more of the closed environments. According to the survey results, psychiatric facilities were monitored by the greatest number of agencies, with 23 out of the 42 agencies (55%) identifying a role there. This was followed by prisons, over which 19 out of 42 (45%) identified a role. Sixteen out of 42 (38%) identified a specific responsibility for secure units for people with disabilities and 13 out of 42

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14 A total of 19 interviews/focus groups were conducted with representatives from 16 agencies. In the case of the Office of the Inspector of Custodial Services in WA, multiple people were interviewed separately on behalf of the organisation. The participants were identified as each having a relevant contribution to make regarding the Office’s past and contemporaneous work. Separate interviews were conducted rather than a single focus group for scheduling reasons.

15 See Part 4 below for a discussion of the overlap between agencies and the impact it has on the effectiveness of monitoring closed environments.

16 This does not necessarily reflect the geographic coverage of oversight bodies with jurisdiction over closed environments.

17 Nine of the agencies stated that they had no ‘specific responsibility’ for any closed environment. This included the Australian Human Rights Commission and Office of the Health and Community Services Complaints Commissioner in South Australia who nonetheless noted that their mandate could extend to complaints and concerns of human rights abuses in immigration detention centres and to prisoners complaining about healthcare respectively. For a discussion of the mandate of the Australian Human Rights Commission see below Part 7(c)(i) Oversight bodies with a specific human rights mandate. There appears to have been differing interpretations of ‘specific responsibility’ as other agencies answered in the affirmative despite having no formal jurisdiction over the closed environments in question.

18 Survey respondents were not asked how frequently their jurisdiction in relation to a particular closed environment was exercised, although see Part 3 below for a discussion of the extent to which certain types of monitoring activities are actually undertaken across all closed environments.
(31%) identified a role in relation to police cells. A much smaller number, only two out of 42 (5%), identified a role in relation to immigration detention.

Generally respondents were established and operated under a formal legislative mandate of some kind. Some agencies, however, had no legislative footing but rather operated under an administrative arrangement within the relevant Department.19

The oversight bodies can be loosely categorised into the following groups:

- Sector-specific bodies;
- Bodies with jurisdiction over particular service providers and/or particular classes of persons;
- Generalist oversight bodies, such as Ombudsman’s offices;
- Bodies with jurisdiction over human rights generally, such as Human Rights Commissions.

These will each be discussed in turn.

**a. Sector-specific bodies**

Sector-specific bodies only existed in relation to prisons. There are a number of specialised prison oversight bodies. Respondents to the survey included the Victorian Office of Correctional Services Review (OCSR), the Queensland Office of the Chief Inspector and the WA Office of Inspector and Custodial Services (OICS).20

**b. Bodies specific to particular types of service providers and/or classes of persons**

Some oversight bodies had a role in relation to the provision of particular services, such as healthcare or disability services. This monitoring function of services in the general community also extended to the service delivery in prisons, mental health and disability facilities.

A number of oversight bodies had responsibility for people detained in police cells. Responses were received from the former Victorian Office of Police Integrity (OPI) (abolished in June 2013),21 the NSW Police Integrity Commission and the South Australian Police Complaints Authority. These bodies had jurisdiction in relation to police conduct and thus their monitoring function in relation to police cells formed only one part of a broader schedule of work. For example, the OPI was charged with ensuring ‘the highest ethical and professional standards are maintained…[and] that members of the Victoria Police have regard to the human rights set out in the Charter.’ The OPI had a systemic review role and reviewed how Victorian Police handle complaints. It also exercised its investigatory and reporting powers in relation to conditions in police cells. In 2005, the OPI conducted a joint investigation with the Victorian Ombudsman on cell conditions at 22 police watch houses.22 The OPI then revisited these cell complexes in 2009.23 The OPI stated in

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19 E.g. The Office of Correctional Services Review sits underneath the Secretary of the Victorian Department of Justice. For a discussion of the structure and independence of oversight bodies see Part 5 below.
20 For a discussion of the different way these bodies were structured see Part 5 below.
21 The Office of Police Integrity has been replaced by the Independent Broad Based Anti-Corruption Commission, which can receive complaints about ‘corrupt conduct’ by public officers, including from persons detained in a police gaol in the legal custody of the Chief Commissioner of Police – see Independent Broad-Based Anti-Corruption Commission Act 2011 (Vic) ss 3(1), 51, 54.
22 See Ombudsman Victoria and Office of Police Integrity, Conditions For Persons in Custody (July 2006), available online at http://www.ibac.vic.gov.au/docs/default-source/opi-parliamentary-reports/conditions-for-persons-in-
their survey response that it was ‘hopeful that ongoing attention…will progressively improve practices and facilities’.

The Office of Police Integrity was disestablished and replaced by the Independent Broad-Based Anti-Corruption Commission (‘IBAC’) between 2012 and 2013. IBAC has jurisdiction over ‘police personnel’ and thereby subsumes the OPI’s role in relation to misconduct by sworn police officers and extends it to include that of unsworn officers.24

Others bodies, such as the Offices of the Public Advocate, had a role assisting particular category of persons, such as persons with disabilities. As a representative of the Victorian Office of the Public Advocate explained, their role has an application to closed environments in that it includes advocacy for people with disabilities and mental illness:

…making a case for reform to situations where other people are subject to restrictions or deprivation of liberty, where there is no formal mechanism for authorising this…

c. Generalist oversight bodies – Ombudsman’s offices

Ombudsman offices across Australia have the legislative function of monitoring government action as a general accountability mechanism. Their primary function is the investigation and prevention of misconduct, maladministration and corruption, and generally upholding the integrity of public office.

In most Australian States and Territories their oversight encompasses the conduct of public authorities or government actors in a number of closed environments, including prisons, mental health and disability facilities. The Commonwealth Ombudsman’s role, dealing as it does with the actions of the federal government, encompasses oversight of immigration detention centres.25

Ombudsman offices can investigate reactively by addressing complaints, and proactively through ‘own motion’ investigations or thematic or systemic reviews. They can also refer to other appropriate authorities when the matter is outside their jurisdiction, or when serious wrongdoing is alleged or involved. Ombudsman offices have wide investigative powers relating to all matters of administration by a Department or prescribed authority.

There is no formal power to require recommendations to be implemented, although Ombudsman offices monitor the implementation of their recommendations when there are adverse findings. Making reports public can act as a lever for action to address the concerns identified. Issues regarding imprisonment more generally are discussed below at 7(b) Monitoring and human rights.

customy---july-2006.pdf?sfvrsn=4 (accessed 4 May 2014); The 22 watch houses visited were those that had cells and which were staffed 24 hours a day.

3 See generally Independent Broad-based Anti-corruption Commission Act 2011 (Vic) s 15(2)(b) and (c).


25 Although the Commonwealth Ombudsman has a mandate to report on long-term immigration detainees under the Migration Act 1958 (Cth), Part 8C, the Ombudsman does not have a specific mandate over immigration detention beyond their general jurisdiction over ‘action that relates to a matter of administration …by a Department or by a prescribed authority’ either in response to a particular complaint as an own motion investigation – Ombudsman Act 1976 (Cth) s 5(1)(a) and (b). According to an interviewee from the Ombudsman’s office, the Ombudsman had exercised their own motion investigation power to examine conditions in detention on a number of occasions and this lead to the grant of distinct funding in 2006 for an Immigration Ombudsman in order to conduct inspections in accordance with the general powers of the agency.
d. Bodies with jurisdiction over human rights

There are a number of human rights standards and principles that have clear application when a person is deprived of their liberty. Oversight bodies with express jurisdiction in relation to human rights, most notably the human rights commissions, hence had some coverage of closed environment/s. For a fuller discussion of the bodies which have jurisdiction over human rights and the role human rights legislation and principles play in informing the work of oversight bodies more generally see Part 7(c) Use and utility of human rights principles in monitoring closed environments below.

3. How do oversight bodies monitor closed environments?

A key aim of this research was to examine the roles and activities undertaken by a selection of oversight bodies in monitoring closed environments. The previous section canvassed the extent to which closed environments fall within the ambit of a variety of oversight bodies’ concern and focus. This section examines the functions that monitoring bodies are empowered to perform and the extent to which these are exercised in practice. This section aims to identify commonalities, as well as key differences, in the powers and practices of the various bodies which work in this space.

Monitoring bodies generally have two broad functions. Firstly, they have an information gathering role – to see how government services are in fact being delivered, either in relation to a particular person or group, or more systemically – through receipt and handling of complaints or through investigations. Secondly, they are tasked with making recommendations in relation to issues identified through that information gathering process.

In order to understand the way closed environments in particular are monitored, it is necessary to examine their role in information gathering and reporting. These activities will be discussed in turn.

a. Information gathering

Oversight bodies that monitor closed environments are empowered to collect information on the operations of those environments in a variety of ways. Survey respondents were given a list of ten formal powers that have been recognised to be important features of robust monitoring frameworks more generally. These included the power to:

- Respond to complaints;\(^\text{26}\)
- Conduct investigations and own motion investigations;\(^\text{27}\)
- Conduct visits/inspections, including free access to documentation and unfettered access to facilities;\(^\text{28}\)


• Conduct thematic and/or systemic reviews; and
• Meet in private with residents/detainees.

Survey respondents were asked to identify which of these powers they had, as summarised in Table 1.

Table 1: Oversight bodies and their formal powers

<table>
<thead>
<tr>
<th>Functions</th>
<th>Formal power (%)</th>
<th>No formal power (%)</th>
<th>Don’t know/no response (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respond to complaints</td>
<td>88</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Investigations</td>
<td>86</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Meetings in private with residents/detainees</td>
<td>83</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>Visits/inspections</td>
<td>79</td>
<td>14</td>
<td>7</td>
</tr>
<tr>
<td>Free access to documentation</td>
<td>71</td>
<td>19</td>
<td>10</td>
</tr>
<tr>
<td>Systemic reviews</td>
<td>69</td>
<td>24</td>
<td>7</td>
</tr>
<tr>
<td>Free access to all areas in closed facility</td>
<td>64</td>
<td>26</td>
<td>10</td>
</tr>
<tr>
<td>Own motion investigation</td>
<td>67</td>
<td>26</td>
<td>7</td>
</tr>
<tr>
<td>Thematic reviews</td>
<td>62</td>
<td>29</td>
<td>10</td>
</tr>
<tr>
<td>Audits</td>
<td>48</td>
<td>43</td>
<td>10</td>
</tr>
</tbody>
</table>

Note: Percentages have been rounded up to the nearest whole number and as such may not add to 100%

The most commonly cited powers were:

• Responding to complaints (88%);
• Conducting investigations (86%);
• Meeting privately with residents or detainees (81%); and
• Undertaking visits or inspections of facilities (79%).

