

# A STRATEGIC FRAMEWORK FOR IMPLEMENTING HUMAN RIGHTS IN CLOSED ENVIRONMENTS

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## I INTRODUCTION

The State power to lawfully detain people against their will has serious consequences for those detained, most prominently the curtailment of their human rights. Most would not dispute that in some circumstances it is proper for the State to detain people, and international human rights law recognises that non-arbitrary detention may be lawfully employed by the State. However, the power to detain carries with it duties to the detainee, both in relation to the conditions in which they are detained and their treatment. Moreover, given the usual vulnerability of detainees, the power imbalances between those detained and those detaining, and the impenetrable nature of secure places of detention, there are inevitable risks of abuse of detainees. International human rights law takes account of these factors, and regulates the conditions of detention and the treatment of detainees, both to protect the rights and dignity of the person and to insure against abuse by others.

Current human rights challenges across the range of detention scenarios include systemic and increasing overcrowding in prisons and police cells; the consequent strain on facilities and programs in prisons and police cells where the overflow of detainees is accommodated; the manifestly inadequate conditions of detention in immigration detention; the treatment of immigration detainees in terms of both their current situation (the inadequacy of services offered in detention centres) and their future status (the sluggish processing of their claims for protection); the myriad of difficulties surrounding the forced detention and medical treatment of the mentally ill, as well as the many forms of restraint employed to ‘manage’ their behaviours; and the physical, emotional and sexual abuse of residents in disability facilities.

A closed environment may be defined as ‘any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial,

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administrative or other order’.<sup>1</sup> Using this definition, there are hundreds of such environments around Australia. Examples include prisons, police cells, immigration detention centres, aged care facilities, juvenile detention facilities, disability care facilities and forensic psychiatric units. Many thousands of people may be held in such places at any one time. The following statistics provide a general sense of the scale of the issue.

There were 35 467 people (sentenced and on remand) in Australian prisons in the March quarter of 2015.<sup>2</sup> A total of 2026 people were being held in immigration detention as at 31 May 2015.<sup>3</sup> The most recent survey of police custody conducted at the national level found that 27 047 people were taken into custody during the single month of October 2002.<sup>4</sup> More recent Victorian figures indicate that 24 777 people were detained in police custody during 2009,<sup>5</sup> and there were 306 people detained in police custody on 10 March 2014.<sup>6</sup>

Many human rights abuses occur in closed environments. Some examples include people being:

- killed by a fellow inmate or a prison officer;<sup>7</sup>
- sexually assaulted in supported residential services;<sup>8</sup>

1 This article draws on research funded by the Australian Research Council (ARC): *Applying Human Rights in Closed Environments: A Strategic Framework for Managing Compliance* (LP0883295) (‘ARC project’). The definition of ‘closed environment’ given here was employed in the ARC project and based on the definition of places where people are deprived of liberty in art 4 of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) (‘OPCAT’).

2 Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2015* (11 June 2015). Aboriginal and Torres Strait Islander people make up 28 per cent (9838) of the national adult prison population despite only making up 2 per cent of the general adult population; 7.8 per cent (2780) of imprisoned people were female.

3 1877 on the mainland and 149 on Christmas Island: Australian Government Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (2015) 3.

4 Natalie Taylor and Michael Bareja, ‘2002 National Police Custody Survey’ (Technical and Background Paper No 13, Australian Institute of Criminology, 2005) 11.

5 Victoria, *Update on Conditions in Victoria Police Cells: Office of Police Integrity*, Parl Paper No 322 (2010) 11 (‘Conditions in Victoria Police Cells’).

6 Victoria, *Victorian Ombudsman Investigation into Deaths and Harm in Custody*, Parl Paper No 310 (2014) 10 (‘Deaths and Harm in Custody’).

7 See, eg, Victoria, *The Death of Mr Carl Williams at HM Barwon Prison — Investigation into Corrections Victoria*, Parl Paper No 127 (2012) (‘Death of Carl Williams’); Human Rights Committee, *Views: Communication No 546/1993*, 57<sup>th</sup> sess, UN Doc CCPR/C/53/D/546/1993 (18 July 1996) (‘Burrell v Jamaica’); *Edwards v the United Kingdom* (European Court of Human Rights, Chamber, Application No 46477/99, 14 March 2002).

8 See, eg, Victorian Office of the Public Advocate, *Sexual Assault in Supported Residential Services: Four Case Studies* (2012).

- provided with inadequate medical care and treatment;<sup>9</sup>
- held in overcrowded and unsanitary conditions;<sup>10</sup>
- denied access to appropriate food, water, daylight and fresh air while in prison or police custody;<sup>11</sup> and
- denied the ability to communicate with lawyers, family members and others outside the closed environment.<sup>12</sup>

Despite the significant numbers of people held in closed environments in Australia, and the range and seriousness of human rights violations that can occur in such environments, comprehensive attention has not previously been given to the application of human rights law in these environments. In particular, no comparisons have been made of the common concerns shared by people held in different types of closed environments, nor has any common framework applying across these environments been explored.

This article redresses this with a ‘strategic framework’ for protecting human rights in closed environments. The proposed strategic framework has the following three pillars:

1. A regulatory framework, which includes the suite of internationally recognised human rights obligations, a comprehensive domestic human rights instrument, and sector-specific legislation operationalising the human rights guarantees;

9 See, eg, *Castles v Secretary, Department of Justice* (2010) 28 VR 141 (‘*Castles*’); Victoria, *Ombudsman Investigation: Assault of a Disability Services Client by Department of Human Services Staff*, Parl Paper No 16 (2011) (‘*Assault of a Disability Services Client*’); Human Rights Committee, *Views: Communication No 609/1995*, 61<sup>st</sup> sess, UN Doc CCPR/C/61/D/609/1995 (4 November 1997) (‘*Williams v Jamaica*’); Human Rights Committee, *Views: Communication No 684/1996*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (concerning psychiatric care in prisons) (‘*RS v Trinidad and Tobago*’); *Brown v Plata* (US Sup Ct, No 09-1233, 23 May 2011); *Musial v Poland* (European Court of Human Rights, Chamber, Application No 28300/06, 20 January 2009); *Renolde v France* (European Court of Human Rights, Chamber, Application No 5608/05, 16 October 2008) (where the lack of medical care provided to a mentally ill prisoner resulted in him committing suicide).

10 See, eg, *Collins v South Australia* (1999) 74 SASR 200; Human Rights Committee, *Views: Communication No 188/1984*, 43<sup>rd</sup> sess, Supp No 40, UN Doc A/43/40 (5 November 1987) (‘*Portorreal v Dominican Republic*’); Human Rights Committee, *Views: Communication No 493/1992*, 53<sup>rd</sup> sess, UN Doc CCPR/C/53/D/493/1992 (4 April 1995) (‘*Griffin v Spain*’); *Badila v Romania* (European Court of Human Rights, Chamber, Application No 31725/04, 4 October 2011) (where 50 prisoners were kept in a cell designed for 24).

11 See, eg, Human Rights Committee, *Views: Communication No 619/1995*, 62<sup>nd</sup> sess, UN Doc CCPR/C/62/D/619/1995 (4 June 1998) (‘*Deidrick v Jamaica*’); Victoria, *Conditions for Persons in Custody: Report of Ombudsman Victoria and Office of Police Integrity*, Parl Paper No 215 (2006) 41, 55 (‘*Conditions for Persons in Custody*’).

12 See, eg, Human Rights Committee, *Views: Communication No 1184/2003*, 86<sup>th</sup> sess, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) (‘*Brough v Australia*’); Human Rights Committee, *Views: Communication No 577/1994*, 61<sup>st</sup> sess, UN Doc CCPR/C/61/D/577/1994 (9 January 1998) (‘*Campos v Peru*’); Human Rights Committee, *Views: Communication No 704/1996*, 62<sup>nd</sup> sess, UN Doc CCPR/C/62/D/704/1996 (4 June 1998) (‘*Shaw v Jamaica*’); *Titarenko v Ukraine* (European Court of Human Rights, Chamber, Application No 31720/02, 20 September 2012); *S v Switzerland* (European Court of Human Rights, Chamber, Application Nos 12629/87 and 13965/88, 28 November 1991).

2. Preventive monitoring mechanisms based on human rights standards, such as oversight by Ombudsman Offices, and a system of national and international oversight mechanisms required under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT'); and
3. Organisational culture change to embed human rights compliance in daily practices.

The first pillar establishes the regulatory framework necessary for the protection and promotion of human rights in closed environments, and the second and third pillars are vital to the implementation of this regulatory framework. Each pillar is a necessary element for the effective protection and promotion of the human rights of people in closed environments, but insufficient on its own. As will be demonstrated, all three pillars are interlinked and mutually reinforcing, and must be in place concurrently.

Part II of this article outlines the research methodology, and some key features of the selected closed environments — particularly tensions that exist within closed environments between the human rights of the individuals, and the nature, aims, and operation of the facilities. Part III examines the first pillar of the strategic framework, being the tripartite regulatory framework, and the reasons why the tripartite framework is superior to any single regulatory mechanism.

Parts IV and V of the article focus on the second and third pillars of the strategic framework, being the preventive monitoring mechanisms, and human rights focussed organisational cultural change respectively. Together, these parts demonstrate that the second and third pillars are essential components of implementation of the regulatory framework, and that it is the combination of the three pillars that will best protect and promote human rights in closed environments.

## II THE CLOSED ENVIRONMENTS

### A *The Research Approach*

The Australian Research Council project ('ARC project') on which this article draws considered six environments in three jurisdictions. These were: prisons; police cells; forensic psychiatric institutions; closed mental health facilities; closed disability facilities; and immigration detention centres.<sup>13</sup> In each environment, the focus was on adults; environments that detain children and juveniles, aged-

13 The choice of environments was driven in part by the organisations that collaborated on the ARC project. The collaborating organisations were the Commonwealth Ombudsman, Office of the Inspector of Custodial Services (WA), Office of the Public Advocate (Vic), the former Office of Police Integrity (Vic), Victorian Ombudsman, and the Victorian Equal Opportunity and Human Rights Commission. Each organisation is a formal oversight body, with external scrutiny responsibilities, including for closed environments.

care secure facilities and military detention were excluded.<sup>14</sup> The jurisdictions selected were Victoria, Western Australia ('WA'), and the Commonwealth (regarding immigration detention centres only).<sup>15</sup>

This article focuses primarily on Victoria because it has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'). Occasional references to closed environments in other jurisdictions are made, to demonstrate cross-sectoral analysis within a jurisdiction with a standalone human rights instrument.

## B Features of Closed Environments

There are significant similarities and differences between closed environments. In terms of similarities, when people are held in closed environments for a long period of time, the environment creates what Erving Goffman identified as a 'total institution':

First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike ... Third, all phases of the day's activities are tightly scheduled, with one activity leading at a prearranged time into the next ... Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfil the official aims of the institution.<sup>16</sup>

The significance of this for human rights is threefold. First, individuals lose their autonomy, and the power to make decisions or choices regarding day-to-day activities. For example, individuals cannot always exercise cultural and religious practices, or maintain family and kinship connections.<sup>17</sup> Secondly, the hierarchical nature of the 'total institution' means that conditions are imposed upon detainees without regard to their individual needs, in ways that inevitably limit the exercise of their rights. For example, sharing a cell interferes with the right to privacy,<sup>18</sup> and constraints on communication with lawyers and family members interfere with freedom of expression, and privacy and correspondence

14 The focus on the adult population was pragmatic. It was, in part, to contain the research to a manageable number of closed environments and, in part, to manage the number of human rights issues to be explored within the closed environments.

15 The choice of jurisdiction was based in part on those jurisdictions that had human rights instruments (Vic) and those that did not (WA), and in part by the collaborating organisations (including the Commonwealth Ombudsman).

16 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Aldine, 1962) 6.

17 As provided for in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27 ('*ICCPR*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19 ('*Charter*'); *Human Rights Act 2004* (ACT) s 27 ('*ACT HRA*').

18 As provided for in art 17 of the *ICCPR*, s 13 of the *Charter* and s 12 of the *ACT HRA*.

rights.<sup>19</sup> Thirdly, the ‘official aims of the institution’, and community expectations, often pit security against the rights of the individual. In the balance, security concerns usually outweigh rights protection, with varying degrees of effort being made to minimise the intrusion on rights, to provide adequate safeguards, and to consider individual circumstances.

The main differences between the closed environments arise from their different goals. For example, a person may be detained in a police cell because of the risk they pose to other members of the community, whereas a person held in a forensic psychiatric setting may pose more of a risk to themselves than the community. A person may be detained in a prison for the purposes of punishment, deterrence and rehabilitation after conviction for criminal acts,<sup>20</sup> whereas a person may be detained in a disability setting for the purposes of ensuring they receive the care and services considered necessary.<sup>21</sup> The detention of people in immigration detention is administrative — that is, people are detained while a determination is made about whether they can lawfully enter Australia as, for example, a refugee.

The human rights at risk within each closed environment vary accordingly. For example, the impact that indeterminate mandatory immigration detention has on the physical and mental health of detainees, and on their right to family, is unique to this setting.<sup>22</sup> The medical treatment administered to people in forensic psychiatric and disability care settings, and the experience of congregate care itself, raise core human rights considerations.<sup>23</sup> The extent to which imprisoned people’s loss of liberty impacts on their enjoyment of other rights in the security-focussed environment of the prison requires a difficult balance to be struck.<sup>24</sup> The risk of self-harm, suicide and death in police custody is high,<sup>25</sup> particularly among Indigenous people.<sup>26</sup>

19 Article 14 of the *ICCPR* provides a right to communicate with counsel (this is reflected in s 25 of the *Charter* and s 22 of the *ACT HRA*). Articles 17 and 23 provide protection of the family (these are reflected in ss 13 and 17 of the *Charter* and ss 11 and 12 of the *ACT HRA*).

20 See, eg, *Sentencing Act 1991* (Vic) s 1.

21 See *Disability Act 2006* (Vic) ss 5, 87.

22 Australia’s mandatory immigration detention regime has been found to breach an array of human rights, including art 7 of the *ICCPR* (the prohibition against torture, and cruel, inhuman or degrading punishment or treatment): see section A 3 of Part III below.

23 See, eg, Owen Bradfield, “‘Chartering’ the Limits of Involuntary Psychiatric Treatment in Victoria: Interpreting the *Mental Health Act 1986* (Vic) in the Age of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)” (2010) 18 *Journal of Law and Medicine* 130; Dorottya Karsay and Oliver Lewis, ‘Disability, Torture and Ill-Treatment: Taking Stock and Ending Abuses’ (2012) 16 *International Journal of Human Rights* 816.

24 See discussion in Bronwyn Naylor, ‘Protecting the Human Rights of Prisoners in Australia’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 395.

25 See Gennady N Baksheev, Stuart D M Thomas and James R P Ogloff, ‘Psychiatric Disorders and Unmet Needs in Australian Police Cells’ (2010) 44 *Australian and New Zealand Journal of Psychiatry* 1043; Mathew Lyneham and Andy Chan, ‘Deaths in Custody in Australia to 30 June 2011: Twenty Years of Monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody’ (Monitoring Report No 20, Australian Institute of Criminology, 2013).

26 Lorana Bartels, ‘Twenty Years On: Indigenous Deaths in Police Custody and Lessons From the Frontline’ in Isabelle Bartkowiak-Théron and Nicole L Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 181.

Whilst specific concerns may vary between particular closed environments, people in these environments have much in common. The commonalities stem from the deprivation of liberty, the power imbalance and vulnerability vis-à-vis those in charge of their detention, the security focus of the environments, and the closed nature of the environment itself. These concerns are addressed in the remainder of this article.

### III PILLAR ONE: THE HUMAN RIGHTS REGULATORY FRAMEWORK

The provision and effectiveness of legally enforceable human rights is the first pillar of the strategic framework for implementing human rights in closed environments. A tripartite system of legally recognised human rights protection is required. That is, the regulatory framework for closed environments requires adherence to Australia's international human rights obligations, together with the comprehensive incorporation of these into the domestic jurisdictions, and the pragmatic operationalisation of both into sector-specific legislation, policy and guidelines. Each of these is necessary, but not sufficient on its own, to protect and promote human rights in closed environments.