It was considerably less likely for an agency to have the power to conduct reviews (69% for systemic reviews, 62% for thematic ones) and audits (48%) than other powers.

Seventy one per cent of respondents reported that they had the power to obtain free access to documentation held in closed environments and 64% reported that their officers had free access to all areas of closed facilities.

Whilst the formal powers held by oversight bodies gives some indication of their monitoring role, to better understand their work it is necessary to look at the extent to which these powers were exercised in practice.

Respondents were thus asked to identify how frequently it was - often, rarely or not at all - that they undertook each of these activities. As can be seen from Table 2 below, although most bodies had a range of powers for overseeing closed environments, fewer powers were said to be utilised in practice.

29 The role of visits in preventing ill treatment in closed environments has been recognised by the international community with the introduction of the Optional Protocol to the Convention Against Torture, both with the international inspection regime and the inspection role to be served by National Preventative Mechanisms. See specifically Optional Protocol to the Convention Against torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006), art 19(a), 20 (a)-(c); Association for the Prevention of Torture, Establishment and Designation of National Preventative Mechanisms, (2006), available online at http://www.apt.ch/en/resources/guide-to-the-establishment-designation-of-npms/, pp. 14-27 (accessed 4 May 2014).
31 OPCAT art 20 (d).
Table 2: Oversight bodies’ exercise of their formal powers

<table>
<thead>
<tr>
<th>Functions</th>
<th>Those with power who use it often (%)</th>
<th>Those with power who use it rarely (%)</th>
<th>Those with power who don’t use it at all (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respond to complaints</td>
<td>84</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>Free access to documentation</td>
<td>77</td>
<td>17</td>
<td>3</td>
</tr>
<tr>
<td>Visits/inspections</td>
<td>76</td>
<td>24</td>
<td>0</td>
</tr>
<tr>
<td>Free access to all areas in closed facility</td>
<td>74</td>
<td>22</td>
<td>4</td>
</tr>
<tr>
<td>Investigations</td>
<td>69</td>
<td>31</td>
<td>0</td>
</tr>
<tr>
<td>Audits</td>
<td>55</td>
<td>35</td>
<td>20</td>
</tr>
<tr>
<td>Meetings in private with residents/detainees</td>
<td>54</td>
<td>40</td>
<td>3</td>
</tr>
<tr>
<td>Systemic reviews</td>
<td>52</td>
<td>48</td>
<td>0</td>
</tr>
<tr>
<td>Thematic reviews</td>
<td>42</td>
<td>46</td>
<td>12</td>
</tr>
<tr>
<td>Own motion investigation</td>
<td>36</td>
<td>57</td>
<td>4</td>
</tr>
</tbody>
</table>

Note: Percentages have been rounded up to the nearest whole number and as such may not add to 100%

Of those that did have the power to respond to complaints, 84% of respondents did this often, with only 16% rarely dealing with complaints in practice, and none reporting that they did not exercise it at all. The power to respond to complaints was thus the most utilised.

Where a respondent had the power to visit or inspect facilities they were likely to exercise it, with 76% of respondents having this power reporting that they used the power often, and the remaining 24% using it rarely. Again, no respondent stated that they did not use the power where they had it.

It was also common for those who had the power to conduct investigations to do so often (69%) or rarely (31%), rather than not at all (0%).

Other powers, such as auditing, and conducting thematic reviews and ‘own motion’ investigations, were employed far less frequently. Less than half the respondent group had the power to conduct audits, but of those that did, 20% reported that they did not use it. Further, a number of organisations noted that they did not conduct thematic reviews at all despite having the power to do so. While all the agencies that had the power to conduct systemic reviews stated that they used it, close to half did so only rarely. Whilst very few of those with the power to conduct own motion investigations not to use the power at all (4%), almost 60% stated that they only used it rarely.

Although reviewing, auditing and own motion investigation functions of oversight bodies may not be regularly used, this does not mean that they are irrelevant. The infrequency of audits, reviews and own motion investigations may indicate that for these agencies there are in fact few issues warranting review. Further the mere fact that they are not common does not say anything about the impact of those audits or reviews that are conducted, however infrequently. Importantly, the existence of the power can itself encourage agencies being monitored to maintain vigilance in relation to the proper exercise of their authority.

31 This does not take into account any ‘don’t know’ or blank responses.
Two activities – responding to complaints and visiting or inspecting facilities - were amongst the powers most frequently employed by oversight bodies in their day-to-day work. Participating organisations were asked particular questions about each of these aspects of their work. These will each be discussed in turn.

i. Receiving complaints about closed environments

Complaints handling is a vital function of oversight bodies. Hearing complaints in relation to closed environments serves two purposes. Firstly, it provides an opportunity for people deprived of their liberty to express concerns about the provision of a service or the conditions of their detention to a body external to the operator of the facility in order to achieve some form of redress. Secondly, it allows monitoring bodies to collect information about the operation of the facility. As an information gathering exercise its utility is limited to the content of the specific complaints, and the presence or absence of complaints.

Hearing and responding to complaints made about closed environments formed part of the work of a large majority of survey respondents. Most of the respondents who had the power to hear and resolve complaints in relation to closed environments performed this role as part of a broader complaints resolution function. That is, they heard complaints about a number of issues, not just the operation of closed environments. For the majority of respondents complaints about closed environments made up less than half of all complaints made to their agency.

The need for accessible complaints processes was highlighted by a number of participants. As examples of measures to enhance access, the NT Ombudsman and the Victorian Ombudsman have direct phone lines at prisons to the Ombudsman’s office. In Victoria, this is a free service established with the help of Corrections Victoria in 2006. Prisoners in NT are able to use the NT Correctional Services’ Prisoner Telephone System to make free calls to the Ombudsman.

The Victorian Ombudsman observed that this had been successful:

…the advantage of a prisoner being able to pick up the phone between 9 and 5, Monday to Friday is they get a quick response and we will get a quick outcome … 95% of our complaints are dealt with within the first seven days.

One respondent noted that:

… [a] direct phone link to the [oversight body] (similar to that offered by the Victorian Ombudsman) from prison facilities would assist with direct contact with prisoners.

Responding to complaints is a resource intensive exercise for oversight bodies. As the Association for the Prevention of Torture (‘APT’) has noted, bodies that combine complaints handling with preventative monitoring functions, such as

32 The importance of internal and external complaints handling processes has been recognised as part of a human rights framework of monitoring and oversight of places of detention. See for e.g. Penal Reform International, above n 26.

33 The Association for the Prevention of Torture (‘APT’) was founded in order to promote the introduction of international legal instruments to prevent torture. The APT and was instrumental in the drafting, adoption and implementation of the OPCAT and European Convention for the Prevention of Torture. For more information visit Association for the Prevention of Torture, ‘About Us’ available at http://www.apt.ch/en/about-us, (accessed 1 April 2014).
a preventative visiting role anticipated under OPCAT, ultimately are more reactive than preventative. This dual proactive and reactive role may mean that the bodies do not comply with OPCAT. This is because in adjudicating complaints it may be difficult for oversight bodies ‘to maintain the cooperative relationship between … [them] and government officials, upon which the constructive dialogue approach of the OPCAT depends.’ Further, as complaints handling often involves a large workload, it may impede the practical capacity of bodies to conduct more systemic-focused activities. Most bodies (71%) described themselves as either ‘mainly reactive’ or ‘equally proactive and reactive’, compared to the 19% who saw themselves as ‘mainly proactive’.

ii. Monitoring through visits and inspections

Visits and inspections are also important tools for monitoring. For many respondents, visits and inspections provide the main source of information about what happens in the sector they are monitoring.

While there is a difference between visits and inspections (with the latter implying a more rigorous and systemic approach), both were generally considered by respondents to be valuable tools, and enabled issues about conditions or treatment to be raised. As shown in Table 1, over three quarters (79%) of respondents have the power to visit or inspect various secure facilities as part of their work, and a large percentage of those (76%) used this power ‘often’.

External monitoring through visiting was highlighted by one interviewee as providing evidence to government that monitoring bodies provided value in reducing risk. It was pointed out that such external scrutiny:

…actually gives the state better value for money. It’s got to get down to things like value for money because that’s where we’re going to get some purchase, in government and in public opinion… It also helps if they think about issues in terms of the risk of not meeting proper standards. Government does not want exposure to risk and inspection systems can give them value for money.

Unannounced visits (where no warning is provided by the oversight body to the facility when the visit is to occur) can be useful, and the surprise element of unannounced visits is attractive to some oversight bodies. A representative from the Victorian Public Advocate said that:

…we do favour the unannounced visits because it is not so much a case of [being] ready in the building…it’s more how individuals are being treated…the unannounced visits are far more instructive…

Another respondent said:

… Unannounced visits … That’s one way of monitoring… We do some visits but you’ve got to be very careful not to offend management…So…because you can actually get some backlash if you don’t handle it well.

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35 The remaining 10% stated that they did not know or did not respond.
The Victorian Ombudsman’s office noted that regular visits had been replaced with inspections:

*what we do now in terms of inspections is that every prison and juvenile justice detention centre is inspected rather than visited a minimum of twice a year...and occasionally we’ll do unannounced inspection ... so, on one occasion, I turned up at 8pm on a Friday night and introduced myself and said ‘I want to look around’ which created great consternation...but it is part of our job to keep the system honest."

Unfettered access to closed environments is vital for effective independent oversight, and should include opportunities to view facilities and talk privately to detainees and staff.36 The extent to which the oversight bodies were escorted by staff appears to indicate that only a minority had such freedom. About half the oversight bodies indicated that they were escorted – 21% of respondents reported they were ‘always’ escorted, while another 26% stated that ‘often’ they were escorted; 18% reported they ‘sometimes’ were, while 21% and 3% indicated they were ‘rarely’ or ‘never escorted’, respectively.

Most monitoring agencies nonetheless reported that they had power to conduct private meetings with residents and detainees (see Table 1 above). Participants were asked whom their staff usually spoke to during visit. Eighty-four per cent of respondents usually spoke to management, 75% usually spoke to detainees/residents (75%), and 73% usually spoke to custodial and non-custodial staff.

b. Recommendations and reporting

The previous Part discussed some key powers of monitoring powers in the gathering of information regarding the operation of, and conditions within, closed environments. This Part examines the way in which monitoring bodies utilise this information through recommendations and public reports.

Recommendations made by oversight bodies range from the very specific to the general. Recommendations might relate solely to an individual or group of individuals in one facility in response to a complaint made to the body, or they might relate to problems identified at a particular facility. Alternatively, they might relate to broader, systemic issues that exist across the sector. Recommendations may be confined to issues in relation to closed environments or might have broader application to services in the general community, depending on the breadth of the particular body’s jurisdiction.

The way concerns are raised and recommendations communicated by oversight bodies differed significantly across the survey respondents, from informal verbal discussions, confidential reports and internal documents, through to public reports, including reports tabled in Parliament and reports published by the agency themselves. One example of informal discussions was provided by a representative from the Australian Human Rights Commission who noted that their role in monitoring immigration detention facilities involved ‘periodic teleconferences with appropriate Department of Immigration and Citizenship offices...[and] follow[ing]... up on progress with implementation of key recommendations arising from the previous visit.’ As another interviewee highlighted, much of their monitoring role involved

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36 OPCAT, art 20(3) states that ‘A visits-based inspection system also involves free and unfettered access to those places’ [emphasis added]; see also Harding et al, above n 5.
raising concerns in informal discussions, noting that ‘there’s a lot that goes on under the radar … that would never make its way in inspection reports.’

Oversight bodies presented recommendations at various levels – from facility management, to the relevant Department, to the Minister concerned, through to Parliament. Eighty eight per cent of respondents made recommendations to the relevant department, 77% to the facility management, with fewer contacting the relevant Minister (62%) and/or Parliament (35%). Respondents commonly referred matters for consideration at more than one level.

Public reports in themselves have important roles in exposing issues, and in providing public visibility to closed environments. Some agencies were required to produce public reports. For example, the Victorian and Commonwealth Ombudsman’s Annual Reports must be tabled in Parliament. The WA OICS outlined its process as follows:

\[ \text{Recommendations and any response from the administering department are tabled in Parliament, where Members and more often, the Standing Committee on Public Accountability, can inquire as to the department’s progress.} \]

Some agencies, such as the Commonwealth Ombudsman, have a discretionary power to submit other investigation reports to Parliament. Where the statute does not specify, the provision of a public report appears to be a matter for the agency to decide.

As noted above, over two-thirds of respondents said that they made recommendations either to the Minister or to Parliament or both, that is, reports that were actually or potentially public. Only 3% of those surveyed stated reports of visits would ‘always’ be publicly available. A third of respondents (33%) said that reports were not publicly available at all, and a further 55% said they were sometimes or often made available.

If they are to effect change, reports need to be acknowledged, responded to and ultimately adopted. Agencies discussed a number of ways in which the agency could improve the chance that their recommendations would be accepted. One respondent noted that it was important from the outset to negotiate recommendations with the agency to make them implementable. A number of interviewees saw public reporting, both in the initial report on the issue and subsequently reporting on the facility or department’s progress or lack thereof, as a mechanism through which to “name and shame” them into action.

An interviewee observed that publication encouraged agencies to pay more attention to recommendations:

\[ \text{… the moment they know their reports [by the oversight agency] are being published, there are some obligations to indicate that they’re actually doing something and not treated with contempt internally as was [the case] for a while there.} \]

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37 Respondents were permitted to provide more than one response.

38 Ombudsman Act 1976 (Cth) s 19; Ombudsman Act 1973 (Vic) s 25.

Another interviewee from the same body commented that:

... all we can do is make public [the report’s] recommendations and that’s the key thing...it’s a matter of embarrassing the department and the government into doing things...to enhance that opportunity, ...[the oversight agency] will hold press conferences and generally talk on forums....

One interviewee emphasised that ‘it is incumbent on the overseeing or watch dog agencies to make sure the work they do is in the public arena and the only legitimate way we can do that is through a report.’

By contrast, a representative of the Commonwealth Ombudsman’s office believed that the organisation could be effective even in the absence of public reports:

...we had an influence as a significant external player and ...with the most oversight in the immigration detention area...we had an impact on improving the way the department sort of dealt with [issues]...but a lot of stuff we do is not in the public realm, so I think our effectiveness also has been that we don’t have to put out a public report to be effective...we also try to give the feedback to the department on regular basis.

Agencies also highlighted the follow-up work they undertake to maximise the uptake of their recommendations, including post-report monitoring, such as site visits and audits, requiring progress reports from the facility or department, and agency reporting on their assessment of the progress, in addition to behind-the-scenes liaison with the facilities. The OICS noted that it employed specific liaison officers who worked closely with the facilities to achieve progress in the implementation of recommendations.

The Queensland HQCC reported that before finalising an investigation it:

...consults with facilities to agree on the recommendations, correspondence is distributed to the facility advising of the investigation closure with the agreed recommendations and the due date for the first progress report on implementation. The three monthly progress reports are monitored on an ongoing basis until all recommendations are implemented to the satisfaction of the HQCC [and] in the event that insufficient action has been taken to fulfil the intent of the recommendations, [which] the facility has marked ‘completed’, the HQCC will correspond with the facility and may request further action be taken and monitor this action.

Another interviewee reported:

we expect agencies not just to pay lip service, we want to see what they have done...so I can say ‘we will be reporting on this in our Annual Report’...and around 92% are accepted recommendations ...we do follow up on all cases, even minor ones...if there is a commitment to make change, then we will expect the department to provide us with some outcome letter in due course... and they do and there’s a provision in the ... [relevant enabling legislation] which says that if a department doesn’t respond to a recommendation within a reasonable period of time, we can report to the Governor in Council, which means we report to Parliament...we’ve never had to exercise that power.
For some agencies these follow-up reporting, auditing and/or visiting processes are mandated by the legislative scheme governing their activities. For example, according to the Office of the NSW Ombudsman:

*for formal recommendations, the report on findings would be made to the relevant department, and to their Minister, with recommendations for advice on implementation; if the matter is under the Ombudsman Act and recommendations are not accepted and no good reason is proffered…there is provision in the legislation for this fact to be raised in Parliament.*

### 4. Interconnections and overlap between oversight bodies

As highlighted in the previous discussion, closed environments may be subject to oversight by a number of bodies. Almost two thirds (60%) of survey respondents believed there was overlapping jurisdiction between them and other oversight bodies.

This network of interlocking and overlapping agencies leads to what Harding and Morgan refer to as a ‘patchwork’ of oversight of closed environments. Scott has noted that where accountability schemes include a network of bodies with overlapping jurisdictions there is a real risk of duplication and gaps in coverage. The interrelationships and jurisdictional demarcation between oversight bodies can impact on how they perform their roles. There can also be benefits of such a ‘safety net’ of coverage, although overlapping roles may fragment the responsibility for oversight. The quality of coordination and collaboration between oversight bodies dictates whether these intersections and differences are capitalised on, rather than merely leading to confusion and uncertainty.

For example, as one interviewee noted, there is a risk that patients with multifaceted needs, such as an intellectual disability as well as a mental illness may fall through the gaps. The interviewee argued that there is:

>a need for the complex needs type approach to say …it doesn’t really matter who’s responsible as long as the system as a whole accepts responsibility.

It has been observed that the various oversight mechanisms can be ‘in tension with each other, in the sense of having different concerns, powers, procedures and culture which generate competing agendas and capacities,’40 A number of interviewees highlighted the network of oversight bodies operating in closed environments and the way in which the interactions between bodies impacted on the effectiveness of the monitoring project. One interviewee noted that ‘there are a variety of [oversight] mechanisms out there…but not necessarily well coordinated’. Others saw the connections as a positive, highlighting the ‘sharing of information, understanding of the environment that can influence the policies and advocacy work that we all do in our respective spaces.’

The survey results indicate that oversight bodies generally have referral pathways in place. The New South Wales Mental Health Review Tribunal (MHRT), for example, reported that it works with and makes referrals to the Health Care

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40 Scott, above n 4, 57 citing Christopher Hood, Colin Scott, Oliver James, Tony Travers and George Jones, *Regulation Inside Government* (1999), 119.
Complaints Commission, Official Visitors and the Medical Board. Another respondent noted that ‘most commonly, complaints are referred to the Ombudsman, the health and disability commissioners and the police complaints authority, who each have a specific mandate to investigate complaints’ in relation to the various sectors. Most often mentioned were referrals to the Ombudsman, Human Rights Commissions, mental health tribunals, and crime and corruption bodies.

As will be discussed in Part 7, the ‘dense webs or networks of accountability’ that now exist to ensure achievement of key government objectives include those that relate to the humane treatment of people who are deprived of liberty.

Where there are numerous bodies that have a role in relation to a closed facility, people will not necessarily know which organisation to approach for assistance. A number of participants noted the issue of complainants approaching their organisation where they had no jurisdiction, hampering the timely and effective resolution of disputes. This can have significant resource implications for the agencies too. One agency, for whom only around half of all approaches to the organisation annually fell within their jurisdiction, noted ‘we… perform a useful public service function in guiding people to …if we can, to the right agency or set of circumstances.’ This highlights the importance of better communication to prospective complainants, and amplifies the need for strong networks and accurate referrals.

5. Accountability and independence of oversight bodies

The previous sections examined the jurisdiction and functions of oversight bodies and the ways in which they interact with each other. This section looks at the ways in which oversight bodies are governed, and the impact of their governance structures on their capacity to fulfill their monitoring role. Interrelated issues are the accountability of monitoring bodies to government, and their independence from government and the agencies being monitored.

Accountability is a central feature in the provision of public services, being the duty to account publicly for actions and the discharge of obligations. Just as the departments and people that manage closed environments must be accountable for the running of the facilities, oversight bodies must be accountable for their decisions and actions.

No one model of accountability applies to all oversight bodies that monitor closed environments. Respondents reported a range of accountability avenues. Sixty-two per cent said that they were accountable to the Minister and a similar proportion reported to Parliament (64%). Only 36% indicated that they were accountable to a government department.

Accountability includes transparency of activities and expenditure of public money. One way such transparency is achieved is through reporting. Most oversight bodies surveyed produced reports on their activities, some of which are publicly available through websites and Annual Reports.

41 Scott, above n 4, 58.

Oversight agencies must be held to a high standard of accountability, but it is also important that their capacity to conduct their monitoring role is not constrained. A cornerstone of public confidence in the ability of oversight bodies to carry out their role and functions is their independence from the departments and facilities that they monitor. The importance of independence to effective monitoring has been recognised by the international community. Under OPCAT, National Preventative Mechanisms responsible for inspecting places of detention must be ‘functionally independent’. This means they must have independence in respect of funding, independence of organisational location (whether within or outside a government department), and their own powers and resources to carry out tasks and report their findings. There is a tension, then, between the principles of independence and of accountability - between allowing oversight bodies the autonomy to be fearless in their criticism as necessary, and ensuring that they do not act beyond their mandate. This tension was illustrated by one respondent, who noted that whilst they reported to Parliament through the Minister of Justice, ‘the Minister cannot dictate what we do’.