Section A will outline the relevant international human rights obligations of Australia, and consider the effectiveness of international enforcement mechanisms. Section B will consider the domestic incorporation of human rights obligations, including their enforcement, in Victoria.<sup>27</sup> Section C will examine some examples of rights protected in specific legislation governing particular closed environments (being corrections and mental health), and examine the adequacy of such regulation. Section D will demonstrate the need for the tripartite approach to regulating closed environments, particularly focussing on the benefit of utilising the obligations, shared language and framework of human rights, and the value of sector-specific legislation that facilitates the practical application of the rights.

27 Victoria is the focus because, of the jurisdictions examined in the ARC project, it has comprehensive human rights legislation. The Australian Capital Territory is the only other Australian jurisdiction that has domestic human rights legislation: see *ACT HRA*. In the recent past, each of Tasmania, Western Australia and the Commonwealth have undertaken consultations on the adoption of formal human rights legislation in their jurisdictions. Each consultation has recommended the adoption of comprehensive human rights legislation, but the government in each jurisdiction has rejected the recommendations. See further, Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007); Consultation Committee for a Proposed WA Human Rights Act, Department of the Attorney General (WA), *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007); Frank Brennan et al, Attorney-General's Department (Cth), *National Human Rights Consultation Report* (2009). In rejecting formal legislative protection of human rights, the Commonwealth did adopt a formal human rights framework: Attorney-General's Department (Cth), *Australia's Human Rights Framework* (2010) (although there has been a change of government since this was released).

## A International Human Rights Law

### 1 The Relevant Obligations

Australia has ratified seven of the nine major international human rights treaties.<sup>28</sup> Discussion will focus on treaty obligations that are most relevant to persons in closed environments, although the indivisibility, interdependency and interrelatedness of all human rights are acknowledged.<sup>29</sup> The *International Covenant on Civil and Political Rights* ('ICCPR') contains two obligations of utmost importance:

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 10(1): All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Many other ICCPR rights are significant for people held in closed environments.<sup>30</sup> The ARC project research, for example, has highlighted the importance of the art 17 right to privacy and correspondence, and the protections offered to families under arts 17 and 23.<sup>31</sup> In terms of State Party obligations, art 2 requires States Parties 'to take the necessary steps ... to adopt such laws or other measures ... to give effect to the rights' in the ICCPR, and to ensure the availability of effective remedies to victims of violations.

The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') elaborates on the art 7 prohibition against torture in the ICCPR. It provides a comprehensive definition of torture, thereby clarifying

28 ICCPR; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *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'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'). Australia is yet to ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force on 1 July 2003), or the *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010).

29 *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc A/CONF.157/23 (12 July 1993) art 5.

30 Including art 6 of the ICCPR, which states that '[e]very human being has the inherent right to life ... No one shall be arbitrarily deprived of his life'. Note that art 9 of the ICCPR (right to liberty and not to be arbitrarily deprived of your liberty) was not considered in the ARC project. The deprivations of liberty were assumed to be non-arbitrary so that research could focus on the treatment of persons detained in closed environments.

31 Article 17 states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. Article 23 states that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

the duties of States.<sup>32</sup> States must adopt legislative, administrative and judicial measures to prevent acts of torture under art 2. States Parties must criminalise all acts of torture under art 4, and States must educate all persons involved in any form of arrest, detention or imprisonment about the prohibition against torture under art 10. Articles 13 to 15 provide a range of remedies for victims of torture, including the right to fair and adequate compensation, which includes rehabilitation. Article 16 requires States to prevent other acts of cruel, inhuman or degrading treatment or punishment ('CIDTP') which do not amount to torture, with the art 10 and 13 obligations of education and victim remedies applying to such actions.

The *Convention on the Rights of Persons with Disabilities* ('CRPD') is relevant to people in forensic psychiatric institutions, and closed mental health and disability units, because it applies to people with physical, mental, intellectual or sensory impairments. Many individuals will come within this definition within other closed environments, such as police custody,<sup>33</sup> prisons,<sup>34</sup> and immigration detention.<sup>35</sup> The CRPD contains provisions prohibiting torture and CIDTP (art 15), recognising rights to choose your place of residence and to live in the community (art 19), rights to privacy regardless of place of residence or living arrangements (art 22), and rights to home and family (arts 22 and 23).<sup>36</sup> Article 4 imposes obligations on States Parties, including obligations to:

32 Article 1 states that:

'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Of particular significance for States that allow closed environments to be managed and run by the private sector is the continuing State responsibility for acts of torture 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

33 A study of Victorian police custody found that 25 per cent of prisoners surveyed had previously been admitted to a psychiatric hospital and 75 per cent fulfilled the criteria for a 'diagnosable mental disorder': see Baksheev, Thomas and Ogloff, above n 25, 1045–6.

34 One Australian study estimated that up to 80 per cent of prisoners have had a psychiatric illness over a 12-month period, compared to 31 per cent in the general community: see Tony Butler et al, 'Mental Disorders in Australian Prisoners: A Comparison with a Community Sample' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 272, 273, 275.

35 One study found that 3 per cent of immigration detainees detained for up to three months had mental health problems, with this figure rising to 44.6 per cent for those who had been detained for more than 24 months: see Janette P Green and Kathy Eagar, 'The Health of People in Australian Immigration Detention Centres' (2010) 192 *Medical Journal of Australia* 65, 68.

36 Although the ARC project focuses on conditions and treatment once a person is detained in a closed environment, rather than whether the decision to deprive the person of their liberty is arbitrary, questions surrounding the latter are intimately linked to the former in the context of persons with disability. In addition to guaranteeing a right to liberty and prohibiting arbitrary interferences with liberty, art 14 of the CRPD provides 'that the existence of a disability shall in no case justify a deprivation of liberty'. Article 19 provides that State Parties:

recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement ...

See Patsie Frawley and Bronwyn Naylor, 'Human Rights and People with Disabilities in Closed Environments' in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (The Federation Press, 2014) 48.

- take appropriate measures, including legislation, to ‘modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’;
- take into account ‘the human rights of persons with disabilities in all policies and programmes’;
- ‘ensure that public authorities and institutions act in conformity with the Convention’;
- ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’; and
- ‘promote the training of professionals and staff working with persons with disabilities’ in the Convention rights.

Australia is a party to many other international instruments that impact on the rights of people in closed environments. In addition to the rights discussed above, Indigenous Australians have a right to culture, religion and language under art 27 of the *ICCPR*. The *United Nations Declaration on the Rights of Indigenous Persons* contains much greater detail on the rights of Indigenous peoples to enjoy their cultural, religious and spiritual traditions.<sup>37</sup> These hard and soft law obligations are significant for Indigenous people, given that 28 per cent of Australian people in prison are Indigenous,<sup>38</sup> and Indigenous people are ‘22 times more likely to be arrested or detained by police than non-Indigenous people’.<sup>39</sup>

There is also a suite of secondary and supporting instruments, generated by United Nations bodies, which elaborate on the international human rights of persons in closed environments, and to which Australia is also a party.<sup>40</sup>

37 In particular, see arts 11 and 12 of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007) (‘*DRIP*’). The *DRIP* differs from the Conventions and Covenants mentioned above because it is a ‘soft law’ document, which means its obligations are declaratory only — aspirations that do not give rise to enforceable international legal obligations.

38 See Australian Bureau of Statistics, above n 2. WA’s Indigenous imprisonment rate is the highest in Australia. In 2008 it was 3556.6 per 100 000 compared to the national Indigenous imprisonment rate which was 2223.2, and the overall national imprisonment rate of 168.7 per 100 000. Victoria’s rate is below the national rate at 1283.2 per 100 000: University of New South Wales, *Comparative Youth Penalty Project: Indigenous Prisoners* (25 June 2013) <<http://cypp.unsw.edu.au/wa-indigenous-imprisonment-rate-compared-australian-imprisonment-rate>>. This is to be understood in light of the fact that Indigenous people currently comprise 2 per cent of the general population: Australian Bureau of Statistics, above n 2.

39 Bartels, above n 26, 181.

40 These include: *Standard Minimum Rules for the Treatment of Prisoners (1955)* (adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977) (‘*Minimum Rules*’) (a revised version of the *Minimum Rules* (to be known as the *Mandela Rules*) has been prepared by the Vienna Crime Commission and is expected to be approved by the UN General Assembly later in 2015); *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN GAOR, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/111 (14 December 1990); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 76<sup>th</sup> plen mtg, UN Doc A/RES/43/173 (9 December 1988); *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 55/89, UN GAOR, 3<sup>rd</sup> Comm, 55<sup>th</sup> sess, 81<sup>st</sup> plen mtg, Agenda Item 114(a), UN Doc A/RES/55/89 (22 February 2001) annex (‘*Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*’).

## 2 Enforcement of the Obligations

Although international human rights law provides a broad set of minimum standards for people in closed environments, the effectiveness of the system cannot be assessed without reference to enforcement. Once Australia ratifies a human rights treaty, it has international legal obligations.<sup>41</sup> Each treaty establishes its own treaty-monitoring body whose role includes ‘enforcing’ the treaty.<sup>42</sup> There are two main ‘enforcement’ mechanisms under the treaty system.<sup>43</sup>

The first mechanism is the obligation to submit periodic reports about a State’s progress toward implementing the treaty obligations to the treaty-monitoring body.<sup>44</sup> After a process of written and oral interactions between the State Party and the treaty-monitoring body,<sup>45</sup> the monitoring body issues Concluding Comments or Observations about the State Party’s achievements, principle areas of concern, and recommendations for action.

The second mechanism is the ability for individuals to communicate alleged violations of human rights to the treaty-monitoring bodies. Individual communications can be made relevantly under the *ICCPR*, *CAT* and *CRPD*.<sup>46</sup> In Section A 3 we will focus on the individual communications under the First Optional Protocol to the *ICCPR*.<sup>47</sup> After a process of written submissions from the alleged victim and the State Party,<sup>48</sup> the treaty-monitoring body pronounces

41 There are two aspects to the international human rights regime: the *United Nations Charter*-based mechanisms and the treaty-based mechanisms. Due to word limitations, this article will focus only on the treaty-based mechanisms. For a discussion of the *United Nations Charter*-based mechanisms, see Sarah Joseph and Joanna Kyriakakis, ‘The United Nations and Human Rights’ in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, 2010) 1; Kate Eastman, ‘Australia’s Engagement with the United Nations’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2012) 97.

42 Article 28 of *ICCPR* establishes the Human Rights Committee as the treaty-monitoring body under the *ICCPR*, and art 17 of *CAT* establishes the Committee Against Torture as the treaty-monitoring body under *CAT*.

43 A third mechanism of enforcement is the independent, external international and domestic monitoring under the *OPCAT*. This mechanism is unique to the *OPCAT* system. This mechanism will be discussed below.

44 For example, art 19 of the *CAT* imposes a four-yearly periodic reporting requirement and under art 40 of the *ICCPR*, States Parties are required to report ‘whenever the Committee so requests’, which is generally every four to five years: Human Rights Committee, *Human Rights. Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev. 1)* (undated) 15.

45 See further Secretary-General of the United Nations, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc HRI/GEN/2/Rev.5 (29 May 2008); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) [1.37]–[1.42]; Joseph and Kyriakakis, above n 41, 21–3.

46 See *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) (*‘First Optional Protocol’*); *CAT* art 22; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/RES/61/106 (entered into force 3 May 2008).

47 The individual communications mechanism under the *ICCPR* is established under the *First Optional Protocol*. Australia ratified the *First Optional Protocol* in September 1991, and it came into effect on 25 December 1991. Article 22 of *CAT* also allows States to submit to the individual complaints jurisdiction of the CAT Committee, which Australia did in 1993.

48 See further Joseph, Schultz and Castan, above n 45, [1.48]–[1.59]; Joseph and Kyriakakis, above n 41, 23–5.

its Views on the Merits. Views on the Merits outline the opinion of the treaty-monitoring body, particularly in relation to whether there has been a violation of a right and, if so, which articles were violated and, if necessary, an appropriate remedy, including compensation.

Both Concluding Comments/Observations and Views on the Merits are non-binding. They are the treaty-monitoring body's assessment of a State Party's periodic progress toward securing the rights or the State Party's responsibility for a human rights violation, but they are not enforceable like judgments of a court or tribunal. Treaty-monitoring bodies are, however, the only bodies empowered to assess a State Party's performance against treaty obligations, so their views are — or should be — highly influential on both international and domestic practices and debates.

In addition to periodic reporting and individual communications, the effectiveness of *CAT* is enhanced by independent, external monitoring by the international Sub-Committee on the Prevention of Torture and domestic National Preventive Mechanisms under the *OPCAT*, further discussed below.<sup>49</sup>

### 3 International Enforcement and Australia

The non-binding nature of the treaty 'enforcement' system is its downfall vis-à-vis Australia. The international human rights treaty system does not adequately hold Australia to account, as evidenced by numerous examples where the Australian Government has ignored or rejected the findings of treaty-monitoring bodies.<sup>50</sup>

The example of mandatory immigration detention is illuminating. Under the periodic reporting mechanisms, Australia has been subject to sustained criticism from treaty-monitoring bodies about the rights-*incompatibility* of the system of mandatory detention of asylum seekers, the offshore processing of asylum seekers, the conditions in detention (including the adequacy of the physical and mental health care), and the inadequacy of the training of those employed at detention centres, accompanied by recommendations for improvement.<sup>51</sup> Despite this, successive Australian Governments continue to maintain the system, with

49 Australia's long journey toward ratification of *OPCAT* is examined by Adam Fletcher, 'Australia and the *OPCAT*' (2012) 37 *Alternative Law Journal* 233.

50 See 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, 2012) 37, 53–6; Eastman, above n 41, 113–15. The treaty-monitoring system has undergone significant reform across the past decade: see Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System' (Report, United Nations Office of the High Commissioner for Human Rights, 2012). This reform process is aimed at making the treaty-monitoring process more efficient and effective. It is, however, unclear whether this will improve Australia's record of engagement with the treaty body system given that the reforms do not alter the non-binding nature of the system.

51 See, eg, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [23]; Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Australia*, 40<sup>th</sup> sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [11], [22], [25]; Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [80]–[81].

responses to treaty-monitoring bodies consisting of a restatement of Australia's laws and policies, and assertions of rights-*compatibility*, such as '[t]he Government believes that robust border security and humane and risk-based detention policies are not incompatible'.<sup>52</sup>

Under the individual communications mechanism of the *ICCPR*, Australia's system of mandatory detention of asylum seekers has been found to violate the right to liberty and prohibition against arbitrary detention (art 9(1)), the right of those detained to challenge the lawfulness of their detention before a court (art 9(4)), and the prohibition from torture and CIDTP (art 7).<sup>53</sup> The Australian government has consistently ignored or rejected the Views on the Merits of treaty-monitoring bodies. The response to the mandatory detention case of *A v Australia* is illustrative:<sup>54</sup>

after giving serious and careful consideration to the ... views expressed by the Committee, the Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A.

The Committee is not a court, and does not render binding decisions or judgments. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.<sup>55</sup>

This type of response is not reserved for the asylum seeker arena.<sup>56</sup> Indeed, the Human Rights Committee in its latest Concluding Observations expressed

52 Australian Government, *Written Response of the Australian Government to Concluding Observations of the United Nations Human Rights Committee* (December 2010) 23. Australia's response to the Human Rights Committee in relation to asylum seekers basically reiterates its current laws and policy without substantively addressing the concerns of the Human Rights Committee: at 21–5.

53 See, eg, Human Rights Committee, *Views: Communication No 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) (*A v Australia*) (where mandatory detention of asylum seekers was held to be arbitrary detention in violation of art 9(1) and 9(4)); Human Rights Committee, *Views: Communication No 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*) (where mandatory detention of asylum seekers was held to be arbitrary detention in violation of arts 9(1) and 9(4) and in violation of the freedom from torture and cruel, inhuman or degrading treatment under art 7).