The interviews and surveys highlighted that oversight bodies have a variety of organisational structures, and varying degrees of administrative and financial independence from the Departments that manage the closed environments they monitor. A few agencies, notably the Office of the Custodial Inspector in WA, operate as independent statutory authorities with a distinct source of funding, administration and legislative mandate. The OICS noted that their ‘statutory autonomy and direct access to Parliament … provide independent inspection of systemic issues within custodial closed environments.’ Since the research was completed, the NSW government has created an independent inspectorate modeled on OICS and its international counterparts.

Other bodies relied in part or in whole on funding from the Department/s they monitored. One agency noted that despite having its own powers and mandate, it was ‘resource poor’ and reliant for additional funding on the Department of Health. As noted below at 8.2, underfunding can significantly limit the effectiveness of oversight bodies. The NSW Mental Health Tribunal noted that a Department’s control of budget and resources can ‘lead to [a] perception of control and subservience.’

Others bodies, such as the Office of the Chief Inspector in Queensland and the Office of Correctional Services Review in Victoria, are located within the relevant Department but separated from the operational arm in some way. For example, the Victorian Chief Psychiatrist sits within the Department of Health but operates separately to the health services themselves, which are governed by local boards. Similarly, the Office of Correctional Services Review sits within the Victorian Department of Justice alongside, but separate to, Corrections Victoria. It monitors and reviews the activities of Corrections Victoria, but is accountable directly to the Secretary of the Department and not to the Commissioner for Corrections.

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43 See generally Smith et al, above n 42.
44 OPCAT, art 18(1).  
48 See Inspector of Custodial Services Act 2012 (NSW).
The OCSR noted that they were ‘very conscious’ of the need for objectivity in their work, especially because they were not an independent statutory authority. They observed that their position within the Department had the benefit of enhancing their practical access to information for the purpose of conducting reviews and investigations.

6. What constitutes effective monitoring of closed environments?

To this point the paper has considered the common features of oversight bodies, their jurisdiction, powers and functions, their interconnections and mechanisms for accountability and independence. The next Part looks at the effectiveness of monitoring. It also reports some of the successes monitoring bodies report in carrying out their role in this challenging area.

Effectiveness refers to the extent to which an institution meets its goals. Whilst the oversight bodies surveyed had their own distinct missions, generally their aims could be seen as challenging or preventing harmful practices in closed environments, and improving the conditions and treatment of persons held there.

Most survey respondents (71%) believed they were at least relatively effective (56% relatively effective; 28% very effective); however 14% believed they were relatively ineffective. Respondents had many suggestions for ways to improve effectiveness. There were two key points of broad agreement: many respondents said that in order to be effective in bringing about change they needed to have some way of enforcing recommendations, and that they needed to be better resourced. These points will be further elaborated.

a. Power to enforce compliance with recommendations

One measure of effectiveness of monitoring bodies is the extent to which their recommendations are ultimately implemented. Monitoring bodies do not usually have power to require the implementation of their recommendations. This is a consequence of their status as separate from, and independent of, executive government. Nevertheless, the majority of respondents reported that their recommendations were ‘always’ (15%) or ‘very often’ implemented (61%), while 15% stated that they were ‘sometimes’ implemented. Only three respondents reported that their implementations were never or rarely implemented. One respondent observed that ‘over the past six years, every formal investigation we have conducted into closed institutions has produced results’.

However, when asked how they would make the monitoring of closed environments more effective, many identified gaps in their powers, most notably in their inability to attach consequences to the failure to implement recommendations. As noted earlier, agencies spent considerable time and effort on follow-up activity, monitoring progress in implementing recommendations and trying to encourage facilities and departments to comply in the absence of the power to enforce compliance. The Office of the Senior Practitioner Victoria suggested the way to enshrine human rights in closed disability facilities would be to ‘link recommendations for implementation to funding or penalty awarded to providers.’ A representative from the Health and Community Services Complaints Commission of South
Australia commented that greater effectiveness could be achieved by legislating powers to issue a public report identifying a service provider and the breach in the event of unreasonable non-compliance with their recommendations.

b. Resourcing

Many respondents felt that their capacity to affect change was constrained by inadequate resourcing. A number of respondents said they were not always able to exercise powers, even when warranted, because of a lack of financial or operational capacity. When respondents were invited to comment on what would make the monitoring of closed environments more effective they often mentioned the need for more resources. Respondents were also asked specifically about the adequacy of their current resources and 59% considered them to be inadequate. One noted that ‘current resources enable a barely adequate level of monitoring…but closed environments deserve more than that and so additional resources would improve that’. Another commented that ‘every year it is a struggle to deal with an increasing number of complaints…without an increase in resources’.

c. Successes

Despite concerns about implementation and resourcing, oversight bodies reported on numerous instances where they had been successful in achieving changes in practices. Some of these successes are outlined below.

Examples included the provisions of basic toiletries, reasonable access by detainees to telephones and letter writing facilities to contact legal representatives, family and complaint bodies, and access to television. Improvements following the intervention of oversight bodies also included protecting detainees’ privacy, establishing seclusion registers on wards, changing complaint handling procedures and improving equipment/furnishings and refurbishment of accommodation. The Public Advocate ACT noted the problem of trying to …’maintain activity within client groups who do not have decision making capacity…[yet] have implemented a number of improvements in relation to mental and disability facilities.’

One interviewee relayed an anecdote related to conditions in police cells in a regional town in Victoria:

I jumped in a car, went up and had a look …the Ombudsman wrote to the Chief Commissioner saying these conditions there were appalling… the conditions were dangerous for not only prisoners but for police officers … they were built in the 1860s and had not been renovated that I could see…there’s a new police station at Kyneton now.

The Victorian Office of Correctional Services Review listed a number of changes they had instigated in prison settings, including refurbishment of additional cells to remove hanging points; increased ‘run out’ times in a prison management unit; improved reporting of incidents such as air conditioning problems on prisoner transport; and clear requirements how prisons report and respond to allegations of sexual assault.

One WA respondent noted the new ‘focus on well-being and not just on security’ in the prison sector since the death in custody of an Aboriginal elder, Mr. Ward. Mr. Ward suffered third degree burns and ultimately died of heatstroke while being
transported in the back of a metal-lined prison van without air conditioning. The interviewee suggested that the adverse media coverage and subsequent legal action led to the expansion of the agency’s monitoring role and a change in Departmental philosophy regarding prisoner transport.

As these illustrations show, the work of oversight bodies has led to many measurable improvements to the conditions in closed environments and the way detainees/residents/patients are treated. The next section further explores the role of monitoring bodies in protecting the human rights of persons held in closed environments.

7. Monitoring and human rights

a. Background

There are a number of key human rights principles contained in international human rights treaties which Australia has ratified, that are directly relevant to persons held in closed environments. These include the right to be treated with humanity and respect for one’s inherent dignity when in detention, and the right not to be subjected to cruel, inhuman or degrading treatment or torture. In order to be given legal effect in Australia, these rights must be enshrined in domestic legislation. These and other civil and political rights are formally protected in the ACT and Victoria under the Human Rights Act 2004 (ACT) (“The HRA”) and the Charter of Human Rights and Responsibilities 2006 (Vic) (“the Charter”) respectively. As noted above, this research also encompassed the perspectives of a number of New Zealand agencies. New Zealanders have had the benefit of formal rights protection for over a decade, under the New Zealand Bill of Rights Act 1999 (NZ) and Human Rights Act 1993 (NZ). These statutory bills of rights not only outline key rights but also oblige public authorities to act in accordance with them, and take them into account when making decisions. This model for formal rights protection is not immune to criticism, especially around its lack of enforceability. However, the ‘dialogue’ model, as it is known, has been recommended for adoption in other states and territories and nationally.

This Part examines this rights framework as it applies to closed environments in Australia and New Zealand and its applicability to the monitoring project. It first canvasses perspectives of oversight bodies on the human rights issues that arise in closed environments. Next it asks whether oversight bodies are employing human rights principles in their work and whether such principles are making a difference to conditions in the facilities themselves. In doing so, it explores oversight bodies’ perspectives on the utility of rights language and the impact of formal rights

49 Corrective Services WA and the private provider G4S were each fined $285,000 for breaching their duty of care to Mr. Ward. Nina Mary Stokoe and Graham Powell, the prison transport officers, were also personally fined $11,000 and $9,000 respectively.

50 ICCPR, art 7;

51 ICCPR, art 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (“CAT”).

52 See for e.g. Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds.), Contemporary Perspectives on Human Rights Law in Australia, (Thomson Reuters, 2013) 37-70.

legislation on their monitoring efforts. Finally, it looks more closely at the international human rights monitoring framework contained in OPCAT.

b. Perspectives of oversight bodies on rights issues in closed environments

As noted above, one key role of oversight bodies is to gather information on how places of detention are being run.54 This section presents the perspectives of oversight bodies on the most prevalent human rights issues, as well as their reflections on balancing rights against competing considerations in places where a person’s liberty is constrained.

i. Key human rights issues

Survey respondents were asked what their organisation perceived to be the main human rights issues for people held in closed environments. They were given a list of 17 civil and political rights and asked to rank them in order importance. The most frequently mentioned rights were:

- The right to humane treatment when deprived of liberty;55
- Freedom from torture and cruel inhuman or degrading treatment or punishment;56
- The right to life;57
- The right to non-discrimination, equality before the law and equal protection of the law;58
- Freedom from arbitrary detention;59 and
- The right to security of the person.60

The interview discussions provided an opportunity for some agencies to articulate practices of concern in terms of the rights of persons in closed environments. These concerns differed considerably across the five sectors. Some are highlighted here as illustrations of agency priorities.

Prisons

A major issue highlighted in relation to prison was overcrowding. As one agency noted:

…the critical thing about overcrowding is doubling up, two-up in a cell that was originally designed for only one…nothing wrong with two people sharing a cell provided it is properly fitted out…and there’s proper space…what tends to happen is these guys have to go to the toilet in the middle of the night, they do it in full view, the other person’s got the smell of it all…it’s those kinds of human rights and decency…they keep cramming extra beds into prisons but the other services, medical services for example lag behind...