54 This attitude to the Views on the Merits is shared across governments of both political persuasions: see Debeljak, 'Does Australia Need a Bill of Rights?', above n 50, 53–6.

55 Daryl Williams and Philip Ruddock, 'Australian Government Responds to the United Nations Human Rights Committee' (Joint Statement, MPS 126a/97, 17 December 1997).

56 The Human Rights Committee found Australia violated arts 10 (humane treatment) and 24(1) (rights of the child) of the *ICCPR* because of the treatment of a 16-year-old Aboriginal boy with a mild intellectual disability in prison: Human Rights Committee, *Views: Communication No 1184/2003*, 86<sup>th</sup> sess, UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) (*Brough v Australia*). The Australian Government's response is contained in *Response of the Australian Government to the Views of the Committee in Communication No 1184/2003 Brough v Australia* and includes: 'The Australian Government does not accept the Committee's view that the author's treatment amounted to a breach of articles 10 and 24 of the Covenant. Australia reiterates its submission that Mr Brough was dealt with in a manner appropriate to his age, indigenous status and intellectual disability, with due consideration to the challenges presented by his behaviour and the risk he presented to himself, other inmates and the security of the Parklea Correctional Centre': at [5]. After restating its arguments ([6]–[10]), the Australian Government concluded that '[a]ccordingly, Australia does not accept the view that the New South Wales Department of Corrective Services failed to respect Mr Brough's rights or failed to give due consideration to his age, indigenous status and intellectual disability': at [11].

‘concern at the State party’s restrictive interpretation of, and failure to fulfil its obligations under the First Optional Protocol and the Covenant’, and ‘recalls that, by acceding to the First Optional Protocol the State party has recognized its competence to receive and examine complaints ... and that a failure to give effect to its Views would call into question the State party’s commitment to the First Optional Protocol’.<sup>57</sup>

#### 4 Impact of International Law in the Domestic Setting

With international enforcement mechanisms being of limited impact, the focus turns to the influence of the international human rights regime on the domestic law of Australia. Under the *Commonwealth Constitution*,<sup>58</sup> Australia has a dual system of law — that is, Australia’s international obligations operate independently to its domestic laws. In terms of international obligations, the *Constitution* empowers the Commonwealth Executive to enter into treaties under s 61 of the *Constitution*.<sup>59</sup> The ratification of an international human rights treaty by the executive gives rise to international obligations only. In terms of domestic law, a treaty does not form part of the domestic law of Australia unless and until it is incorporated into domestic law by the Commonwealth Parliament under s 51(xxix) of the *Constitution*.<sup>60</sup> Although Australia has incorporated *some* aspects of *some* international human right treaties into domestic law,<sup>61</sup> the ‘patchwork’<sup>62</sup> of legal protections falls far short of comprehensive domestic implementation.

The ineffectiveness of enforcement at the international level, coupled with the monopoly that the executive and Parliament have over what international human rights instruments Australia should adopt and their (lack of) implementation within the domestic legal system, undermine human rights protection in Australia.<sup>63</sup> Without comprehensive domestic constitutional or statutory implementation, the protection, promotion and enforcement of human rights remain elusive. This

57 Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, 95<sup>th</sup> sess, UN doc CCPR/C/AUS/CO/5 (7 May 2009) [10]. It recommended: ‘The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation when there has been a violation of the Covenant.’

58 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

59 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193–5 (Gibbs CJ); 211–12 (Stephen J); 237–40 (Murphy J) (*Koowarta*’); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J) (*Teoh*’).

60 *Koowarta* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1, 69–70, 106 (Gibbs CJ); 131–2 (Mason J); 189 (Wilson J) (*Tasmanian Dam Case*’); *Kioa v West* (1985) 159 CLR 550, 570; *Teoh* (1995) 183 CLR 273, 286–7. This reflects the notion that it is Parliament — not the executive — which is the primary lawmaker.

61 For a discussion on the incomplete suite of constitutional and statutory protections of rights, see Debeljak, ‘Does Australia Need a Bill of Rights?’, above n 50, 38–44. These constitutional and statutory protections are bolstered by judicial reliance on human rights norms, and recent obligations formalising federal executive and parliamentary human rights scrutiny: at 48–52.

62 *National Human Rights Consultation Report* (2009) 127.

63 See Debeljak, ‘Does Australia Need a Bill of Rights?’, above n 50.

brings us to Victoria, which addressed this flaw by essentially incorporating the *ICCPR* into domestic law.

## **B The Victorian Charter of Human Rights and Responsibilities**

The *Charter* was enacted in 2006, and came fully into force on 1 January 2008.<sup>64</sup> The aim of the *Charter* is to better protect and promote human rights in Victoria,<sup>65</sup> and this is achieved in part by establishing a dialogue about human rights between the executive, Parliament and the judiciary.<sup>66</sup> A dialogue model was adopted in order to achieve the other aim of the *Charter*, which is the preservation of parliamentary sovereignty — under a dialogue model, as opposed to a constitutional model, judges cannot invalidate legislation that unjustifiably limits rights.

The *Charter* guarantees a suite of civil and political rights, and provides two mechanisms for the enforcement of those rights — one mechanism relates to legislation and the other mechanism relates to public authorities.<sup>67</sup> The scope of the rights and limitations thereto will be considered, followed by an analysis of the enforcement mechanisms.

### **1 The Rights and Justifiable Limitations**

Sections 8 to 27 of the *Charter* guarantee a range of civil and political rights, based primarily on the *ICCPR* rights.<sup>68</sup> For those in closed environments, the *Charter* contains a prohibition on torture and other CIDTP, rights to privacy and

64 *Charter* s 2.

65 *Charter* s 1(2).

66 Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9, 9–10 and 15–16. There is some controversy over the dialogue metaphor amongst the judges of the High Court of Australia: *Momcilovic v The Queen* (2011) 245 CLR 1, 67–8 [95] (French CJ), 84 [146] (Gummow J); 207 [534] (Crennan and Kiefel JJ) ('*HCA Momcilovic*'). Regardless of whether the dialogue metaphor is approved and adopted by the courts as a legally useful concept, it will still have political relevance because of its significance in the creation of the *Charter*.

67 In its current form, the *ACT HRA* is very similar to the *Charter* in relation to the guaranteed rights and limitations thereto, and the enforcement mechanism which relates to legislation. Originally, the *ACT HRA* did not impose any rights obligations on 'public authorities'. Obligations on 'public authorities' were introduced, however, after a statutorily mandated review of the *ACT HRA*. The obligations on 'public authorities' under the amended *ACT HRA* cohere with the *Human Rights Act 1998* (UK) ('*UK HRA*'), such that the *ACT HRA* now has stronger remedial force against public authorities than the *Charter*. Consideration of the *ACT HRA* is beyond the scope of this article, but further information can be found at the Australian National University *ACT Human Rights Act (ACTHRA) Portal* (21 August 2014) <<http://acthra.anu.edu.au/>>.

68 Although the adoption of civil and political rights without economic, social and cultural rights is the usual approach of many developed, democratic, capitalist States, the universality, indivisibility, interrelatedness and interconnectedness of all rights must be acknowledged. The adoption of one set of rights is not a futile exercise; however, it is difficult to achieve the realisation of one set of rights without guaranteeing and realising all rights. See *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc A/CONF.157/23 (12 July 1993) art 5.

family, linguistic and cultural rights, and the right to humane treatment when detained,<sup>69</sup> in similar terms to the *ICCPR*.<sup>70</sup>

In keeping with general human rights principles, the guaranteed rights may be subject to justifiable limitations. The capacity to place limits on rights recognises that not all rights are absolute, and that rights may need to be balanced against other competing rights, and other important societal values, objectives and interests.<sup>71</sup> There are two ways in which rights may be limited. First, there is the general limitation contained in s 7(2) of the *Charter*, which provides that human rights ‘may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.<sup>72</sup> This general limitations provision applies to all of the rights.<sup>73</sup> In addition, some individual rights also contain internal qualifications to the scope of the right,<sup>74</sup> or internal limitations that specifically articulate the capacity to reasonably and justifiably limit a particular right.<sup>75</sup>

There are numerous examples of legislation pertaining to closed environments that limit relevant rights — the real question is whether those limits are reasonable

69 *Charter* ss 10, 13, 17, 19, 22 respectively.

70 International, regional and comparative human rights jurisprudence is relevant to the interpretation of the protected rights: *Charter* s 32(2).

71 See generally Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32 *Melbourne University Law Review* 422, 427–33.

72 Section 7(2) then provides the following inclusive list of relevant factors: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. Section 7(2) is similar to, and inspired by, other general limitations provisions contained in comparable human rights instruments, and the jurisprudence under those instruments — see *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) (s 1); *New Zealand Bill of Rights Act 1990* (NZ) (s 5); *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2 (*Bill of Rights*) (s 36); the Canadian Supreme Court decision of *R v Oakes* [1986] 1 SCR 103. To further explore the operation of limitations provisions, see Melissa Castan and Julie Debeljak, ‘Indigenous Peoples’ Human Rights and the Victorian *Charter*: a Framework for Reorienting Recordkeeping and Archival Practice’ (2012) 12 *Archival Science* 213, 222–4.

73 For a discussion of the problematic nature of such a broad-ranging limitations provision, see Debeljak, ‘Balancing Rights in a Democracy’, above n 71.

74 Examples of internal qualifications under the *Charter* are the freedom from forced labour under s 11(3) and the right to liberty and security of the person under s 21. An example under the *ICCPR* is the right to liberty, which is qualified by a State Party’s capacity to undertake non-arbitrary arrest or detention, and to deprive liberty ‘on such grounds and in accordance with such procedure as are established by law’: art 9.

75 An example of an internal limit under the *Charter* is the freedom of expression under s 15, which may be subject to restrictions necessary to protect the reputation of others, and for the protection of national security, public order, public health or public morality. In essence, s 15 contains a specific articulation of the legislative purposes that may justifiably limit a right — that is, in s 7(2) terms, it specifies what is reasonable. Examples of internal limitations provisions under the *ICCPR* include arts 18(3), 19(3), 21, and 22(2).

and demonstrably justified.<sup>76</sup> The acceptability of the limits placed on these rights is the crux of the issue.

## 2 Mechanism One: The Impact of Human Rights on Legislation

The first mechanism addresses the consistency of legislation with the protected rights by imposing numerous obligations on the creation and interpretation of legislation. There are proactive and reactive aspects to the first mechanism. Focussing on the proactive, the executive and Parliament have pre-legislative human rights scrutiny roles under the *Charter*. The executive must take rights into consideration in policy formulation and legislative drafting. This is formally recognised in s 28, which requires parliamentarians to make a statement assessing whether or not proposed legislation is rights-compatible, and the reasons for the assessment, when introducing legislation to Parliament.<sup>77</sup> Parliament also has enhanced rights-scrutiny through its constitutional roles of legislative scrutineer and lawmaker. Under s 30, the Scrutiny of Acts and Regulations Committee ('SARC') must scrutinise all proposed legislation and accompanying statements of compatibility against the *Charter* rights and any limitations thereto. SARC reports to Parliament, which then debates the legislation and decides whether to enact the law.

These pre-legislative scrutiny obligations are intended to bolster rights protection by making them explicit considerations in the policy-making and lawmaking processes, to create a more transparent and accountable government, and to create a dialogue between the three arms of government,<sup>78</sup> allowing educative exchanges between the arms of government with a view to reconciling conflicts over rights.<sup>79</sup>

Turning to the more reactive elements, s 32 requires all statutory provisions to be interpreted in a way that is compatible with protected rights, so far as it is possible to do so, consistently with statutory purpose. Where it is not possible to interpret legislation compatibly with rights and/or consistently with the statutory purpose, the courts<sup>80</sup> are only empowered to issue an unenforceable 'declaration

76 For example, in *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009), the tribunal determined that the human rights of Mr Kracke, a mentally ill person on a community treatment order, could be limited by requiring him to take medication without his consent because it was medically necessary. See further Ian Freckleton and Simon McGregor, 'Human Rights and Review of the Involuntary Status of Patients with a Mental Illness: Kracke after Momcilovic' (2010) 17 *Psychiatry, Psychology and Law* 173, 182–3.

77 *Charter* s 28(3). Statements of (in)compatibility do not bind the judiciary: s 28(4).

78 For the opinion of the High Court of Australia on the concept of 'dialogue', see *HCA Momcilovic* (2011) 245 CLR 1.

79 See Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, 2002) ('Charter Conflicts'); See also Kent Roach, 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 *Canadian Bar Review* 481, especially 485; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, 2001); Janet L Hiebert, 'A Relational Approach to Constitutional Interpretation: Shared Legislative Responsibilities and Judicial Responsibilities' (2001) 35(4) *Journal of Canadian Studies* 161.

80 That is, the Supreme Court or Court of Appeal of Victoria.

of inconsistent application' under s 36. A s 36 declaration is unenforceable in the sense that it does not affect the validity, operation or enforcement of the legislation, or create in any person any legal right or give rise to any civil cause of action (s 36(5)). Rather, it is the judiciary's method of informing the executive and Parliament that the legislation is incompatible with the judiciary's understanding of the rights and justifiability of limitations thereto. Importantly, the judiciary is not empowered to invalidate rights-incompatible legislation, which thus preserves the sovereignty of Parliament, and ensures an institutional dialogue about rights and limitations thereto, rather than giving the judiciary the final say. To facilitate this dialogue, the executive and Parliament must review their assessment of the rights-compatibility of the legislation when a s 36 declaration is issued. In particular, under s 37, the responsible Minister has six months to prepare a written response to a s 36 declaration and table it in Parliament.

Continuing the focus on the reactive elements, s 32 is an 'enforcement mechanism'. Section 32 provides a remedy where legislation unjustifiably limits rights. In essence, a rights-compatible interpretation of a law is a complete remedy for a person whose rights would have otherwise been violated had the law been interpreted rights-incompatibly.<sup>81</sup> Given that a s 32 rights-compatible interpretation is designed to provide a remedy for rights-incompatible legislation, the remedial conception of s 32 and its strength were bound to be contested.

Three Victorian judges (Warren CJ, Nettle JA and Bell J) in three separate cases followed the lead of British and New Zealand jurisprudence in giving s 32 a *strong* remedial reach — that is, those judges would allow the courts to 're-interpret' legislation that was rights-incompatible, in order to 'fix' any human rights problems in the legislation.<sup>82</sup> In this scenario, a rights-compatible 're-interpretation' that is possible and compatible with statutory purpose was to be adopted in preference to a rights-incompatible interpretation, thereby providing a complete remedy to an otherwise rights-incompatible statutory provision.<sup>83</sup>

However, three judges in the Victorian Court of Appeal in the later case of *R v Momcilovic* ('*VCA Momcilovic*') were not willing to go as far, giving s 32 a

81 As indicated above, s 36 declarations are unenforceable, and do not impact on the validity, operation or enforcement of the legislation, such that s 36 does not provide a remedy. A s 36 declaration may inspire the executive and Parliament to amend the legislation to make it rights-compatible, but there is no obligation for the executive or Parliament to do this, and certainly no obligation for this to be applied retrospectively.

82 See *RJE v Secretary, Department of Justice* (2008) 21 VR 526 (Nettle JA); *Kracke v Mental Health Review Board & Ors (General)* (2009) 29 VAR 1 ('*Kracke*') (Bell J); *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 (Warren CJ).

83 The methodology under the UK HRA was first outlined in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72–3 [75], and has been approved and followed as the preferred method in later cases, such as, *R v A (No 2)* [2002] 1 AC 45, 72 [58]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 784 [149]; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 570 [24]. The current methodology under the *New Zealand Bill of Rights Act 1990* (NZ) was outlined by the majority of judges in *R v Hansen* [2007] 3 NZLR 1. This method is in contra-distinction to an earlier method proposed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 ('*Moonen No 1*'). For a discussion of the methodology under the *Charter*, see Debeljak, 'Parliamentary Sovereignty and Dialogue', above n 66, 28, 32.

weaker remedial reach.<sup>84</sup> Their Honours held that s 32 could not be used to ‘re-interpret’ laws that were rights-*incompatible*. Rather, their Honours tentatively<sup>85</sup> held that the section’s use was limited to the initial interpretation of the law.<sup>86</sup> In particular, s 32(1) was held to be part of the ‘framework of interpretive rules’,<sup>87</sup> which includes s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) and the common law rules of statutory interpretation (particularly the principle of legality),<sup>88</sup> and to satisfy the s 32(1) obligation a court must explore ‘all “possible” interpretations of the provision(s) in question, ... adopting that interpretation which least infringes *Charter* rights’.<sup>89</sup>

This decision was appealed to the High Court of Australia in *Momcilovic v The Queen* (*‘HCA Momcilovic’*),<sup>90</sup> which was split on the meaning of s 32, and its interaction with ss 7(2) and 36. In essence, three justices supported a weaker remedial approach to s 32,<sup>91</sup> whilst three justices supported a stronger remedial approach.<sup>92</sup> The remaining judge supported a stronger remedial approach but found that this was an unconstitutional conferral of legislative power on the judiciary.<sup>93</sup> The implications from *HCA Momcilovic* are far from clear and settled. Victorian superior courts consider *VCA Momcilovic* to not necessarily be overruled and efforts to find a ratio have led to a reductionist reading of s 32.<sup>94</sup>

84 *R v Momcilovic* (2010) 25 VR 436 (*‘VCA Momcilovic’*).

85 The Court only provided its ‘tentative views’ because ‘[n]o argument was addressed to the Court on this question’: *VCA Momcilovic* (2010) 25 VR 436, 464 [101]. In fact, a number of the parties sought the adoption of the UK *HRA*-based methodology as propounded by Bell J in *Kracke* (2009) 29 VAR 1, 26–60 [65]–[235].

86 *VCA Momcilovic* (2010) 25 VR 436, 446 [35].

87 *Ibid* 464 [103]. It is merely ‘part of the body of rules governing the interpretative task’: at [102].

88 For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the *Momcilovic* Court, see Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 87–90 [3.11]–[3.17].

89 *VCA Momcilovic* (2010) 25 VR 436, 464 [103].

90 (2011) 245 CLR 1.

91 *HCA Momcilovic* (2011) 245 CLR 1, 50 [50]–[51] (French CJ); 217 [565]–[566] (Crennan and Kiefel JJ).

92 *Ibid* 84–6 [146], 92 [168], [170] (Gummow J, with Hayne J concurring); 249–50 [683]–[684] (Bell J).

93 *Ibid* 165 [415], 166–7 [418], 168–9 [423], 170 [427], 172 [431], 174 [436], 181–2 [450] (Heydon J).

94 See further Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended It to Have’ (2011) 22 *Public Law Review* 15. Some Victorian judgments have followed *VCA Momcilovic* as approved by French CJ in *HCA Momcilovic*: see, eg, *Slaveski v Smith* (2012) 34 VR 206, 214–15 [20]–[25], especially [23]–[24]; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 [24]–[27] (Nettle J); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608–9 [139]–[142] (Nettle JA); *WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322, 350–1 [122]–[123] (Warren CJ, with Hansen JA agreeing). Another judgment expands upon the codification of the principle of legality characterisation: *PJB v Melbourne Health and State Trustees* [2011] VSC 327 [270]–[271] (*‘Patrick’s case’*). Two judgments suggest s 32(1) reaches beyond a codification of the principle of legality. See Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond’ (2014) 40 *Monash University Law Review* 340, 386–7, where she discusses Nettle JA in *WK v The Queen* [2011] VSCA 345, and Tate JA in *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37. For the ACT response to the decisions, see Allatt & ACT Government Health Directorate (*Administrative Review*) [2012] ACAT 67 (2 October 2012).

Nevertheless, the reactive element of s 32 has been used by persons in prisons,<sup>95</sup> psychiatric settings<sup>96</sup> and disability settings.<sup>97</sup> The *Charter* arguments have resonated — in some instances the *Charter* reinforced a common law right or interpretation of a statutory obligation,<sup>98</sup> in others a limitation on *Charter* rights was justifiable,<sup>99</sup> and in others decisions were informed by *Charter* rights.<sup>100</sup>

The proactive element of s 32 is its requirement for dialogue.<sup>101</sup> The judiciary will consider whether a s 32 rights-compatible interpretation is available and, if not, whether it is appropriate to issue a s 36 unenforceable declaration of inconsistent interpretation. The judicial opinion feeds back into the dialogue loop. The executive and Parliament may respond to judicial opinions in many and varied ways. In relation to a s 32 rights-compatible interpretation by the judiciary, the executive and Parliament may agree with the judicial analysis and accept the rights-compatible interpretation of the legislation. Equally, the executive and Parliament may disagree with the judicial analysis and neutralise an unwanted s 32 rights-compatible interpretation by legislatively reinstating a rights-incompatible provision.<sup>102</sup> In relation to a s 36 declaration, the judicial analysis of the legislation

- 95 See, eg, *Rich v Secretary, Department of Justice* [2010] VSC 390 (31 August 2010); *Castles* (2010) 28 VR 141; *Knight v Hastings* [2010] VSC 99 (3 May 2010); *Re Percy* [2010] VSC 179 (31 March 2010); *Rogers v Chief Commissioner of Police* [2009] VCAT 2526 (26 November 2009); *Dale v DPP* [2009] VSCA 212 (21 September 2009); *R v Kent* [2009] VSC 375 (2 September 2009); *DSC Tarrant v Townsend* (Unreported, Magistrates' Court of Victoria, Magistrate Garnett, 7 August 2010); *R v Benbrika* (2008) 18 VR 410; *R v White* [2007] VSC 142 (7 May 2007). There have also been numerous challenges to extended supervision order cases for sex offenders under the *Serious Sex Offenders Monitoring Act 2005* (Vic), which tend to focus on the right to be free of arbitrary detention (beyond the ARC grant research), but which could potentially raise arguments about the conditions of detention: *Secretary, Department of Justice v AB* [2009] VCC 1132 (28 August 2009); *R v Byrnes* [2009] VCC 0733 (18 June 2009); *RJE v Secretary, Department of Justice* (2008) 21 VR 526.
- 96 See, eg, *Antunovic v Dawson* (2010) 30 VR 355; *Kracke* (2009) 29 VAR 1; *09-085* [2009] VMHRB 1 (23 February 2009); *Daniels v Bayside Health* [2008] VSC 472 (21 October 2008); *08-133* [2008] VMHRB 3 (26 February 2008); *08-106* [2008] VMHRB 2 (9 January 2008).
- 97 See, eg, *DAJ (Guardianship)* [2009] VCAT 972 (28 April 2009); *LM (Guardianship)* [2008] VCAT 2084 (9 October 2008); *MM (Guardianship)* [2008] VCAT 1282 (26 June 2008); *09-003* [2008] VMHRB 1 (3 June 2008); *MH6 v Mental Health Review Board (General)* [2008] VCAT 846 (7 May 2008).
- 98 See, eg, *Castles* (2010) 28 VR 141; *Dale v DPP* [2009] VSCA 212 (21 September 2009); *Antunovic v Dawson* (2010) 30 VR 355; *Kracke* (2009) 29 VAR 1; *09-085* [2009] VMHRB 1 (23 February 2009); *09-003* [2008] VMHRB 1 (3 June 2008).
- 99 See, eg, *LM* [2008] VCAT 2084 (9 October 2008); *MM* [2008] VCAT 1282 (26 June 2008); *MH6 v Mental Health Review Board* [2008] VCAT 846 (7 May 2008); *Kracke* (2009) 29 VAR 1.
- 100 See, eg, *R v Kent* [2009] VSC 375 (2 September 2009); *DSC Tarrant v Townsend* (Unreported, Magistrates' Court of Victoria, Magistrate Garnett, 7 August 2010); *R v White* [2007] VSC 142 (7 May 2007); *DAJ (Guardianship)* [2009] VCAT 972 (28 April 2009).
- 101 For the opinion of the High Court of Australia on the concept of 'dialogue', see *HCA Momcilovic* (2011) 245 CLR 1.
- 102 In *RJE v Secretary, Department of Justice* (2008) 21 VR 526, a rights-compatible interpretation of 'likely to commit a relevant offence' under the *Serious Sex Offenders Monitoring Act 2005* (Vic) was given by Maxwell P and Weinberg JA on the basis of the common law and by Nettle JA on the basis of s 32. Parliament was not persuaded by the reasoning of the judges and responded to the judicial decision by amending the legislation to overturn the rights-compatible interpretation. The amendment was enacted in a matter of weeks, with little resistance in either House of Parliament. The *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) amends the definition of 'likely to commit a relevant offence' from the *RJE*-sanctioned 'more likely than not' meaning to 'a lower threshold than a threshold of more likely than not'.

may persuade the executive and Parliament that the law is unjustifiably rights-incompatible such that they amend the law to make it rights-compatible. Equally, the judicial analysis may not persuade the executive and Parliament of the need to amend the law, and the rights-incompatible law may be retained — this is the essence of parliamentary sovereignty.<sup>103</sup>

### **3 Mechanism Two: The Human Rights Obligations on Public Authorities**

Sections 38 and 39 contain the second *Charter* mechanism which impacts on public authorities. We will focus first on the definition of ‘public authority’ contained in ss 3 and 4.<sup>104</sup> One category of ‘public authority’ is the core, wholly public entity. This category of entity is listed in s 4(1) and relevantly includes public officials, Victoria Police, and entities established by statute that have functions of a ‘public nature’. Many of the entities that are authorised to detain persons in closed environments come within this category — including Victoria Police, government-run prisons, government-run disability facilities, and secure mental health facilities in public hospitals. These core, wholly public authorities are bound by the *Charter* obligations in all their activities.<sup>105</sup>

The second category of ‘public authority’ is functional, or hybrid, public authorities. Functional or hybrid public authorities are those entities who undertake part-public and part-private functions, with s 4(1)(c) referring to an ‘entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority’. In terms of identifying a functional public authority, s 4(2) contains an inclusive list of factors that are relevant to determining whether a function is of a public nature.<sup>106</sup> In terms of the obligations of functional public authorities, the *Charter* obligations are imposed on functional public authorities only when they are exercising functions of a public nature. Functional public authorities do not have *Charter* obligations when operating in a private capacity.

This breaking down of the traditional public-private divide is of utmost importance in the context of closed environments, many of which are now run and managed

103 It should be noted that the executive and Parliament may choose to utilise the s 31 override provision. Under s 31, Parliament can override the application of any or all of the protected rights. Parliament can use the s 31 override power when enacting legislation, or in response to a judicial ruling. Use of the override means that the overridden legislation operates notwithstanding the *Charter*; in other words, the s 32 interpretative obligation and the s 36 declaration power will not apply to overridden legislation. See generally *Charter* s 31 and accompanying legislative note.

104 Note that wholly private entities have no obligations under the *Charter*.

105 There are some bodies excluded from this category: notably, Parliament, and courts and tribunals except in their administrative capacity: see *Charter* ss 4(1)(i)–(j).

106 The factors are: (a) the function is given by or under statute; (b) the function is connected to or generally identified with functions of government (for example, providing correctional services, by way of managing a prison, under the *Corrections Act 1986* (Vic) (‘CA’)); (c) the function is regulatory in nature; (d) the entity is publicly funded to perform the function; and (e) the entity is a company whose shares are held by or on behalf of the State. These factors are not exhaustive, and the presence of one or more factors does not necessarily mean the function is of a ‘public nature’: *Charter* s 4(3). The fact that the entity is publicly funded to perform functions does not necessarily mean it is exercising that function on behalf of the State or other public authority: *Charter* s 4(5).

by private entities under contract to otherwise core public authorities.<sup>107</sup> Relevant hybrid public authorities include two privately run prisons (Port Phillip Prison and Fulham Correctional Centre),<sup>108</sup> and the forensic psychiatric facility run by the Victorian Institute of Forensic Mental Health, known as ‘Forensicare’.<sup>109</sup>

Secondly, we must consider the two obligations imposed on public authorities. Under s 38(1), it is ‘unlawful for a public authority to act in a way that is incompatible with a human right’. This imposes a substantive obligation on public authorities — that is, the public authority must act compatibly with the substance of the rights. Under s 38(1), it is also unlawful for a public authority, when ‘making a decision, to fail to give proper consideration to a relevant human right’. This imposes a procedural obligation on public authorities — that is, public authorities must ensure that relevant rights are a factor in the decision-making matrix, and that ‘proper’ weight is given to them.<sup>110</sup>

Section 38 outlines some ‘exceptions’ to unlawfulness.<sup>111</sup> Relevantly, under s 38(2), there is an exception to the obligation where ‘the public authority could not reasonably have acted differently or made a different decision’ because of a statutory provision. This exception would apply, say, where a public authority is simply giving effect to a rights-*incompatible* law. Wherever this exception is claimed, a complete answer may be provided by a s 32 remedial interpretation — that is, a litigant could seek a rights-*compatible* interpretation of an otherwise rights-*incompatible* law. Once a s 32 rights-compatible interpretation is secured, the exception under s 38(2) no longer applies.<sup>112</sup> Although the *Momcilovic* decisions do not directly touch upon s 38, the indirect impact of the decision is of concern. To the same extent that the *VCA Momcilovic* decision narrows the application of s 32(1), the s 38(2) exception/defence for public authorities is expanded. This

107 The case of *Metro West v Sudi* [2009] VCAT 2025 (revised 16 October 2009) is a good example of the reasoning in the hybrid public authorities case. In that case, Metro West, which was delegated statutory powers allowing it to lease, sub-lease, acquire and dispose of property on behalf of the government under the *Housing Act 1983* (Vic), was held to be a hybrid public authority.

108 These prisons are managed by G4S and the GEO Group Australia respectively.

109 There are numerous government-run and non-government-run community residential units for people with mental health and disability issues. Government-run facilities include Sandhurst Centre, Colanda Centre and Plenty Residential Services. The non-government-run units are run by agencies such as Scope and Yooralla, which should come within the definition of hybrid public authority, but community residential units are not necessarily technically ‘closed’ environments (although users of their services may experience the units as ‘closed’).

110 Justice Emerton provides valuable guidance on the requirements of the s 38(1) ‘proper consideration’ of a relevant human right obligation in *Castles* (2010) 28 VR 141, 184–5 [185]–[187]. These comments have been approved and relied upon in numerous cases, including *Director of Housing v TK (Residential Tenancies)* [2010] VCAT 1839 (16 November 2010) [16]–[17], [57]–[58]; *Director of Housing v KJ (Residential Tenancies)* [2010] VCAT 2026 (16 December 2010) [81]–[83]. See also Emerton J in *Giotopoulos v Director of Housing* [2011] VSC 20 (7 February 2011), especially [90]. For a critique of Emerton J’s approach, see Melanie Schleiger, ‘One Size Fits All: The Obligation of Public Authorities to Consider Human Rights under the Victorian Charter’ (2011) 19 *Australian Journal of Administrative Law* 17. Justice Bell has proposed an arguably stricter approach to ‘proper consideration’, which requires a more exacting approach to the human rights obligations of public authorities, in *PJB v Melbourne Health* [2011] VSC 327 (19 July 2011) [311]–[317].