Even where the interviewee did not describe double bunking directly as inhumane or degrading, that is, they did not employ human rights language, they

54 See above Part 3(a).
55 ICCPR, art 10(1).
56 ICCPR, art 7.
57 ICCPR, art 6(1).
58 ICCPR, art 26.
59 ICCPR, art 9(1).
60 Ibid.
used a focus on risk to draw attention to the issue of overcrowding.\textsuperscript{61} As one interviewee noted:

\textit{it is those sorts of things that you always keep an eye out for…you would go in and say that’s not a safe design. I am seriously worried, for example, about how people are getting up to [the top bunk]…and the lack of room.}

The OICS raised specific concerns about Indigenous people who are held in prisons. Human rights issues for Indigenous people take many forms. As one representative noted, many of the issues experienced by Aboriginal prisoners are related to their removal from country, and the corresponding dislocation from their identity, language and culture. According to the interviewee, the prisons struggled to recognise Aboriginal culture in their policies and decision-making, most notably in relation to requests for leave to attend funerals. As the interviewee noted:

\textit{Culture is very broad in the Aboriginal community and cultural obligations means attending funerals. This should be part of human rights …that right to attend funerals… but there are limitations on who can go to funerals in WA…the white community does not understand that this is the most significant event for Indigenous people.}

Another example related to culturally appropriate food:

\textit{[T]raditional food is very important to Indigenous people and the [corrections department] has a great deal of difficulty in meeting that…it needs a lot of working through…and we’ve been pushing the issue of food for a long long time…it’s not something you fix straight away because cooking kangaroo for example in kitchens smells, it smells bad [to] many non-Aboriginal people.}

The interviewee noted that private prisons had demonstrated, by offering a choice of food every day, that it was possible to accommodate different diets. In relation to language, the interviewee noted:

\textit{…Aboriginal people cannot speak or are not encouraged to speak their language in prisons…the man from Kalumburu comes down here and wants to lingo with his mob, can’t because the system won’t allow it…So, my countrymen and me cannot talk in lingo because it’s not allowed and that’s a denial of human rights… Aboriginal prisoners believe they have a right to speak their language…}

The interviewee made the point that the low level of literacy amongst Aboriginal prisoners was evidence that their rights were not being addressed. Indigenous prisoners ‘have rights to access education. Not to be put down at the back…they should be able to have a right to be able to read…’ Illiteracy also inhibits Aboriginal prisoners’ capacity to access to complaints mechanisms. As the interviewee noted, ‘it is your right to complain, but hang on, you only write it…’

\textsuperscript{61} For a fuller discussion of the way human rights language was employed and/or endorsed by respondents see Part 7(c)(i) below.
Police cells

An issue that was raised by interviewees, and has subsequently received increasing attention in the media and the courts, is the impact of prison overcrowding on police cells.62 As the OPI explained, the overcrowding leads to a backlog of remand prisoners in police watch houses not designed or staffed to hold large numbers of remandees for long periods.

The OPI also noted the issue of deaths in custody in Victorian police cells and past instances of police misconduct in the handling of internal investigations into the deaths. Conditions in police cells were stated to ‘var[y] considerably from station to station, both in terms of the physical state of the cells and the standard operating procedures in place.’ As the OPI noted, ‘your treatment in a police cell will depend on where you… are lodged.’ The standard operating procedures dictate other matters relevant to rights including the number of visits:

[whether you have access to a razor so you can shave before Court… Whether or not you get your bra stripped off you… get to read a book or a newspaper, play… play cards… the quality of the food you eat.

Closed disability facilities

Some interviewees suggested that housing persons with disability in closed facilities with locked doors was often not appropriate at all. Many issues were seen by interviewees to be a product of paternalism or risk aversion by service providers and staff. Issues highlighted by interviewees included staff padlocking the fridge to stop residents eating too much and making themselves sick, keeping wheelchair table tops down in order to feed patients who refuse to eat, and restricting romantic and sexual relationships or associations between residents. Other interviewees were concerned about residents’ privacy.

Secure mental health facilities

Some interviewees were concerned that closed mental health facilities were being used to house persons who need not be subjected to that deprivation of liberty, simply because of the unavailability of appropriate alternative accommodation in the community. Another key issue was the use of restrictive interventions for behaviour management and punishment rather than treatment.

Immigration detention facilities

The primary concern of interviewees who monitored immigration facilities was the policy of mandatory detention. Other concerns included the use of private providers and the difficulties this raised in ensuring detainees were being housed in adequate conditions, had services to support their needs, and were treated fairly. One issue highlighted was a lack of clarity in the roles of the various bodies - the Department, the private provider, and other on-site agencies contracted to provide physical and mental health services on-site. But, as a representative from the Commonwealth Ombudsman noted:

62 See for e.g. Jane Lee, Nino Bucci, Adam Cooper, ‘Justice System “Crumbling”’ The Age (30 October 2013).
Immigration can’t just wipe its hands of its duty of care to detainees purely because they’ve contracted out the service of detention to Serco and IHMS and the other providers.

ii. Balancing rights with other considerations

General principles of human rights law provide that most human rights are not absolute and need to be balanced against other human rights, as well as other countervailing interests in a society such as public health and national security. In those jurisdictions with formal rights protection (Vic and ACT), the law specifies that rights may be restricted by ‘reasonable limits set by laws that can be demonstrably justified in a free and democratic society’.

Closed environments generate particular tensions by virtue of the need to maintain the security of the facility. A number of oversight bodies discussed the difficult balance that is involved in upholding the rights of a person held in closed environments when they come into apparent conflict with other rights.

One respondent noted how the exigencies of security could bring rights into conflict:

…in one case the human rights agency came in [to prison] and said, ‘It’s degrading for people to be walking around with an electronic monitoring device’. But the flip side that you have to put against that is that systems of this sort can potentially free up movement around the prison. So, prisoners may be freer to move around without escorts than they would otherwise be. These systems can also help to track responsibility for incidents; for example, in knowing where a suspect was at the time of an alleged assault on another prisoner.

Another example, given by another representative of the same organisation, was the prospect of banning smoking in prisons. They noted that:

in a prison environment … human rights is not…not ignored but is removed…and it can cause dilemmas in trying to work out our best you know? An example of that is smoking…having prisoners stop smoking. Well, we know the health reasons for banning smoking but doesn’t this also impinge on their human rights?

Practical and resource issues can also be hurdles to the full protection of rights. The Ward case in WA, for example, led to improved forms of transport for prisoners, but indirectly led to constraints on travel due to the increased cost. Oversight agencies gave other examples of such dilemmas.

Improvements to prisoner transport in WA were welcomed by oversight agencies but were also reported as having unintended negative consequences. As it is described by an oversight agency:

…on the one hand, [prisoner] transport has improved enormously…but when they introduced coaches as opposed to these horrible…tin boxes, they would have maybe 10-15 prisoners on a coach…they would have them in handcuffs and they also had a leg restraint…we had this absurd situation where the buses wouldn’t fit in the

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64 See Charter of Human Rights and Responsibilities 2006 (Vic) s 7(2) and Human Rights Act 2004 (ACT) s 28(1).

sally port, the secure entry point to the prison, so they were unloading them outside the sally port and they had to walk through...in my view it was degrading to see them with leg restraints... they are all Aboriginal people, shuffling down the steps...walking into the sally port. It also seemed unnecessary to use restraints as the majority of them were minimum security [prisoners].

c. Use and utility of human rights principles in monitoring closed environments

The preceding section focused on issues perceived by oversight bodies to be of concern in closed environments. This section looks at the use and utility of rights principles in the monitoring project. For this discussion it is convenient to group the oversight bodies into three categories:

- Those that have a specific ‘human rights’ mandate, such as Human Rights Commissions;
- Those without a specific human rights mandate but that nevertheless operate in jurisdictions where there is formal human rights protections (Vic, ACT and NZ); and
- Those without a specific human rights mandate that operate in jurisdictions without formal human rights protections (Cth, WA, NT, SA, Qld, NSW, Tas).

For each category of oversight bodies this section addresses four key, interrelated questions:

1. How do human rights principles inform their work, if at all?
2. Is human rights language useful?
3. Does or could human rights legislation make a difference to their monitoring?
4. Have the respondents been effective in assisting closed environments to adopt human rights principles in policy and practice?

In general, oversight bodies appear to use human rights principles in different ways with varying degrees of success. Many – though not all - oversight bodies are either required, or have voluntarily elected, to adopt human rights standards as a benchmark against which to measure their own performance, and/or the performance of the department/provider operating the closed environments and the conditions therein. More survey respondents considered that human rights legislation currently facilitated their monitoring work, or could do so in future, than those who did not. Further, a majority of survey respondents classified themselves as having been effective or at least satisfactory in assisting closed environments to implement standards, policies and practices that incorporate human right principles.

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66 In Victoria and the ACT a public authority must not act in a way that is incompatible with a protected right or fail to give proper consideration to a protected right when making a decision: Charter of Human Rights and Responsibilities 2006 (Vic) s 38(1); Human Rights Act 2004 (ACT) s 40B(1). The definition of ‘public authority’ includes ‘an entity established by a statutory provision that has functions of a public nature’ as well as public officials in Vic (Charter of Human Rights and Responsibilities 2006 (Vic) s 4(1)) and includes ‘an entity whose functions are or include functions of a public nature’ and an ‘administrative unit’ in the ACT (Human Rights Act 2004 (ACT) s 40(1).

67 An analysis of qualitative responses to the question revealed that 45% considered that it could be or was presently useful, and 29% indicated that it would have little or no impact on their role. One was unsure of the impact, and the remaining respondents gave an answer that was inapplicable or no response.

68 10% said they were very effective, 36% said they were relatively effective and 26% said they were ‘about right’. This was compared to 17% who said they were relatively ineffective and 0% who said they were ineffective.
These findings are analysed in relation to each category of oversight bodies below.

i. Oversight bodies with a specific human rights mandate

Generally

Some oversight bodies have a specific mandate over human rights. The clearest example of bodies with specific human rights functions are the human rights commissions which exist in Victoria, the ACT, at a national level, and in New Zealand. They are tasked with promoting and protecting human rights. Their ability to monitor closed environments stems from human rights and/or anti-discrimination legislation. The Commissions serve a combination of preventative and reactive aims, providing education and policy, complaints handling and conciliation services.

Predominately such bodies operate in jurisdictions where there is formal rights protection, although not exclusively so. For example, the Australian Human Rights Commission operates, in the absence of formal rights legislation at the federal level, under anti-discrimination legislation and other non-binding statements of human rights.69 As will be seen below, the Victorian Human Rights Commission (‘VEOHRC’) predates the introduction of the Charter, and continues to derive part of its human rights mandate from other legislation, including anti-discrimination laws.