111 Another exception to the obligations is that extended to ‘religious bodies’: see *Charter* ss 38(4)–(5).

112 Again, a s 32 rights-compatible interpretation provides a complete remedy, because the law is no longer rights-incompatible and the public authority can no longer rely on a rights-incompatible law for breaching its s 38(1) duty.

is because the counter-argument to s 38(2) claims is now weakened to the same extent that s 32(1) is weakened by *VCA Momcilovic*.<sup>113</sup>

Thirdly, we need to consider the consequences for public authorities if they act unlawfully or make a decision in an unlawful manner. Unlike the *Human Rights Act 2004* (ACT) ('*ACT HRA*') and the *Human Rights Act 1998* (UK) ('*UK HRA*'),<sup>114</sup> the *Charter* does not confer a free-standing cause of action — that being breach of a statutory duty, with the *Charter* being the statute. Rather, under s 39(1), a person can only seek redress if they have a claim to pre-existing relief or a remedy in respect to the act or decision of the public authority, in which case that relief or remedy may also be granted for *Charter* unlawfulness. This provision requires a *Charter* claim of unlawfulness to be 'piggy-backed' onto another pre-existing claim of unlawfulness. The *Charter* clarifies this in s 39(2), making it clear that s 39(1) does not interfere with the right of any person to seek judicial review of an administrative decision (s 39(2)(a)), and to seek a 'declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence' (s 39(2)(b)). Section 39(2) is considered to provide two examples of the type of pre-existing relief and remedy that a *Charter* claim of unlawfulness could be 'piggy-backed' onto.

Section 39(3) states that '[a] person is not entitled to be awarded any damages because of a breach of this Charter'. Similarly to the cause of action provisions, however, s 39(4) does allow a person to claim damages if they have a pre-existing right to damages — again, a 'piggy-back' damages provision. Evans clarifies s 39(4) by way of example: a person could not sue for damages for inhuman treatment in police custody *per se*; but they could argue that a civil tort, such as assault, was committed using the *Charter* rights to substantiate the claim, and seek damages for the assault.<sup>115</sup> The restrictive and complex nature of s 39 is likely to impact negatively on those in closed environments, who already face numerous barriers to accessing justice, including legal representation.<sup>116</sup>

Finally, the legal obligations imposed under ss 38 and 39 have proactive and reactive elements. Proactively, public authorities undertook *Charter* audits

113 That is, if s 32(1) is part of the initial interpretative process and does not allow for 're-interpretation', there is less scope to 'remedy' the rights-incompatible law, and there is less scope for avoiding s 38(2). This undermines the already weak remedial regime vis-à-vis public authorities. This has now been confirmed in *Dawson v Transport Accident Commission* [2010] VCAT 644 (13 May 2010) (Deputy President Macnamara). See generally Julie Debeljak, 'Human Rights Responsibilities of Public Authorities under the *Charter of Rights*' (Paper presented at the Law Institute of Victoria *Charter of Rights* Conference, Melbourne, 18 May 2007).

114 The *UK HRA* creates a free-standing action under ss 6–9. The amended *ACT HRA* contains a free-standing cause of action: at s 40C.

115 Simon Evans, 'What Difference Will the *Charter of Rights and Responsibilities* Make to the Victorian Public Service?' (Speech delivered at Clayton Utz, Melbourne, 13 June 2006). Again, this differs from the *UK HRA* s 8, which allows damages to be sought if the court is satisfied that the award is necessary to afford just satisfaction. The *ACT HRA* does not allow for damages claims based solely on the free-standing cause of action, being breach of statutory duty under the *ACT HRA*, but it does allow for claims for damages based on pre-existing rights to a claim for damages: *ACT HRA* ss 40C(4), (5)(b).

116 In relation to prisons, see Anne Grunseit, Suzie Forell and Emily McCarron, Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Needs of Prisoners* (2008).

before the *Charter* came into effect, ensuring that relevant laws, policies and practices were subjected to a rights-assessment and, where needed, rights-based amendment or reorientation.<sup>117</sup> Moreover, public authorities, as part of good governance, ought to continually audit laws, policies and practices for rights compliance, and can request the Victorian Equal Opportunity and Human Rights Commission (‘VEOHRC’) to review their programs and practices to determine their compatibility with rights.<sup>118</sup> Reactively, public authorities are now forced to confront their human rights obligations if an allegation of unlawfulness is made under s 38, such as occurred in the case of *Castles*.<sup>119</sup>

## **C Other Sources of Human Rights for People in Closed Environments**

In addition to international and domestic human rights instruments, specific legislation may address rights protections in closed environments. Specific legislative provisions are important, but provide patchy protection.<sup>120</sup> Specific legislation for prisons and closed facilities for people with intellectual disabilities are provided as case studies of the tension between the goals of the closed environment and human rights protection.<sup>121</sup>

### **1 Prisons**

In Victoria, the rights of imprisoned people are specified in s 47(1) of the *Corrections Act 1986* (Vic).<sup>122</sup> They include the right to open air exercise, to adequate food (including special dietary requirements) and clothing, to reasonable medical care and dental treatment, to take part in educational programmes, and to

117 The Victorian Government describes its pre-*Charter* audit of legislation in its submission to the four-year review of the *Charter*: Victorian Government, Submission No 324 to the Scrutiny of Acts and Regulations Committee, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 2011, 5–8 [7]–[17]. The Victorian Equal Opportunity and Human Rights Commission also reported on the pre-audit undertaken by government departments, as well as their education strategies, in its annual report of 2007: Victorian Equal Opportunity and Human Rights Commission, *The 2007 Summary Report on the Operation of the Charter of Human Rights and Responsibilities: First Steps Forward* (2008), 8–15.

118 *Charter* s 41(c).

119 (2010) 28 VR 141. See also above nn 98–100, and discussion in text following n 131.

120 Since the mid-1990s, government services have increasingly been provided by private corporations under contract, and these contracts include forms of rights protections. This is an additional source of rights protection for those in closed environments, although there is little evidence that such rights protections have been enforced: see, eg, Tania Penovic, ‘Privatised Immigration Detention Services: Challenges and Opportunities for Implementing Human Rights’ in Naylor, Debeljak and Mackay, above n 36, 10; Victorian Auditor-General, *Audit Summary of Management of Prison Accommodation Using Public Private Partnerships* (2010).

121 Note that significant law reform has occurred in the area of mental health. The *Mental Health Act 1986* (Vic) was replaced by the *Mental Health Act 2014* (Vic) on 1 July 2014.

122 There have been similar provisions since 1997 in Tasmania (though these are less extensive: see *Corrections Act 1997* (Tas) s 29) and since 2007 in the ACT (see *Corrections Management Act 2007* (ACT) s 12, ch 6).

make complaints about prison management to various public officials, as well as religious rights and visiting rights.<sup>123</sup>

There are many difficulties with s 47(1). Most of the rights therein are expressed in general terms, making them difficult to enforce in practice. For example, there is a right to take part in educational programmes,<sup>124</sup> but no detail about the standard or quality of such programmes. Moreover, some of the rights are stated in absolute terms, whilst other rights are stated in qualified terms, with the qualifications ranging from ‘reasonable’ access or access because of ‘necessity’,<sup>125</sup> to rights being subject to prison security and good prison management,<sup>126</sup> to rights being subject to the safe custody and welfare of any prisoner or the safety of the community,<sup>127</sup> to the loss of the right to correspond in certain circumstances (such as when a letter is believed to contain an unauthorised article or substance).<sup>128</sup> Further, all but the most specific s 47(1) rights are susceptible to being overridden for security reasons, under the s 21(1) statutory requirement that prison management maintains the ‘security and good order of the prison and the safe custody and welfare of the prisoners’. The balance between ss 21(1) and 47(1) by and large falls in favour of the former.<sup>129</sup> Furthermore, there is no obvious way to enforce s 47(1), with no provision of a remedy in the statute.<sup>130</sup> Finally, s 47(1) can be overridden by ordinary legislation.

Section 47(1) had not been enforced in legal proceedings until the 2010 case of *Castles*, which was decided in the context of the *Charter*.<sup>131</sup> The case involved an application by a woman in prison who wished to undertake in-vitro fertilisation (‘IVF’) treatment. She had been on IVF treatment before her imprisonment, and argued that she would be unable to recommence treatment on release given her age. The Victorian Supreme Court upheld her application under s 47(1)(f) of the *Corrections Act 1986* (Vic), which provides that all people in prison have a right to have access to reasonable medical care and treatment. Justice Emerton held that s 47(1)(f) ‘confers on Ms Castles the right to continue to undergo IVF treatment’,<sup>132</sup> although not necessarily at the clinic of Ms Castles’ choice. This decision was based primarily on the s 47(1) right in the *Corrections Act*, with the

123 These rights are ‘additional to, and do not affect any other rights which a prisoner has under an Act other than this Act or at common law’: *Corrections Act 1986* (Vic) s 47(2).

124 *Ibid* s 47(1)(o).

125 See, eg, *Corrections Act 1986* (Vic) ss 47(1)(c), (f), (h).

126 *Ibid* s 47(1)(i).

127 *Ibid* s 47C.

128 *Ibid* ss 47A, 47D.

129 See Richard Edney, ‘Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners’ Rights’ (2001) 7 *Australian Journal of Human Rights* 91.

130 Matthew Groves, ‘Prisoners and the *Victorian Charter*’ (2010) 34 *Criminal Law Journal* 217, 217–18.

131 *Castles* (2010) 28 VR 141. Rights under s 47 were raised in the Federal Court case of *Minogue v Williams* (2000) 60 ALD 366, but that aspect was not decided.

132 *Castles* (2010) 28 VR 141, 145 [3]. Justice Emerton explained that ‘IVF treatment is both necessary for the preservation of Ms Castles’ reproductive health and reasonable given the commitment to the treatment that Ms Castles has already demonstrated, her willingness to pay for further treatment, her age and the fact that she will become ineligible for further treatment before she is released from prison’.

*Charter* only serving ‘to confirm the interpretation that had been arrived at in any event’.<sup>133</sup>

## 2 Persons with Intellectual Disabilities in Closed Facilities

The *Disability Act 2006* (Vic) imposes rights-based obligations, ensuring least-restrictive practices for people with intellectual disabilities.<sup>134</sup> Its objects include advancing ‘the inclusion and participation in the community of persons with a disability’, promoting and protecting ‘the rights of persons accessing disability services’, and ‘mak[ing] disability service providers accountable to persons accessing those disability services’.<sup>135</sup> The legislation is expressly intended to be protective, and replaces what were previously unregulated practices of restriction and control.<sup>136</sup>

The *Disability Act 2006* (Vic) certainly limits rights by conferring powers to order medical treatment without the patient’s consent, to use restrictive practices, and to require the patient to live in a particular location. These powers are subject to a range of controls and safeguards, such as time limits, protocols for approval, the reporting of practices, and rights to independent review.

For example, a Supervised Treatment Order (‘STO’), which is a civil order to detain a person with an intellectual disability, may be ordered by the Victorian Civil and Administrative Tribunal (‘VCAT’) under s 191(6) only if it is satisfied of all the following:

- (a) the person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm;
- (b) there is a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means;
- (c) the services to be provided to the person in accordance with the treatment plan will be of benefit to the person and substantially reduce the significant risk of serious harm to another person;
- (d) the person is unable or unwilling to consent to voluntarily complying with a treatment plan to substantially reduce the significant risk of serious harm to another person;

133 Ibid 146 [4].

134 Section 5(4) of the *Disability Act 2006* (Vic) states that if restrictions on the right of a person with a disability are necessary, the one chosen should be the least restrictive of the person as is possible in the circumstances. Such a rights-based approach was first legislated in Victoria in the *Intellectually Disabled Persons’ Services Act 1986* (Vic).

135 *Disability Act 2006* (Vic) s 4.

136 For background to the 2006 Act see Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Report (2003).

- (e) it is necessary to detain the person to ensure compliance with the treatment plan and prevent a significant risk of serious harm to another person.

Numerous safeguards are in place in respect of STOs, including the certification of the intellectual disability by the Senior Practitioner and approval of the treatment plan, notice provisions to the person intended to be subject to the STO and the Public Advocate, guarantees that the treatment requested can be administered by the disability service provider, explicit statements of the restrictions to be used and the extent of supervision required, articulation of the process for transition to lower levels of restriction, including community living (where appropriate), and review, variation and revocation powers.<sup>137</sup>

The *Guardianship and Administration Act 1986* (Vic) establishes the Office of the Public Advocate to protect the rights of people with disabilities, including mental illnesses, and to monitor places where they reside.<sup>138</sup> People with intellectual disabilities may, in addition, be held in other closed environments — in prisons, police cells, and immigration detention — with no specific legislative protections for their particular needs. The Public Advocate highlighted the risk of rights violations in the prison system:

Once in the prison system, people with disabilities' needs are often not met because of a lack of understanding of their disability and a lack of appropriate services. This can lead to people being subject to inappropriate sanctions for breaching prison rules. For example, people with dementia, Huntington's disease, or autism spectrum disorders are sometimes placed in seclusion as punishment for inappropriate behaviours that they were unable to control because of their disability.<sup>139</sup>

### 3 Overall

These examples demonstrate that, at its best, sector-specific legislation provides some rights to people in some closed environments, and articulates the justification for placing limitations on these rights. Existing sector-specific legislation, however, fails to provide comprehensive rights and obligations, meaningful safeguards to ensure restrictions to rights are minimal, effective forms of review to ensure those imposing restrictions are accountable, or adequate enforceability where rights are unjustifiably limited. The primary goals of containment and

<sup>137</sup> *Disability Act 2006* (Vic) ss 191, 193.

<sup>138</sup> *Guardianship and Administration Act 1986* (Vic) ss 14–18A ('GAA'). The GAA also empowers a guardian appointed by VCAT to make decisions about the care and treatment of a person with an intellectual disability who 'is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances': s 22(1)(b). The guardian is required to act in the best interests of the person they are representing under s 28, and are bound by the terms of the guardianship order. The GAA requires that when determining whether or not a person is in need of a guardian, VCAT consider whether that person's needs 'could be met by other means less restrictive of the person's freedom of decision and action': s 22(2)(a).

<sup>139</sup> Public Advocate in Victoria, Submission No 91 to the Productivity Commission, *Inquiry into the Disability Discrimination Act*, May 2003, 4.

security tend to operate as a presumptive justification for restrictions on liberty, privacy and any protection from degrading treatment.

## D The Tripartite Regulatory Framework

A tripartite scheme of international and domestic human rights legislation together with domestic sector-specific legislation is proposed. The strength of the international human rights regime is its articulation of the minimum human rights standards that apply to persons in closed environments. The weaknesses of the system include its limited enforceability and its dependence on translation into domestic systems.<sup>140</sup>

The strengths of the *Charter* are the incorporation of the international minimum standards into the domestic law of Victoria, and the two enforcement mechanisms providing remedies for violations of rights. The enactment and implementation of domestic human rights instruments serve many purposes. First, Australian governments have not engaged in comprehensive rights-consistent legislative programs for closed environments in the absence of the driver of comprehensive human rights legislation. Adoption of the *Charter* initiated a rights-audit across government, which resulted in some legislative change,<sup>141</sup> and revision of policies and guidelines.<sup>142</sup> The *Charter* has also influenced major legislative reviews,<sup>143</sup> and requires the prospective ongoing oversight of legislation.

Secondly, litigation under the *Charter* can lead to significant outcomes. *Charter* rights have influenced rights-consistent outcomes in numerous cases,<sup>144</sup>

140 The treaties themselves impose obligations to this effect in relation to States Parties adopting legislative, judicial, administrative and other measures to give effect to the protected rights (see *ICCPR* art 2; *CAT* art 2), and States Parties providing effective remedies in the event of a violation (see *ICCPR* art 2; *CAT* arts 13–15). Indeed, international human rights law ‘is mediated almost wholly through the domestic apparatus of interpretation, expression, application and enforcement’, such that ‘international human rights law relies on states for the application and enforcement of human rights norms at the domestic level’: David Kinley and Penny Martin, ‘International Human Rights Law at Home: Addressing the Politics of Denial’ (2002) 26 *Melbourne University Law Review* 466, 472. An additional weakness is the tendency to the ‘lowest common denominator’ in standard setting. This is a function of international law being based on the consent of States, which may result in weaker human rights protections in exchange for consensus amongst the States. This is not to suggest that the human rights standards relevant to closed environments are inadequate; however, it is to suggest that the implementation of those rights ought not be adjudged by the ‘lowest common denominator’.

141 See *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009* (Vic).

142 Victorian Government, above n 117, 5–8 [7]–[17].

143 For example, the review of the *Mental Health Act 1986* (Vic) which commenced in 2008 — see Department of Health (Vic), *A New Mental Health Act for Victoria: Summary of Proposed Reforms* (2012) 3. Moreover, the senior policy makers interviewed for this research reiterated the importance of the *Charter* in requiring whole-of-government reviews of legislation, policies and practices: Katie Mitchell et al, ‘Perspectives of Senior Management on Applying Human Rights in Closed Environments’ (Working Paper No 1, ARC Project, November 2011) (*Working Paper 1*).

144 See above nn 95–100.

and litigation can also lead to systematic change in legislation, policies and guidelines.<sup>145</sup>

Thirdly, human rights considerations are now part of the decision-making matrix of all core and hybrid public authorities. Rights are also an additional advocacy tool for individuals when negotiating with public authorities. This has been evident, for example, in public housing, where solutions to seemingly intractable problems have been reached once the rights implications of a public authority's actions or decision are highlighted.<sup>146</sup>

Fourthly, the language of 'human rights' draws on minimum standards of treatment that are widely accepted, thoroughly articulated, cast in objective language, and readily measurable.<sup>147</sup> Human rights standards have been adopted by most jurisdictions around the world.<sup>148</sup> The international and comparative jurisprudence on rights provide guidance on the application of human rights in real situations of conflict.

The strength of sector-specific legislation is the precision with which rights can be conferred, and limitations explicitly articulated and justified. Such legislation can be tailored to the reality of the sector in a way that broad human rights legislation that applies across all closed environments cannot. The weakness of sector-specific legislation to date is the lack of definition of rights and obligations, safeguards against abuse, accountability when restrictions are imposed, and enforceability of rights. Sector-specific legislation, however, serves numerous purposes.

First, to twin the rights instrument with specific legislation allows a more specific identification of what is and is not protected in and across closed environments.

145 In the UK, for example, in *HL v United Kingdom* [2004] IX Eur Court HR 191, the European Court of Human Rights rejected reliance on common law principles of necessity to justify the restraint of patients with disabilities, as breaching the prohibition in the European Convention of Human Rights on arbitrary detention (art 5). This decision led to the establishment of legislated 'Deprivation of Liberty Safeguards' under amendments in 2007 to the *Mental Capacity Act 2005* (UK). Another example is the changes in the US state of California that followed the Supreme Court ruling that overcrowding in Californian prisons had resulted in people with mental illness not receiving adequate treatment, in violation of the Eighth Amendment to the *United States Constitution* (prohibition of cruel and unusual punishment): *Brown v Plata* (US Sup Ct, No 09-1233, 23 May 2011). This led California to enact the *Criminal Justice Realignment Act of 2011* which transferred responsibility for 'lower-level felons' to 'county jails' instead of state prisons: see Joan Petersilia and Jessica Greenlick Snyder, 'Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment' (2013) 5 *California Journal of Politics and Policy* 266.

146 See, eg, Human Rights Law Centre, Submission No 263 to the Scrutiny of Acts and Regulations Committee, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, 36–7 [80]. See further *Director of Housing v TK* [2010] VCAT 1839 (16 November 2010).

147 Indeed, even economic, social and cultural rights are increasingly acknowledged as measurable standards: see Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2010); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009); Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008); James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) 3 *Journal of Human Rights Practice* 162.

148 Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 288: 'As of 6 December 2006, the six core international human rights treaties (on civil and political rights, economic, social, and cultural rights, racial discrimination, women, torture, and children) had an average 168 parties, which represents a truly impressive 86 percent ratification rate.'

For example, the articulation of law, policy and guidelines that respect the right not to be subject to CIDTP in a disability setting must be guided by the overarching right, and will be different for prisons and police cells.

Secondly, security considerations often trump all other considerations in closed environments, whether one considers the laws, policies and guidelines used in closed environments, or the multitude of daily decisions of those working within them. The proposed regulatory framework would play a dual role here. The general limitations provision<sup>149</sup> of the domestic human rights instrument would bring these competing interests to the forefront of considerations when drafting legislation, policies and guidelines, and transparent justification for any limitations would need to be provided. Moreover, specific legislation, guidelines and policies based on a justifiable balance of rights vis-à-vis security would modify the daily exercises of discretion in this area — discretion which is often exercised in favour of security.

Thirdly, the language of human rights is difficult to operationalise for those managing the daily detention of people. For example, what does ‘humane treatment’ mean for the prison officer, or for the imprisoned person? To date, such provisions have been defined retrospectively through litigation. Specific regulatory translation of the overarching human rights would provide prospective guidance in the daily running of closed environments.<sup>150</sup>

Finally, sector-specific protections should apply *across* sectors, so that for example the rights of people with mental illness and intellectual disability are protected in other closed environments, such as prisons and immigration detention.<sup>151</sup> Different types of regulatory instruments may be needed to implement these protections. Incorporation into legislation is essential for accountability, transparency and enforceability, but codes and guidelines will be needed to provide a greater level of detail and flexibility.<sup>152</sup>

In summary, the rights of people in closed environments will be best protected by a regulatory framework encompassing the international human rights obligations that Australia already has, together with comprehensive domestic human rights legislation, and sector-specific legislation, policy and guidelines which operationalise the broad human rights obligations in a manner specific to each sector, and against which detaining institutions are held accountable. This is the

149 This reflects the fact that, in international law, many rights are not absolute. See generally Debeljak, ‘Balancing Rights in a Democracy’, above n 71.

150 Indeed, the increasingly sophisticated tools developed for measuring compliance with human rights help to clarify the precise meaning of the obligations which, in turn, assists in the operationalisation into daily practice of the rights.

151 This might include detailed schemes, developing those found in the *Minimum Rules*, translated in Australia as the Standard Guidelines for Corrections in Australia, specifying, for example, accommodation, food and family contact standards; or, for example, the right of an immigration detainee or prisoner, or person held in a disability facility, to medical care which is of an equivalent standard to the medical treatment in the non-custodial environment. An overview of the specific human rights considerations relating to people with mental illness and intellectual disability in prisons is provided in: Anita Mackay, ‘Human Rights Protections for People with Mental Health and Cognitive Disability in Prisons’ (2015) *Psychiatry, Psychology and Law* < <http://www.tandfonline.com/action/showAxArticles?journalCode=tppl20#VgX0y1-qpBc>>.

152 For a fuller discussion of some existing sets of Standards see Part IV B 3 below.

first pillar of the strategic framework. The two further implementing pillars focus ideally on proactively preventing rights abuses from occurring, although they can also be employed reactively after an abuse has occurred. They will be considered in turn.

#### **IV PILLAR TWO: IMPLEMENTING THE REGULATORY FRAMEWORK THROUGH PREVENTIVE MONITORING MECHANISMS**

The second pillar — preventive monitoring — requires the establishment of independent monitoring bodies, which carry out regular visits to closed environments and report publicly on their findings, providing accountability and transparency.<sup>153</sup> It also requires the establishment of clear standards against which to monitor and report. Monitoring does not usually include the power to enforce findings or recommendations.

Monitoring regimes combine ‘carrots’ and ‘sticks’ to achieve their aims. The main aim is to encourage and support a rights-compliant regime of detention by setting standards, monitoring compliance, engaging in discussion, and negotiating desirable outcomes — the ‘carrot’ approach. The strongest ‘stick’ for achieving compliance through monitoring is the threat or actuality of public reporting of negative findings — that is, ‘naming and shaming’.

External monitoring for closed environments is predominantly state based, with some federal mechanisms. External monitoring at the international level is also relevant to Australia, particularly the infrastructure established by the *OPCAT*. This Part begins in Section A with an analysis of the functions of monitoring bodies and their contribution to the protection of human rights. It then examines the criteria by which Australian monitoring bodies should be assessed in Section B, before concluding with a discussion of the *OPCAT* in Section C.

##### **A Functions of Monitoring Bodies**

External monitoring bodies perform a number of reactive and proactive roles. Reactive functions include: assessments of the appropriateness of detention, usually by administrative tribunals;<sup>154</sup> receiving complaints from people in closed environments by, say, Ombudsmen and Human Rights Commissions; and

153 Civil society — such as non-governmental organisations, advocacy groups and Independent Visitors — clearly also plays a role in assisting people in closed environments. However, the present discussion is focused on formal (and usually statute-based) preventive monitoring mechanisms. For further discussion of civil society organisations in relation to Australian closed environments see Jane Barnett et al ‘The Role of Civil Society in Monitoring and Overseeing Closed Environments’ (Working Paper No 2, ARC Project, August 2013). For an international picture see Vivien Stern, ‘The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight’ (2010) 30 *Pace Law Review* 1529.

154 For example, the Forensic Leave Panel, which is established under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 59 to determine applications for leave from forensic patients.

court-based litigation resulting from an allegation of rights violation. Proactive or preventive monitoring functions include: the inspection of specific places of detention, and systemic reviews within an individual closed environment or across similar types of closed environments.<sup>155</sup> This article focuses on proactive forms of monitoring.

## 1 Examples of Monitoring Bodies

In Australia, preventive monitoring functions are undertaken by both generalist and sector-specific organisations.<sup>156</sup> An example of a generalist organisation is the Ombudsman. All states and territories in Australia have Ombudsman offices with some level of authority over places of detention. Ombudsman Offices can usually initiate inquiries where they identify systemic concerns using the ‘own motion’ power.<sup>157</sup> Reports of such inquiries are usually provided to the agency being investigated, as well as to Parliament.<sup>158</sup> An Ombudsman cannot enforce their recommendations, with ‘naming and shaming’ being the main mechanism they have to achieve results.<sup>159</sup>

The Victorian Ombudsman also has express statutory responsibility for monitoring compliance with human rights under the *Charter*.<sup>160</sup> Relevantly, the Victorian Ombudsman reported on complaints regarding corrections and disability services in the 2014 Annual Report. The Victorian Ombudsman has used its power to initiate inquiries, examining systemic human rights issues on conditions in prisons,<sup>161</sup> mental health issues in prisons,<sup>162</sup> disability facilities,<sup>163</sup> and police cells.<sup>164</sup> Some inquiries have also been initiated by a reference under the *Whistleblower Act 2001* (Vic).<sup>165</sup>

155 Such as the inquiry into conditions of detention in police cells across Victoria: see *Conditions in Victoria Police Cells*, above n 5; *Conditions for Persons in Custody*, above n 11.

156 See the list of organisations ordered by jurisdiction on the ARC project website: Monash University, Faculty of Law, *Bodies Carrying Out Monitoring in Closed Environments* <<http://www.law.monash.edu.au/castancentre/research/hrce-monitoring-bodies.html>>. See also Bronwyn Naylor et al, ‘Monitoring Closed Environments: The Role of Oversight Bodies’ (Working Paper No 3, ARC Project, May 2014) (*Working Paper 3*) for fuller details.

157 *Ombudsman Act 1973* (Vic) s 16A.

158 See *Ombudsman Act 1973* (Vic) s 23.

159 See discussion in Matthew Groves, ‘Ombudsmen’s Jurisdiction in Prisons’ (2002) 28 *Monash University Law Review* 181, 193–4.

160 *Ombudsman Act 1973* (Vic) s 13(2).

161 See, eg, *Deaths and Harm in Custody*, above n 6; *Death of Carl Williams*, above n 7; *Conditions for Persons in Custody*, above n 11; Victoria, *Investigation into the Use of Excessive Force at the Melbourne Custody Centre*, Parl Paper No 54 (2007); Victoria, *Investigation into Contraband Entering a Prison and Related Issues*, Parl Paper No 102 (2008).

162 Victoria, *Investigation into Prisoner Access to Health Care*, Parl Paper No 60 (2011).

163 *Assault of a Disability Services Client*, above n 9.

164 *Conditions for Persons in Custody*, above n 11. The Victorian Ombudsman ceased to have jurisdiction over Victoria Police in February 2013 due to this responsibility being transferred to the Independent Broad-Based Anti-Corruption Commission.

165 See, eg, Victoria, *Investigation into Improper Conduct Involving Victoria Police: Whistleblowers Protection Act 2001* Parl Paper No 184 (2012); Victoria, *Whistleblowers Protection Act 2001: Investigation into Conditions at the Melbourne Youth Justice Precinct*, Parl Paper No 388 (2010).

There are also Human Rights Commissions, which are hybrid bodies. The Commissions are in one sense generalist because they are not focused on any particular sector, but they are specialist in that their main remit is human rights and non-discrimination. Sections 40 and 41 of the *Charter* outline the additional human rights functions of the VEOHRC. First, the VEOHRC must submit annual reports to the Attorney-General on the operation of the *Charter* and how it interacts with statute and common law, as well as all declarations of inconsistent interpretation and overrides in that year. Secondly, it can undertake ad hoc reports and reviews.<sup>166</sup> Thirdly, the VEOHRC is to assist the Attorney-General in conducting the 4- and 8-year reviews of the *Charter*. Fourthly, the VEOHRC is to provide community education about human rights and the *Charter*. Finally, the VEOHRC is empowered to intervene in certain court proceedings concerning the *Charter*.<sup>167</sup>

There are many sector-specific monitoring bodies. For example, disability sector organisations include the Office of the Senior Practitioner within the Department of Human Services,<sup>168</sup> the Disability Services Commissioner,<sup>169</sup> and the Office of the Public Advocate ('OPA'). The OPA engages in advocacy at both an individual<sup>170</sup> and a systemic level. Examples include reviewing the use of STOs, contributing to the review of the *Mental Health Act 1986* (Vic),<sup>171</sup> and reporting annually on the continuing use of restrictive practices.<sup>172</sup> The OPA also manages the Community Visitors scheme, a program of trained volunteers who regularly visit and report on community facilities housing people with intellectual disabilities and people with mental illness. The Community Visitors report to the OPA, and also table an Annual Report in Parliament.

Monitoring bodies should not operate in silos; interactions between monitoring bodies are of great importance. For example, the Victorian Ombudsman's

166 In particular, upon the Attorney-General's request, the VEOHRC may review and report on the effect of statutes and the common law on human rights; and, upon the request of a public authority, it may review and report on the authority's programs and practices for compliance with human rights obligations.

167 That is, where proceedings involve a question of law about the application of the *Charter*, the interpretation of a statutory provision under s 32, or when a court is considering issuing a s 36 declaration of inconsistent interpretation.

168 The Senior Practitioner's central role is 'ensuring that the rights of persons who are subject to restrictive interventions and compulsory treatment are protected': *Disability Act 2006* (Vic) s 23(2)(a). This involves monitoring restrictive interventions, developing standards and guidelines and educating disability service providers.

169 See *Disability Act 2006* (Vic) pt 3 div 3. The Disability Services Commissioner hears complaints about disability services and disability service providers and provides advice on matters referred to them by the Minister: *Disability Act 2006* (Vic) s 16. It appears that their work is primarily complaints based, with systemic issues being dealt with by the Ombudsman's office or the Office of the Public Advocate.

170 For example the OPA is given notice of any application for a STO, and can be a party to any STO hearing: *Disability Act 2006* (Vic) ss 191(4)–(5).

171 Which was superseded by the *Mental Health Act 2014* (Vic) on 1 July 2014.

172 See further John Chesterman, 'Restrictions on the Liberty of People with Disabilities: The View from the Office of the Public Advocate' in Bronwyn Naylor et al (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 65, 77–8.

investigation into the treatment of a disabled resident of a Community Residential Unit was triggered by a Community Visitor's report.<sup>173</sup> The Public Advocate observed that '[i]f it wasn't for these volunteers, these marvellous community visitors, this incident would never have been uncovered'.<sup>174</sup>

## 2 Monitoring and Human Rights

Preventive monitoring protects human rights in closed environments in a number of ways. First, it focuses on the day-to-day practices within the environments, allowing rights-inconsistent practices and processes to be identified and rectified. Owers, the former Chief Inspector of Prisons in the UK, points out:

I have rarely been into a prison where inspection did not reveal something that those running it did not know, or had ignored. There is sometimes a 'virtual prison' — the one that exists in the governor's office, at headquarters ... — as compared with the actual prison being operated on the ground. Inspections pick up the 'inspection gaps' between what ought to be and what is.<sup>175</sup>

Secondly, monitoring bodies can offer advice on improving practice in one closed environment based on their observations from comparable environments. A comparable environment may be a similar institution in the same sector with a similar detainee population; or it may be an institution in a different sector with a dissimilar detainee population but which experiences common issues. Creative solutions to entrenched problems may be readily apparent from an understanding of comparable institutions, sectors and issues. This is proactive monitoring at its best.