Below is a discussion of the role of each of the bodies with specific human rights mandate, grouped by jurisdiction - Victoria, ACT, Commonwealth, NZ respectively. This section canvasses their functions as well as their perspectives on the utility of rights language and of a formal rights framework.

Victoria

The VEOHRC has jurisdiction under three Acts in Victoria: the Equal Opportunity Act 2010 (Vic) (‘the EOA’), the Charter of Human Rights and Responsibilities 2006 (Vic) and the Racial and Religious Tolerance Act 2001 (Vic). They have a role to educate people about each of these laws. Their conciliation function is limited to cases of discrimination, sexual harassment, racial and religious vilification and victimization. The Commission has an investigatory function to look at ‘discrimination, sexual harassment or victimisation [of a serious nature] that impacts on a group or class of people that can’t be resolved readily through an individual complaint’. The Equal Opportunity Act 2010 (Vic) gives them ‘a bit more flexibility … [to] do things like report to Parliament, report to the Attorney General.’ A representative from VEOHRC noted that ‘issues in closed environments can come under any of [the three Acts], depending on the circumstances.’

The VEOHRC noted that the Charter had expanded its monitoring work beyond the largely reactive complaint-handling role conferred under anti-discrimination legislation:

...our role in monitoring and reporting on the operation of the Charter in Victoria has given us a role in this area to look at system-wide issues across public authorities, to undertake research, and to report publicly...previously our role was focused on individual complaints of discrimination.

69 The ICCPR and some, but not all, of the international human rights treaties to which Australia is a party, are annexed to the Australian Human Rights Commission Act 1986 (Cth).
The Charter also expanded the role of other existing oversight bodies to encompass a specific human rights function. For example, under s 13 (1)(a) of the Ombudsman Act 1973 (Vic) the Victorian Ombudsman now has the power to inquire into or investigate whether any administrative action is incompatible with a human right as set out in the Charter. Since 2006 the Ombudsman’s reports have included a discrete consideration of human rights.

The introduction of the Charter also expanded the mandate of the former Office of Police Integrity in Victoria to include a role in ensuring ‘that members of Victoria Police have regard to the human rights set out in the Charter’. This role has since been transferred to IBAC.70

In discussing the Charter and its impact some bodies reflected on the utility of rights language. For VEOHRC, rights language had a particular symbolism and hence purchase with those who operate facilities. As the interviewee noted it was ‘not something that any agency really wants to have on the front page of The Age… that they’re breaching people’s human rights.’ The VEOHRC interviewee also suggested that the notion of entitlement inherent in some people’s understanding of “rights” was hard to reconcile with the Charter model of rights protection that does not allow people to sue when their rights are breached. As they noted:

*It is hard in the Charter context to… to help manage people’s expectations about it…particularly when you’re in a prison… in a very rights-focused and rights-restrictive framework… your engagement with public authorities on these issues might not actually deliver what you think they might deliver. Because we don’t have … the cause of action. It’s not the same framework that people might expect from watching American television.*

Overall, the Victorian bodies surveyed and/or interviewed felt the Charter had had a positive impact on their monitoring work.72 A representative from VEOHRC described the Charter as a ‘practical tool to engage with management’, one that offered ‘a framework and an impetus to actually drive that [change] within the organisation’. According to the interviewee, the Charter had the effect of taking rights out of the realm of esoteric international norms and giving them local application and relevance:

*I*I’s a slow progress in terms of using those instruments to achieve culture change but they certainly are tools to do that and I think…. it gives people a lot more to work with than just say having the International Human Rights framework sitting out there quite removed. To be able to engage with providers in the Victorian space, that… these are laws the Victorian Parliament has passed you need to comply with … regardless of the… strength and weaknesses of enforcing them. They’re legal obligations that the organisations have… that the Ombudsman and Auditor General can look at and take very seriously. So, being able to bring more of that direct legal framework to bear in the conversation…which I think has helped build it into management practices, [and into] the planning and auditing of work… So, it makes it a much more mainstream part of the way we do business …across the public sector in Victoria.  

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70 Police Integrity Act 2008 (Vic) s 8(1)(d). This role has since been transferred to the new Independent Broad-Based Anti Corruption Commission, see Independent Broad-based Anti-corruption Commission Act 2011 (Vic) s 9(3)(b)(iii).


72 When asked whether formal rights legislation facilitated or hindered their work all three Victorian survey respondents with a specific human rights mandate – VEOHRC, the Victorian Ombudsman and the OPI – noted that the Charter had facilitated their work in some way.
In their interview a representative from the Victorian Ombudsman observed that all Ombudsman work could be seen as addressing rights, but that the statutory power in relation to the Charter made this explicit:

Ombudsman work by its very nature is dealing with human rights and before the Charter they weren’t labelled human rights …we’ve always been mindful of how the individual is being treated…and now we measure that against the specific provisions of the Charter…it is a good discipline to be able to do that…most times we are looking at what’s fair and what’s reasonable and in that category, does it impact on a person’s human rights.

The OPI reflected that the Charter:

has increased Victoria Police’s awareness of human rights issues and has made the organisation more responsive to OPI’s oversight work in this area. The addition of human rights to the Objects of the Director, Police Integrity, has also given OPI a clear mandate in this area which cannot be ignored by Victoria Police.

Both the Victorian Ombudsman and the OPI reflected positively on their effectiveness in embedding human rights principles into police policy and practice. VEOHRC noted that, whilst its training and reporting ‘have helped to facilitate some changes and have seen the incorporation of human rights into specific policies’, they were still not having a broad enough impact at the time of survey.

ACT

The ACT Human Rights Commission was created by the HRA. It is responsible for identifying and examining issues that affect the human rights of vulnerable groups in the community and reporting them to the Attorney-General. They can also hear complaints regarding unlawful discrimination, and the provision of disability services, health services, services for children and young people, and services for older people, although not about breaches of the HRA. This mandate can encompass conditions in closed environments including prisons, police cells and closed disability facilities. The ACT Commission has exercised this jurisdiction on a number of occasions, with two audits conducted to date into conditions of detention, one into Bimberi and the other into the Belconnen Remand Centre. The Commission is also currently undertaking an audit into the treatment of women at the Alexander Maconochie Centre.73

The ACT Human Rights Commission argued that human rights legislation provided a useful framework for reporting to service providers. However, they did note that their ‘outcomes and recommendations would probably not have been too dissimilar without human rights legislation.’ They also flagged a problem with rights language, noting that the non-government sector appeared to misunderstand rights concepts.

The ACT Commission classified itself as relatively ineffective in assisting providers to adopt polices and practices with human rights in mind noting that it mainly investigates complaints from individuals, implying it had a less systemic impact.

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Commonwealth

The Australian Human Rights Commission (‘AHRC’) reported functions ‘in 3 related areas relevant to closed environments, namely: human rights, unlawful discrimination, and Aboriginal and Torres Strait Islander social justice and native title’. The Commission conciliates complaints of unlawful discrimination, and of breaches of certain enumerated human rights, but not those in the Convention Against Torture. Amongst other things, it can also ‘inquire into acts and practices that may be inconsistent with or contrary to human rights’. Most closed environments operate at a state level and hence fall outside of AHRC’s mandate. The AHRC can monitor the Commonwealth immigration facilities to the extent they raise human rights complaints or issues. However the AHRC noted in its survey responses that the absence of a specific authority to monitor compliance with human rights standards in immigration detention and/or for violations of OPCAT made it less effective. Its contribution was also limited in the absence of dedicated funding for an immigration-specific inspection and monitoring role. Nevertheless, they have conducted a number of inquiries and produced many research reports into conditions of immigration detention, the most recent of which was announced on 3 February 2014, looking at the treatment of children in particular.

The AHRC believed that human rights legislation would make them more effective, noting that:

[i]t could provide an agreed overarching framework for the human rights that apply to individuals in places of detention, and accessible remedies for breaches of those rights. It could also assist in terms of requiring the Australian Government to reassess some of its current policies for their consistency with human rights, for example the mandatory immigration detention of children.

The AHRC noted that such reform should be supplemented by ‘legislated minimum standards for conditions and treatment of people in immigration detention … based on relevant international human rights standards.’

The AHRC reported changes to immigration policies and practices regarding conditions achieved through ‘a combination of immigration detention visits and reports, national inquiries, investigating individual complaints, training for service providers, and commenting on draft policies at the Department of Immigration and Citizenship’s request.’ Again, it stressed the impact of budgetary constraints.

New Zealand

New Zealand has a statutory bill of rights, like Victoria and the ACT, and a well-developed statutory OPCAT monitoring framework based on international human rights standards.

75 Australian Human Rights Commission Act 1986 (Cth) ss 3, 11. The rights are those appended to the Act and include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief, and the Convention on the Rights of Persons with Disabilities, but does not include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment or the International Covenant on Economic, Social, and Cultural Rights.
The New Zealand Human Rights Commission (‘NZHRC’) is empowered under the Human Rights Act 1993 (NZ) to hear complaints about unlawful discrimination, as well as carrying out inquiries and reporting to the Prime Minister on matters affecting human rights.

The NZHRC characterised itself as relatively effective in assisting providers to adopt policies and practices with human rights in mind, NZHRC stated that it had seen an ‘evident increase in familiarity with OPCAT monitoring and human rights amongst staff of institutions.’

The NZHRC noted, however, that even ‘robust’ legislation could not alone ensure culture change, highlighting the problem of translating principles into training and day-to-day practice.

Conclusion

All of the bodies with specific human rights mandate were in favour of formal rights protection. However, they did not all feel that they were effective in embedding human rights thinking into the closed environments themselves. This illustrates that, for these bodies, the presence of a formal rights instrument was important but not necessarily sufficient to ensure that oversight bodies could be effective in assisting closed environments to implement human rights standards into their policy and practice. The scope of their powers was a critical factor.

ii. Bodies operating in the context of formal human rights protection

In Victoria, the ACT and NZ, consideration of human rights principles was not limited to those bodies with an express legislative mandate conferred under formal human rights legislation. Many of the oversight bodies predate the introduction of the HRA in the ACT and the Charter in Victoria. However, they nevertheless described their role by reference to human rights or to the concepts which underpin them, such as ‘fair, safe and humane’ treatment. Some agencies working under disability, mental health and health legislation stressed that these statutes had a pre-existing focus on rights, which shaped their role.