Thirdly, monitoring provides people who are detained with an opportunity to speak to someone other than a staff member about treatment and conditions. In addition to the opportunity to raise concerns about rights violations, it may reinforce that they have equal rights to other members of society:

Independent visits to psychiatric and social care institutions are also important as they raise the 'cloak of invisibility', and can be a 'source of reassurance' to those deprived of their liberty. Furthermore, ... they send a message to the national authorities and to others that such places of detention and those detained within them are then perceived as of equal value to others.<sup>176</sup>

173 *Assault of a Disability Services Client*, above n 9; Grant McArthur, 'Ombudsman George Brouwer Finds Disabled Man was Assaulted by Carers', *Herald Sun* (online), 3 March 2011.

174 McArthur, above n 173.

175 Anne Owers, 'Independent Inspection of Prisons' in David Jones (ed), *Humane Prisons* (Radcliffe Publishing, 2006) 177, 186.

176 Elina Steinerte, Rachel Murray and Judy Laing, 'Monitoring Those Deprived of Their Liberty in Psychiatric and Social Care Institutions and National Practice in the UK' (2012) 16 *International Journal of Human Rights* 865, 866 (citations omitted).

Finally, monitoring opens the closed environment to public scrutiny. Transparency and public accountability are drivers for change, within environments that often evoke little public sympathy. Owers has noted that ‘the sense of outrage and concern provoked by some of the worst inspection reports creates a political space in which Ministers can, and sometimes must, improve prison conditions’.<sup>177</sup>

## **B Criteria for Effective Monitoring Bodies**

The *OPCAT* identifies the necessary elements for an effective monitoring scheme as independence, regular visits, resourcing, and appropriate functions and powers. Catherine Branson, then President of the Australian Human Rights Commission (‘AHRC’), has summarised the necessary elements of effective monitoring in Australia (echoing many of the elements stipulated in the *OPCAT*) as follows:

Monitoring bodies should be independent. They should make regular visits and should be supported by adequate resources and have adequate functions and powers. They should work cooperatively with detaining authorities and be able to report publicly on their work.<sup>178</sup>

To evaluate the current effectiveness of Australian monitoring bodies and their potential to be *OPCAT*-compliant (as discussed below at C), they will be assessed against these key criteria. Standards for monitoring will be considered as part of the discussion of adequate functions and powers.

### **1 Independence**

Independence is crucial for the credibility of a monitoring scheme. Lack of independence will at least create the perception that the agency may not engage in robust and critical review. Many formal monitoring bodies have statutory underpinning, with an independently appointed head, direct budget allocations, and are independent of the agencies and departments they monitor. These include Ombudsman offices and Human Rights Commissions.<sup>179</sup> However, some bodies have much less independence. These include the Victorian Senior Practitioner and Chief Psychiatrist, and the Office of Correctional Services Review (‘OCSR’), which are all located within the relevant department.

In the case of the OCSR, not only does it sit within the Department of Justice, it does not publicly publish its reports or specific findings;<sup>180</sup> rather, a summary of

177 Anne Owers, ‘Prison Inspection and the Protection of Prisoners’ Rights’ (2010) 30 *Pace Law Review* 1535, 1546.

178 Catherine Branson, ‘Potential for Oversight — The Role and Effectiveness of Monitoring Bodies in Overseeing Human Rights in Closed Environments. A Commonwealth Perspective’ in Bronwyn Naylor et al (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 37, 39.

179 For more detail, see *Working Paper 3*, above n 156.

180 Human Rights Law Resource Centre, *Reducing Offending and Strengthening Correctional Accountability for a Safer Victoria* (2011).

its work is provided in Department of Justice Annual Reports.<sup>181</sup> Although there is some evidence to suggest the OCSR has achieved a range of reforms using internal reporting and negotiation,<sup>182</sup> the lack of independence and transparency undermines it.

The Victorian Ombudsman has been critical of the OCSR, noting ‘[t]he Victorian community should have confidence that the prison system is subject to independent, robust and transparent oversight. By any measure, the OCSR does not achieve any of these objectives’.<sup>183</sup> The Department of Justice has responded to such criticism by indicating that the OCSR ‘was never intended to be an independent oversight agency’ because this was ‘properly the jurisdiction of the Ombudsman and police’.<sup>184</sup> The Ombudsman, Human Rights Law Centre and Law Institute of Victoria have all called for an independent prisons inspectorate for Victoria to rectify this situation.<sup>185</sup>

The situation of OCSR may be contrasted with the Western Australian Office of the Inspector of Custodial Services (‘OICS’), which commenced operations in June 2000.<sup>186</sup> OICS is a prisons inspectorate with independence from government.<sup>187</sup> OICS is established by the *Inspector of Custodial Services Act 2003* (WA), which gives the Inspector the power to carry out announced and unannounced visits,<sup>188</sup> and requires reporting on findings to Parliament.<sup>189</sup> Inspections of prisons, detention centres, court custody centres and lock-ups must be carried out every three years.<sup>190</sup> The Inspector has broad powers, with s 27 providing that ‘[t]he Inspector has power to do all things necessary or convenient to be done for or in connection with the performance of the Inspector’s functions’.

181 See, eg, Department of Justice, *Annual Report 2013–2014* (2014) 163–5 (Appendix 9).

182 The interview with the Chief Officer of the OCSR for this research is reported in *Working Paper 3*, above n 156.

183 *Deaths and Harm in Custody*, above n 6, 135.

184 *Death of Carl Williams*, above n 7, 138.

185 *Deaths and Harm in Custody*, above n 6, 129–37; ABC News Radio, ‘Calls for Independent Prisons Monitor to Address Crisis in Vic System’, *The World Today*, 26 November 2013 (Alison Caldwell) <<http://www.abc.net.au/worldtoday/content/2013/s3899083.htm>>; News, ‘Calls for Independent Prisons Inspection Body’ (2008) 82 *Law Institute Journal* 22.

186 A similar body commenced operations in New South Wales on 1 October 2013 (pursuant to the *Inspector of Custodial Services Act 2012* (NSW)). There have also been proposals for an inspectorate in Tasmania where the Strategic Plan for Tasmanian Corrections for 2011–2020 notes that a way of improving integrity and oversight functions is to ‘[e]xplore options for the establishment of an independent Prisons Inspectorate’: Department of Justice (Tas), *Breaking the Cycle: A Strategic Plan for Tasmanian Corrections 2011–2020* (2011) 15. A long-established model of prison inspection exists in the United Kingdom where Her Majesty’s Inspectorate of Prisons has been a proactive monitor of prison conditions for many years. For a discussion of the UK approach see Owers, ‘Independent Inspection of Prisons’, above n 175.

187 The Inspectorate is modelled on Her Majesty’s Inspectorate of Prisons in the UK.

188 *Inspector of Custodial Services Act 2003* (WA) s 25.

189 *Ibid* ss 20, 34–5.

190 *Ibid* s 19.

## 2 Regular Visits and Resourcing

Most monitoring bodies have authority to enter the closed environment for purposes of inspection. The regularity of the visits is important, as is the power to make unannounced visits. The regularity of visits will ideally be mandated by legislation, such as s 19 of the *Inspector of Custodial Services Act 2003* (WA) which stipulates that visits be conducted every three years. Deitch observes:

Regular monitoring helps keep the quality of correctional services high, because the staff's knowledge that an inspector could arrive at any time acts as a means of informal control over staff behavior. In other words, it 'keeps staff on their toes' and helps them avoid complacency, even when everything is going well.<sup>191</sup>

In terms of prior notification of visits, there is a difference between having a power to make unannounced visits and exercising that power. Casale, former President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'), highlights that the CPT generally prefers to announce its visits and allow facilities to make their own improvements before visits, noting that 'we tend to smell a lot of fresh paint'.<sup>192</sup> The OICS similarly prefers to make announced visits and to negotiate improvements.<sup>193</sup>

Appropriate resourcing of monitoring bodies is fundamental to their effectiveness as accountability mechanisms. A government's commitment to human rights compliance is most readily undermined by under-resourcing.

The impact of under-resourcing has been most publicly debated in the area of monitoring immigration detention. A former Commonwealth Ombudsman highlighted the inadequacy of funding provided for oversight of immigration detention.<sup>194</sup> Branson, when President of the AHRC, also expressed concern about the reduction of funding provided for monitoring immigration detention centres — funding was being reduced at a time when detainee numbers were soaring. She concluded that the inadequacy of resources meant that the AHRC could no longer effectively carry out monitoring, resulting in the AHRC withdrawing from the space and leaving the under-resourced Commonwealth Ombudsman as the sole monitoring body.<sup>195</sup> Since this announcement, the AHRC has conducted a

191 Michele Deitch, 'Distinguishing the Various Functions of Effective Prison Oversight' (2010) 30 *Pace Law Review* 1438, 1443.

192 Silvia Casale, 'Mechanisms for Custodial Oversight: The United States and Europe' (2006) 22 *Washington University Journal of Law & Policy* 217, 223.

193 Bronwyn Naylor, 'Introduction: Monitoring and Oversight as a Mechanism for Protecting Human Rights in Closed Environments' in Bronwyn Naylor et al (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 1, 11.

194 See Allan Asher, 'People Just Like Us; Human Rights for Asylum Seekers!' (Paper presented at the Annual Castan Centre for Human Rights Law Conference, Melbourne, 20 July 2012).

195 Catherine Branson, 'Applying Human Rights in Closed Environments: Practical Observations on Monitoring and Oversight' (Speech delivered at the Implementing Human Rights in Closed Environments Conference, Melbourne, 21 February 2012). The ACT Human Rights Commission has also been critical of not being funded to inspect the ACT prison (the Alexander Maconochie Centre) — see ACT Human Rights Commission, *Annual Report 2011–2012* (2012) 13.

national inquiry into children in immigration detention.<sup>196</sup> Without any increase in its resources, this welcome development means that limited resources will have been diverted from other programs of the AHRC.

### 3 Adequate Functions, Powers and Standards

The adequacy of monitoring depends on the functions and powers conferred on the monitoring body, and the standards against which it can monitor: the more extensive the functions and power and the more sophisticated and broader the standards, the more rigorous the monitoring.

The requisite functions and powers include: authority to carry out announced and unannounced visits; regular visits; unhindered access to staff, detainees, and documents; and the power to report publicly on findings. Many monitoring bodies have such powers prescribed in legislation, with OICS being an ideal example.<sup>197</sup>

The importance of publicly proclaimed standards against which to monitor has been noted by Lawson:

Publication of the basic expectations of supranational monitoring bodies ... can serve to inform those responsible for places of detention of how relevant monitoring bodies consider that detainees 'ought to be treated'. It can thus help to drive up standards — a process underpinned by inspection visits and dialogue.<sup>198</sup>

We argue that human rights based standards are preferred to other regulatory/organising concepts, such as 'decency' and 'respect'. As discussed above, human rights standards are internationally accepted, thoroughly articulated, well-defined and bounded, and readily and increasingly measureable. Relevant minimum international human rights obligations are contained in the *ICCPR*, *CAT* and *CRPD*. The scope of human rights and justifiable limits thereto have been developed through enforcement, including periodic reporting, individual communications, and *OPCAT* monitoring. From this, numerous standards have been developed for the practical implementation of human rights in closed environments.<sup>199</sup>

196 Australian Human Rights Commission, *The Forgotten Children. National Inquiry into Children in Immigration Detention* (2014) <[https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf)>.

197 *Inspector of Custodial Services Act 2003* (WA) pts 4–5.

198 Anna Lawson, 'Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies' (2012) 16 *International Journal of Human Rights* 845, 860 (citations omitted).

199 See, eg, *Minimum Rules*; Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide* (2004); United Nations Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (2010). See also Andrew Coyle, *A Human Rights Approach to Prison Management: Handbook for Prison Staff* (International Centre for Prison Studies, 2<sup>nd</sup> ed, 2009).

In Australia, prison monitoring draws on international standards,<sup>200</sup> and on the detailed application of human rights principles by the United Kingdom Inspectorate of Prisons ('UK Inspectorate'). The UK Inspectorate developed 'expectations' in relation to prisons<sup>201</sup> and immigration detention.<sup>202</sup> The UK Inspectorate states that the expectations are 'referenced against international human rights standards' and are 'part of the mechanism by which the UK fulfils its obligations as a signatory to the [OPCAT].'<sup>203</sup> These 'expectations' have been colloquially termed the 'Healthy Prison' standards,<sup>204</sup> and comprise four tests — safety, respect, purposeful activity, and resettlement.<sup>205</sup> A range of detailed 'indicators' have been developed to assess whether the expectations are achieved. The 'Healthy Prison' standards have been adopted and adapted in a number of Australian jurisdictions.<sup>206</sup>

Human rights based monitoring standards will be most effective — they are linked to universally accepted standards, reference the broad and growing expertise and practice of international monitoring bodies, translate broad human rights standards for different closed environments and sectors, and give practical guidance on the management of rights-compliant facilities.

#### 4 Implementation and Working Cooperatively

A major constraint on monitoring bodies is their lack of power to enforce their recommendations:

The effectiveness of monitoring bodies in preventing human rights abuses and changing institutional cultures therefore depends on structural issues — sources of power, levels of independence, degree of access to the closed environments, access to expertise when monitoring, public accountability — and also on politics and their capacity to negotiate changes in the absence of powers of enforcement.<sup>207</sup>

Monitoring bodies can report publicly, often to Parliament, and many make use of the media to disseminate their findings. Whilst this does not equate

200 See Corrective Services Ministers' Conference, *Standard Guidelines for Corrections in Australia* (2004).

201 Her Majesty's Inspectorate of Prisons (UK), *Expectations: Criteria for Assessing the Treatment of Prisoners and Conditions in Prisons* (Version 4, 2012).

202 Her Majesty's Inspectorate of Prisons (UK), *Expectations: Criteria for Assessing the Conditions for and Treatment of Immigration Detainees* (Version 3, 2012).

203 Her Majesty's Inspectorate of Prisons, *Criteria for Assessing the Treatment of Prisoners*, above n 201, Introduction.

204 Based on the concept of a 'healthy prison' developed by the World Health Organisation: World Health Organisation, *Health in Prisons: A WHO Guide to the Essentials in Prison Health* (2007).

205 For more detail see Anne Owers, 'Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection' in Naylor, Debeljak and Mackay, above n 36, 209.

206 See, eg, Queensland Corrective Services, *Healthy Prisons Handbook* (2007); ACT Corrective Services, *Operating Philosophy* (10 August 2010) ACT Department of Justice and Community Safety <<http://www.cs.act.gov.au/page/view/867/title/operating-philosophy>>.

207 Naylor, above n 193, 10.

with ‘enforcement’, it increases the transparency and accountability of closed environments. In itself ‘naming and shaming’ may not induce change. A more low-key and cooperative approach by monitoring bodies may be more effective in achieving change, at least as a first step. Many monitoring bodies engage in a dialogue with the monitored agency, as demonstrated by inclusion of the agency’s response in any final publication of the monitoring body.<sup>208</sup> Many monitoring bodies report high levels of compliance with their recommendations. For example, the Victorian Ombudsman reports a 90 per cent implementation rate of recommendations.<sup>209</sup>

There have, however, been examples of significant failures to implement recommendations. One example is the death of Mr Ward in 2008, who died from heatstroke after being transported by the WA Department of Corrective Services to Kalgoorlie in a defective, nonair-conditioned vehicle. The OICS had raised serious safety concerns in two previous reports (2001 and 2007),<sup>210</sup> finding that the use of these vehicles for anything other than short trips would be ‘inhumane’. The Coroner concluded that ‘[i]n my view all of the above observations made by the Office of the Inspector of Custodial Services were accurate and should have been acted upon as a matter of urgency.’<sup>211</sup> This demonstrates that despite the fact that OICS has been established with appropriate independence, is statutorily required to inspect regularly, and has a wide range of powers and functions, its effectiveness is nevertheless limited by its inability to enforce the implementation of its recommendations.