As noted above, bodies with express human rights jurisdiction, such as human rights commissions, generally saw formal rights protection as a positive development. Five of the other ten bodies operating in Victoria, ACT and NZ also saw formal protection as useful in some way to their monitoring role, and their capacity to influence and implement change.

Some noted the changes to their practices by virtue of the obligations imposed upon them to make decisions and act in accordance with human rights. Oversight bodies spoke of the force of human rights language in leveraging action in a new way. The Office of the Senior Practitioner in Victoria observed that the ‘presence of human rights legislation in Victoria… [is] most helpful and used as leverage for compliance to recommendations.’

The Office of the Public Advocate in Victoria stated that the Charter ‘has given our work an important (well-understood) language which we can use in our monitoring activities.’ They also reported that the Charter ‘has had an impact,

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78 Respondents may have been more likely to emphasise this aspect or focus of their work given that it was explicitly raised in the research being conducted.
and it’s variable. In some situations it’s quite significant and in others it is at least in the vocabulary.’

Some agencies had mixed feelings. One noted that it was resource intensive, but that it encouraged closed environments to conduct internal reviews in human rights terms.

Some suggested that the introduction of rights legislation had not had an impact on their monitoring. For example, the Office of the Chief Psychiatrist in Victoria noted that their work was led not by human rights but was rather ‘linked to National Standards, good clinical practice and protections under the Act’.

The presence of human rights legislation was no guarantee that human rights principles were filtering down into the policies and practices of closed environments. Some agencies saw themselves as being very effective, whilst others thought their effectiveness was ‘about right’. The Mental Health Review Board reiterated the NZHRC’s concerns that legislation alone was not sufficient to create the necessary change. They described themselves as relatively ineffective in assisting closed environments to adopt human rights standards on the basis that:

[although the Board’s work directly impacts on the services the services have had little training in understanding how the Charter has impact on their work and their approach to the Board. The responsibility for training service staff rests with the services and so, unless invited, the Board has little impact in this area.]

### iii. Bodies operating without any formal human rights protection

Even in jurisdictions where there was no formal human rights protection a number of respondents characterised their role as involving the promotion and protection of rights.

The idea of patient rights and health rights had a legislative footing in certain jurisdictions such as Queensland, despite the absence of a comprehensive human rights statute. The Queensland Mental Health Directorate noted that they were:

*responsible for ensuring that mental health services across the State are compliant with legislative and policy requirements in relation to upholding patient rights.*

In WA, the Disability Services Commission framed the standard against which all government-funded services are measured in human rights terms, noting that such services must ensure ‘the protection of human rights and freedom from abuse and neglect for people accessing these services’. Similarly, the WA Ombudsman refers to its human rights role in relation to dealing with complaints.

The Office of the Public Guardian (Tasmania) has duties such as ‘protecting and promoting the rights of people’, whilst the Mental Health Tribunal of Tasmania aims ‘to balance the human rights of a patient against the public safety and to provide a framework whereby, given the existence of stated criteria, these rights are curtailed.’
Some expressly noted the relevance of human rights principles to the standards they applied in evaluating the relevant closed environment/s. For example, the Office of Commissioner for Public Interest Disclosures (NT) stated that they do ‘a lot of work with disadvantaged people, particularly prisoners and the mentally ill, and human rights are a consideration in this work.’

When describing their role, many oversight bodies employed concepts that can be understood as underpinning human rights principles, such as notions of humane values, fair treatment and conditions that are not degrading, even where they did not use the word ‘rights’. The NSW Ombudsman noted that:

*while human rights are not specifically mentioned in [our] enabling legislation, the concept is captured in a range of functions [we] are mandated to carry out.*

The Office of the Commonwealth Ombudsman illustrated how agencies can adopt the underlying concepts without necessarily using the language of “rights”:

> [W]e’re often not referring to them as rights as such. I guess, people have got a right to complain; they’ve got a right to ensure that … they’re treated properly and fairly and all those sorts of things. But …the Human Rights Commission is totally different, they’ve got you know, carriage over … articulated human rights things that would need to be adhered to. But in saying that it’s not as if we’re ignoring people’s rights.

The Chief Psychiatrist in WA noted that patients expressed complaints as a ‘sense of outrage, rather than “it’s been a breach of my rights in this way…”’

In Queensland, the Chief Inspector of Prisons has a statutory position under the *Corrective Services Act 2006* (Qld). They employ Healthy Prison standards when monitoring Queensland’s prisons. These standards are based on human rights principles of respect and fairness embodied in the UN Minimum Rules for the Treatment of Prisoners.

Thus, despite the absence of a formal rights document, oversight bodies operating in these jurisdictions demonstrated a concern for the same underlying standards, with rights language having some purchase.

The WA OICS noted that other types of arguments, including ‘value for money’, ‘risk’, organisational/management structures and ‘doing things better’, often carry greater weight with government than human rights discourse. The OICS characterised their approach as a ‘human rights plus’ model that incorporates human rights principles and standards as well as these broader issues including cost and contract management.79

The relevance and utility of human rights principles is a related but separate enquiry to whether formal human rights legislation should be enacted. Oversight bodies were invited to reflect on how the presence or absence of human right legislation in their jurisdiction affected their monitoring work, if at all.

One Queensland agency did not feel that specific human rights legislation was necessary in light of other legislation, which they felt adequately covered the field, including the *Anti-Discrimination Act 1991* (QLD), *Judicial Review Act 1991* (QLD), and the *Ombudsman Act 2001* (QLD).

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79 Email correspondence.
The WA OICS argued that that their inspection standards ‘are already based on human rights instruments’ and that ‘the...absence of specific human right legislation in WA has not hindered the work of this office.’

Others considered there would be some value to the introduction of human rights legislation, even though they felt it was not imperative as they could draw on existing legislation:

> the lack of a specific piece of human rights legislation in NSW can make it more difficult to drive change based on a human rights perspective. Having such legislation would enhance this type of work [but]...in our disability area there is specific legislation in the Disability Services Act which has been able to drive some considerable change.

And as a Tasmanian body noted:

> so far, this has not been a hindrance...when it comes, for it is currently projected, it is likely to strengthen us in this work’.

Representatives of some oversight agencies said that, whilst formal rights legislation offered some important protections it was often too general to be of tangible benefit.

As a representative from OICS noted:

> ...the human rights language probably doesn’t quite get you to that level...I think it’s too limiting...for example, the fact that you a problematic officer culture...it doesn’t naturally fit the language [of human rights].

They went on to note that human rights legislation on its own can be too general to provide all the necessary protections:

> I believe in human rights and I believe it its language. But I don’t think that having a Human Rights Act actually adds very much frankly and there are a few reasons for that. One is that they don’t get into the sort of level of detail that really is relevant. It’s very high-level statements.

The same interviewee also suggested that the human rights framework might be limiting, as it seems to exclude from scrutiny workplace issues and other aspects of prison operations that the Inspector currently examines:

> [Human rights] language is not explicitly in our legislation and because our role is to monitor and inspect these services and institutions, we don’t just go in with a kind of Human Rights focus based on the detainees, we go in with a much broader set of issues to examine. My starting point must be that people who work in these places also have rights.

A representative from WA OICS noted that Aboriginal people had placed faith in the principles of ‘human rights’ as a way forward but ‘had not seen much benefit so far, in terms of in terms of key indicators such as rates of imprisonment, over-representation etc.’ The interviewee also noted that Aboriginal
prisoners ’tend[ed] to find human rights dialogue of limited value in pursuing justice and practical change.”

Others were of the view that human rights legislation could play a valuable role in legitimising the human rights discourse and add a measure of enforceability to rights standards. The Northern Territory Community Visitor Program for prisons noted that:

…the work would be much easier if the human rights legislation had been passed in the NT…oversight agencies are in general unable to fulfil their functions … because they are located within government departments with no commitment to their role, … because there is not just the resourcing…there needs to be an ethos that human rights are fundamental…if human rights legislation was present in this jurisdiction, it would give more teeth…it might also legitimate rights-based dialogues in the NT…[but] we would need to ensure it was not facade legislation.

The Disability Services Commissioner in WA also suggested that:

human rights legislation is important in the field of disability service provision because of the need for some reference to the rights of people with disabilities who are still discriminated against when accessing some generic services.

In summary, there was little consensus in the survey responses from non-Charter states/territories as to the benefit of a Charter. Close to a third of all non-Charter states/territories thought formal rights legislation would be useful in some way (30%) whilst a third suggested it was unnecessary. The remainder were unsure or did not respond.

d. An international human rights monitoring framework - The Optional Protocol to the Convention against torture (OPCAT)

As outlined in the introduction, Australia has signed but not ratified OPCAT. In February 2012, the National Interest Analysis on OPCAT was tabled in the Australian Parliament and referred to Joint Standing Committee on Treaties. The Committee recommended that OPCAT be ratified and implemented as soon as practicable. As yet there has been no indication by the new Coalition government that it intends to ratify OPCAT. By ratifying Australia would commit to establishing National Preventive Mechanisms (NPMs) to provide regular inspections of closed environments, and facilitating international visits by the UN Subcommittee on the Prevention of Torture (‘SPT’). In order to comply with OPCAT requirements, NPMs must have the following features:

- A mandate to undertake regular preventive visits;
- Independence (functional independence, independence of personnel);
- Expertise (required capabilities and professional knowledge);
- Necessary resources;
- Access (to all places of detention; to all relevant information; the rights to conduct private interviews);
- Appropriate privileges and immunities (no sanctions for communicating with the NPM; confidential information shall be privileged);
- Dialogue with competent authorities regarding recommendations; and
- Power to submit proposals and observations concerning existing or proposed legislation.81

80 Email correspondence.
Crucial to the successful implementation of the OPCAT framework in Australia will be the coordination and streamlining of the roles and practices of the network of agencies with an oversight role. One interviewee noted that the implementation of OPCAT was critical for the application of human rights in closed environments:

...OPCAT would also provide a good opportunity for coordination and collaboration between organisations that monitor conditions in places of detention.

The work of these domestic NPMs may be incorporated into the work of existing oversight bodies, but may also necessitate changes to the current arrangements to encompass a tiered monitoring structure covering a broader variety of closed environments.

This is a point on which valuable comparisons can be made between Australian and New Zealand monitoring processes. As noted above New Zealand has domestic human rights legislation. Having ratified OPCAT in 2008, the NZ Parliament passed legislation to provide for open and unrestricted visits to ‘places of detention’ by the SPT; to establish national review bodies; and to establish a central coordinating body whose function it is to liaise with both the national and international bodies.

The New Zealand NPMs are the Ombudsman, which has jurisdiction over prisons, closed disability and mental health facilities, and immigration detention, the Independent Police Conduct Authority, which has jurisdiction over police cells, the Office of the Children’s Commissioner, with a role over residences for children and young people, and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General relating to defence force detention facilities. These agencies conduct regular OPCAT monitoring visits of facilities. The New Zealand Human Rights Commission (NZHRC) was designated as the central NPM with a role coordinating visits, preparing reports and identifying and responding to systemic issues in each of the closed environments. The NZHR has additional responsibilities in advocating and promoting respect for human rights more generally and has powers to conduct own motion investigations, thematic reviews and respond to complaints in that regard. In addition the NZHRC has the power to ‘seek legal representation to take a case to the Human Rights Review Tribunal’.

According to the NZHRC the OPCAT model of monitoring has had ‘positive impacts to date’. However, there was still room for improvement, most notably in terms of co-ordination and resourcing. As NZHRC noted:

\[\text{The regularity of monitoring is a key factor in its effectiveness. Adequate resourcing of NPMs is necessary. Given the size and resources of New Zealand NPMs, and the number of facilities to be visited, on current resource levels, some sites may not receive an OPCAT visit for several years. Prioritisation and careful planning of monitoring programmes has been required. Monitoring could be improved by increasing the regularity of visits, and the size and composition of visiting teams.}\]


\[83\] Of the NZ NPMs only the NZHRC and NZ Ombudsman participated in the survey. Other NZ survey respondents fell outside of the formal NPM framework but nonetheless had jurisdiction over some aspects of closed environments, including the New Zealand Privacy Commissioner and the Inspector of Corrections, which sits within the Department of Corrections.

\[84\] See Part 7(c)(i) above.
In relation to Australia, there is general agreement that many of the oversight bodies currently working in this space do not comply with OPCAT standards. In 2008, the Australian Human Rights Commission released a research report on options for implementing OPCAT. The report found that:

There are very few agencies within Australia that could carry out the functions within the OPCAT remit in an OPCAT-compliant way. This means that the creation of an OPCAT-compliant system will require ground up review and not just a ‘tweaking’ of existing arrangements. However, in some areas (including prisons, juvenile detention facilities, psychiatric wards, immigration detention centres, military detention facilities, any places of detention operated by national intelligence services and old people’s homes) there are a number of agencies across Australia whose statutory responsibilities and operational capacity could be bolstered to meet OPCAT criteria...[yet] the area that appears to have consistently lagged behind is police lock-ups and police stations.84

More recently, the Joint Standing Committee on Treaties concluded that ‘Australia’s inspection systems, while substantial, do not fully meet the Optional Protocol requirements.’85 The Committee noted, however that:

reliance on these existing bodies to fulfill national preventive mechanism obligations would be possible provided that the necessary and, in many cases, relatively minor changes are made to the structure, mandate or powers of these bodies in order to comply with the Optional Protocol.86

The Committee noted that the current network of agencies has left some gaps in coverage that need to be filled, particularly around police cells and detainee transfer vehicles. The Committee did not specify whether it would be preferable to expand the mandate of an existing independent body or to establish a new independent body to act as the NPM in relation to these areas.87

The results of the interviews and survey broadly support these findings that the present network of oversight bodies do not meet OPCAT requirements. Key issues with the current framework include:

- Issues of overlap and coordination across agencies;
- The absence of a clear legislative mandate in relation to particular closed environments, such as the Commonwealth Ombudsman’s role in inspecting conditions in immigration detention;
- A focus on complaints handling at the expense of more systemic and preventative functions; and
- Lack of adequate resourcing.

It is clear then that the functions, governance and resourcing of some oversight bodies will need to change in order for the Australian framework of oversight of closed environments to comply with OPCAT. However, not all oversight bodies will necessary want, or need to participate in an OPCAT process. Survey respondents were asked whether they, as an oversight body with responsibilities for closed environments, could contribute to the OPCAT process. Half the agencies did want to be involved, a third stated they did not know how they could contribute (34%), and only 17% stated that they did not believe they could contribute. This also raises

84 Harding et al, above n 5, 2.
85 Joint Standing Committee on Treaties, above n 12, 52, Recommendation 6, [6.29].
86 Ibid.
87 Ibid, 52, [6.32].
interesting questions on the interaction between NPMs and other oversight bodies operating outside of the OPCAT framework and how best to capitalise on their connections and minimise duplication.

8. Summary and discussion

It has been argued that effective monitoring of the operation of closed environments by independent agencies is a pivotal part of the protection of the rights of detainees. This Paper offers some key findings from survey and interview research on the current operation of monitoring on the protection of rights of people held in closed environments. The research reported here involved three interrelated tasks: the identification of bodies monitoring closed environments, exposition of the functions and activities engaged in, and an analysis of the extent to which human rights considerations form part of the monitoring matrix employed by those bodies when overseeing life in closed environments.

A range of agencies

The most striking finding from this piece of research is the large number, and variety, of agencies with some responsibility for monitoring closed environments.

There was some indication that prisons drew a greater degree of attention from external oversight bodies than other closed environments. Whilst it may be that prisons have been generating a greater number of human rights concerns, it could also be that issues in other closed environments are hidden from view. Whilst prisons tended to be monitored by specific prison inspectorates, the other environments were more often monitored by agencies with a broader mandate over certain vulnerable groups, of which the resident/patient/detainee group was only one. For example, the Office of the Public Advocate had jurisdiction over persons with disabilities both in the community and in various closed facilities. This inevitably has implications in terms of the focus and resourcing such agencies are able to devote to closed environments. Such service or client-specific oversight bodies also have a prospective role to play in prisons in relation to physical and mental health service delivery, with potentially overlapping coverage.

Another possible explanation for the greater coverage of prison issues relates to differences in the accessibility of complaints processes to prisoners as compared with other closed environments. People in prison may be better accessing complaints services than other persons held in secure settings. A representative from the Victorian Ombudsman noted that in the previous year, and since the introduction of the toll free phone number in prisons, prisoner complaints had represented approximately half of all complaints received.

Human rights commissions tended to have the broadest coverage. Interestingly, a number of human rights commissions have also chosen to exercise their investigation and reporting function in relation to particular issues in prisons, whereas there appeared to be fewer systemic reviews conducted in relation to other closed environments.

A notable exception was the Australian Human Rights Commission and its coverage of immigration detention through inquiries, reports and media statements. There were far fewer agencies with jurisdiction over immigration detention facili-
ties compared to other closed environments. As the only Commonwealth sector included in this research, immigration detention facilities rely on Commonwealth monitoring agencies. Whilst the Commonwealth Ombudsman and the AHRC have some oversight powers, in this study and in public announcements they have each reported significant limitations in their capacity to carry out any effective oversight of these politically controversial facilities. The policy of offshore processing on foreign territory in Nauru and Manus Island further restricts the capacity for independent oversight of the operation of immigration facilities. The Australian Human Rights Commission does not appear to have jurisdiction to visit and investigate complaints regarding conditions in detention facilities outside Australia.88 The AHRC can thus only exercise their complaint handling and inquiry powers remotely.89 The jurisdiction of the Commonwealth Ombudsman over such facilities is not clear.90

Features of effective monitoring

The monitoring practices reported here are also varied: ideal features include formal and actual independence, powers to inspect, adequate resourcing for the monitoring work, powers of public reporting, and the capacity to bring about change through the acceptance of recommendations by the supervised organisations. A few agencies reported all or most of these ideal features, but most identified areas where their effectiveness could be improved.

Human rights considerations

The third central finding relates to the role of human rights in the work of monitoring bodies. The uptake of human rights principles varied across the range of bodies, and varied depending on formal and informal adoption of human rights principles and language. Respondents provided insightful observations about whether human rights laws alone could provide the optimal level of protection for people held in a closed environment.

Concluding observations

The significance of the range and differing focus of monitoring agencies is at least threefold. First, there are likely to be overlaps and gaps in coverage. Detainees may have difficulty identifying the most effective or appropriate agency. Moreover, government welfare agencies, and advocacy groups may assume that oversight is occurring when it is not.

Secondly, in system terms, whilst it is reassuring that closed environments are on the regulatory radar, there are arguments for rationalising the work of monitoring to ensure proper coverage and, in preparation for OPCAT, establishing clear sets of monitoring bodies which can take up the role of NPMs. Harding and Morgan recommended that Australia should establish a ‘mixed’ NPM model, with separate NPMs in each state and territory, with the Human Rights Commission as the

88 The Commonwealth Solicitor-General has provided advice to the AHRC stating this, see Professor Gillian Triggs, President, ‘Australian Government’s Third Country Processing Regime: What are the Human Rights Implications?’ (Speech delivered to the Refugee Advice and Casework Service, 6 June 2013). The AHRC has accepted this advice but some lawyers have argued that this is a misinterpretation of international law, see generally Bianca Hall, ‘Official Barred From Visits to Nauru, Manus Island’ The Age (5 March 2013).
89 Ibid.
90 See for e.g. Commonwealth Ombudsman, Suicide and Self-Harm in the Immigration Detention Network, (May 2013), 25 [3.48].
There will be challenges arising from the existing agency boundaries, and from Australia’s system of federation.

Thirdly, the consideration of human rights issues specifically as part of the monitoring process is patchy and depends, in part, on the prominence of formal rights instruments and guidelines, and on the ways in which the oversight function has been envisaged when the bodies were established. Those bodies with an express human rights mandate tended to be more supportive of the principles of human rights and the value of formal rights legislation. They stressed the importance of other factors in addition to a charter of rights, including the scope of powers. On balance agencies operating within jurisdictions with formal rights protection tended to see such legislation as beneficial to their monitoring work. However, this was a more divisive issue in jurisdictions without such formal protection. Some agencies considered the language of rights to be too vague and confrontational, and proposed that human rights values might better expressed through notions of respect, fairness, reasonableness and humanity.

Even those that supported a Charter-type framework noted that it was not sufficient to ensure effective monitoring. Other key elements to being effective in implementing human rights principles in the closed environments themselves included having sufficient powers and resources to investigate issues, power to and offer guidance and advice, and the need for training and culture change.

The introduction of the OPCAT regime of domestic and international monitoring would address many of these concerns, with a rationalised system of state and federal monitoring bodies, and international oversight, all employing human rights-based frameworks for monitoring. Human rights considerations are clearly already becoming part of the thinking of people engaged in monitoring, formally and informally, and will continue to provide crucial guidance in this challenging area.

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81 Harding et al, above n 5.
### Appendix

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