Ideally monitoring bodies will follow up to verify whether their recommendations have been implemented. The process of implementation of recommendations made by the UK Inspectorate has been outlined by Owers to include a structured follow-up process:

Some of the things we find are remedied before we are out of the gate. Others will be dealt with in the action plan the Prison Service produces within two months in response to our recommendations. And we will return, unannounced, a year or so after that to see if action has in fact happened.<sup>212</sup>

A number of formal bodies monitor closed environments in Australia. Ombudsman offices and independent Prison Inspectorates most closely align with the criteria for effective monitoring, with monitoring bodies in many sectors falling short. Constraints to effective monitoring include a lack of independence, under-resourcing, and inadequate functions, powers and/or monitoring standards. The federal structure in Australia presents another challenge — namely, gaps and

208 *Working Paper 3*, above n 156, 16.

209 Victorian Ombudsman, *Annual Report 2014* (2014), 41.

210 OICS, ‘Report of an Announced Inspection of Adult Prisoner Transport Services’ (Report No 3, November 2001); OICS, ‘Thematic Review of Custodial Transport Services in Western Australia’ (Report No 43, May 2007).

211 State Coroner of Western Australia, *Inquest into the Death of Ian Ward* (Ref No 9/09, 12 June 2009) 89.

212 Anne Owers, ‘Prison Inspection and the Protection of Human Rights’ [2004] *European Human Rights Law Review* 107, 112.

overlaps in monitoring coverage. These problems are considered, in the light of the opportunities promised by the *OPCAT*, in the following section.

### **C Optional Protocol to the Convention Against Torture**

A significant international development is the *OPCAT*.<sup>213</sup> The *OPCAT* was developed to improve practical implementation of the *CAT*. It establishes a dual system of international and national monitoring of places of detention. It applies to all ‘places of detention’ and has a broad definition of ‘deprivation of liberty’.<sup>214</sup> Australia signed the *OPCAT* in May 2009, but is yet to ratify it.<sup>215</sup> Ratification requires States Parties to establish a national monitoring regime of National Preventive Mechanisms (‘NPMs’) for all places of detention, and to allow monitoring by the international Subcommittee on the Prevention of Torture (‘SPT’).

Nationally under *OPCAT*, NPMs must be independent,<sup>216</sup> and have requisite statutory powers.<sup>217</sup> NPMs must be granted free access for their visits to any place of detention, including free access to all necessary information, and the ability to conduct private interviews with detainees and any other people they believe relevant.<sup>218</sup> NPMs must be adequately resourced to undertake their role,<sup>219</sup> including sufficient resources to allow for regular follow up visits. Finally, the reports of NPMs must be publicly available.<sup>220</sup>

Some countries have established a new NPM, whilst others have allocated the role to an existing body or bodies. New Zealand ratified the *OPCAT* in 2007, and draws on five existing monitoring bodies, with the New Zealand Human Rights Commission as the Central NPM.<sup>221</sup> Similarly, the UK’s NPM is comprised

213 As at 3 September 2015 79 countries had signed the *OPCAT* and 62 countries had designated their NPM: Association for the Prevention of Torture, *OPCAT Database* <[www.apt.ch/en/opcat-database/](http://www.apt.ch/en/opcat-database/)> (accessed 7 September 2015).

214 ‘Deprivation of liberty’ is defined as meaning ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’: *OPCAT* art 4(2). It applies to the research-focussed closed environments: see Richard Harding and Neil Morgan, Australian Human Rights Commission, *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia* (2008) 9–11. For example, the *OPCAT* applies to secure facilities for young people, closed aged-care facilities, transport vehicles for people in detention, and potentially a range of other contexts in which people are not free to leave.

215 Two major steps towards ratification that have already occurred are the preparation of a National Interest Analysis, and consideration of that document by the Joint Standing Committee on Treaties, which recommended Australia ratify the *OPCAT*. See Fletcher, above n 49, 235–6.

216 *OPCAT* art 18(1).

217 *Ibid* art 19.

218 *Ibid* art 20.

219 *Ibid* art 18(3).

220 *Ibid* art 23.

221 The other bodies are the Independent Police Conduct Authority, the Office of the Children’s Commissioner, the Office of the Ombudsman and the Inspector of Service Penal Establishments. For more information about the operation of the *OPCAT* in New Zealand see Natalie Pierce, ‘Implementing Human Rights in Closed Environments: The *OPCAT* Framework and the New Zealand Experience’ in Naylor, Debeljak and Mackay, above n 36, 154.

of eighteen existing agencies, coordinated by the UK Inspectorate. It includes agencies with oversight of prisons, immigration detention, hospitals, and mental health and disability care.<sup>222</sup>

The international component empowers the SPT to carry out announced and unannounced visits to places of detention, where it must be permitted private interviews with detainees, staff, government officials and anyone else it requires. The SPT also has unhindered access to requisite information and documentation. The SPT can liaise with States and domestic NPMs, and make recommendations about enhancing protections against torture and CIDTP in its reports. Its reports are only published at the request of the State.<sup>223</sup> Whilst this appears to limit transparency, the European equivalent of the SPT, the CPT,<sup>224</sup> has found that most States agree to publication.<sup>225</sup>

In writing about the advantages of the *OPCAT* for Australia, Fletcher has observed:

The point of the regime is to ensure transparency and accountability in a sphere in which the government has complete power over individuals, but to do so in a non-confrontational way which is more likely to be effective than an aggressive, politically-oriented approach (because such an approach invariably makes governments defensive).<sup>226</sup>

In addition to improving transparency and accountability, the *OPCAT* would necessitate a more comprehensive and coordinated approach to monitoring than currently exists in Australia, better filling the gaps in monitoring, and more clearly defining the roles and responsibilities of monitoring bodies where there is overlap. It would also expose Australian closed environments to an international oversight mechanism. The insights the SPT has gained from comparing the practices within a variety of closed environments across countries would assist to improve compliance with human rights in Australia.

## **D Concluding Remarks on Preventive Monitoring**

A strategic framework for protecting rights in closed environments must include monitoring by properly resourced and independent bodies, with the powers and

222 See National Preventive Mechanism, *Monitoring Places of Detention: Third Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2011 – 31 March 2012*, Cm 8558 (2013). For the experience of other federations which have already ratified the *OPCAT* and established NPMs see, eg, Germany and Mexico.

223 See generally Part III of the *OPCAT*.

224 The CPT process has been operating for over 20 years in Europe. The process is set up under the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. The powers of access to people, places, and documents of the CPT are as extensive as the *OPCAT*. Its Annual Report of 2013–14 indicates that the CPT undertook 25 country visits, consisting of 14 within its regular program of visits, and 11 ad hoc visits: Council of Europe, 24<sup>th</sup> General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1 August 2013 – 31 December 2014 (2015) 9 [1]. Like the SPT, the CPT only publishes reports where the State requests this.

225 Ibid 25 [47]. 317 of the 363 CPT reports to date have been made public.

226 Fletcher, above n 49, 234.

expertise to assess the practices of detention against human rights standards and expose them to public scrutiny, and ideally mechanisms to facilitate the implementation of their recommendations. Sector-specific agencies are needed for all closed environments, with a general oversight body that can ensure consistency across environments on common issues, and guard against gaps and overlaps.

The first and second pillars are both necessary but not sufficient to ensure the promotion and protection of human rights in closed environments. Monitoring standards should be clearly referable to the regulatory framework consisting of international, domestic and sector-specific legislation (the first pillar), and monitoring is most effective if undertaken against sophisticated, broad-based human rights standards.

However the rights-based assessments made by monitoring bodies will not be implementable without a focus on the culture of the closed environment. Imposing human rights standards within closed environments and monitoring against these will be ineffectual without human rights culture change.

## **V PILLAR THREE: IMPLEMENTING THE REGULATORY FRAMEWORK THROUGH HUMAN RIGHTS CULTURE CHANGE**

The third pillar of the strategic framework is changing the culture of closed environments to be human rights oriented and compliant. It is the lived experience of detainees and staff that is at the heart of the regulatory framework and of preventive monitoring, and the culture of an organisation is vital to that lived experience.

In this Part, a definition of a ‘human rights culture’ will be developed in Section A, and the requisite elements for achieving such a culture will be explored in Section B. Examples from various closed environments will be used to illustrate the challenges for, and the benefits of, securing cultural change.

### **A Definition**

An important way of changing behaviour within organisations is to change their ‘organisational culture’. A widely adopted definition of ‘organisational culture’, formulated by Schein, is:

a pattern of shared basic assumptions learned by a group as it solved its problems of external adaption and internal integration, which has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.<sup>227</sup>

227 Edgar H Schein, *Organizational Culture and Leadership* (Jossey-Bass, 4<sup>th</sup> ed, 2010) 18.

It is more difficult to find an accepted definition of a ‘human rights culture’. This concept is more advanced in the UK than Australia, given the UK’s human rights legislation was enacted in 1998,<sup>228</sup> with an explicit purpose to create a human rights culture.<sup>229</sup> Whether the aim has been achieved is debatable.<sup>230</sup> However, analysis of the changes required to establish a ‘human rights culture’ has certainly taken place.

The UK Parliamentary Joint Committee on Human Rights (‘Joint Committee’) identified two dimensions of a human rights culture, the first being personal, and the second institutional. The personal dimension includes a ‘sense of entitlement’ to rights, a ‘sense of personal responsibility’ to exercise rights in a manner that does not infringe on the rights of others, and a ‘sense of social obligation’, which recognises that rights must be balanced against the broader ‘public interest’.<sup>231</sup> The institutional dimension involves all public authorities understanding their obligation not to violate the rights of those whom they serve or care for, and their positive duty to promote rights.<sup>232</sup>

The institutional dimension may seem the most relevant to closed environments as public authorities. However, the personal dimension will inevitably inform the institutional dimension: as argued by the Joint Committee, institutional policies and practices will be most likely to change in response to ‘a widely-shared sense of entitlement to [human] rights, ... and of respect for the rights of others’.<sup>233</sup>

An ‘organisational culture’ which is also a ‘human rights culture’ would therefore involve: ‘shared assumptions and patterns of behaviour that are respectful of the human rights of people both within and outside the organisation, and that comply with the organisation’s negative and positive obligations to promote human rights’. This definition assumes a common understanding of what human rights are. There is no such common understanding in the Australian context, the significance of which is discussed below.

## B The Elements

According to the literature, there are at least three important elements in achieving a human rights culture in closed environments. These include:

228 UK HRA.

229 During the passage of the Bill that became the UK HRA Lord Irvine said ‘[o]ur courts will develop human rights throughout society. A culture of awareness of human rights will develop’: United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol 582 col 1228. See also the discussion in Joint Committee on Human Rights, *The Case for a Human Rights Commission*, House of Lords Paper No 67-I, House of Commons Paper No 489-I, Session 2002–03 (2003) 11–21.

230 See Lieve Gies, ‘The Hard Sell: Promoting Human Rights’ (2011) 24 *International Journal for the Semiotics of Law* 405, 409; Karen Bullock and Paul Johnson, ‘The Impact of the Human Rights Act 1998 on Policing in England and Wales’ (2012) 52 *British Journal of Criminology* 630.

231 Joint Committee on Human Rights, above n 229, 12.

232 Ibid.

233 Ibid.

1. gaining the perspectives of detainees about the culture of particular closed environments as a means of identifying what needs to be changed;
2. creating a human rights culture in the society more broadly if change is to be achieved within closed environments; and
3. establishing strategies for achieving change initiated from within closed environments, specifically leadership, change agents and education.<sup>234</sup>

To illustrate each element, examples from a range of international and Australian closed environments are referred to, given the experience of one closed environment may offer some guidance to others.

## 1 *Gaining Detainee Perspectives*

Any attempt to achieve a human rights culture in closed environments must take account of the views of those detained, although they are most unlikely to define their experiences as being part of the ‘culture’ of the organisation.<sup>235</sup>

Liebling has developed tools for measuring the ‘quality of life’ in prisons, including the Measuring the Quality of Prison Life (‘MQPL’) survey. This has been used in UK prisons for ten years, and in some Australian jurisdictions.<sup>236</sup> The MQPL survey measures interactions between staff and imprisoned people, and examines imprisoned people’s perspectives on their treatment in the particular institution. The survey questions are divided into five ‘dimensions’, which are:

1. harmony, for example, how respectful staff are towards imprisoned people;
2. professionalism, for example, fairness of procedures;
3. security, for example, staff control of the environment;
4. conditions and family contact, for example, regime decency; and
5. well-being and development, for example, whether an environment helps to address offending behaviour.<sup>237</sup>

Liebling has further identified the potential to use the MQPL to measure the implementation of international human rights obligations, explaining: ‘It is

234 This is not an exhaustive list. For more detail about culture change in closed environments see Jem Stevens, ‘Changing Cultures in Closed Environments: What Works?’ in Naylor, Debeljak and Mackay, above n 36, 228.

235 This perspective has been sought as part of the ARC project. For an analysis of prisoners’ perspectives see Bronwyn Naylor, ‘Human Rights and Respect in Prisons: The Prisoners’ Perspective’ in Naylor, Debeljak and Mackay, above n 36, 84.

236 Alison Liebling, *Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life* (Oxford University Press, 2004). See further Ben Crewe, Alison Liebling, and Susie Hulley, ‘Staff Culture, Use of Authority and Prisoner Quality of Life in Public and Private Sector Prisons’ (2011) 44 *Australian and New Zealand Journal of Criminology* 94; Alison Liebling, ‘What is “MQPL”? Solving Puzzles about the Prison’ [2012] (202) *Prison Service Journal* 3.

237 For an overview of the dimensions see Alison Liebling, Susie Hulley and Ben Crewe, ‘Conceptualising and Measuring the Quality of Prison Life’ in David Gadd, Susanne Karstedt and Steven F Messner (eds), *The SAGE Handbook of Criminological Research Methods* (SAGE Publications, 2012) 358, 366–70.

clear that concepts like “dignity” and “humanity” are difficult to operationalize. Prisoners are articulate about them, however, and know the difference between “feeling humiliated” and “retaining an identity”.<sup>238</sup>

The advantage of an instrument such as the MQPL is that it allows the organisational culture of a particular prison to be measured, as well as more specifically allowing for an assessment of the extent to which a ‘human rights culture’ exists. The tool can also be used to evaluate change over time, within and between prisons.

## 2 Broader Social Change

There are undoubtedly deficiencies in the broader Australian community’s understanding of human rights as they might apply in closed environments. Senior managers and policymakers interviewed for the ARC project identified the absence of a broader human rights culture in the Australian community as one challenge in implementing human rights in closed environments.<sup>239</sup> This is supported by Dunn’s recent analysis of public attitudes to human rights, based on several large national attitude surveys, which found that ‘human rights are seen as desirable, yet there is complacency about the state of human rights protection, and ignorance about how they are protected’.<sup>240</sup> Dunn’s analysis also found what he terms ‘hierarchies of sympathy’, with certain vulnerable groups seen as more in need of protection than others. For example, the public are very unsympathetic to asylum seekers, with 30 per cent of respondents considering that they should have *less* human rights protection than they currently have.<sup>241</sup>

The limited community understanding of human rights has two significant impacts in closed environments. First, staff and people detained in closed environments bring their own perceptions and misperceptions about human rights into the closed facility, and these perceptions influence their behaviour towards others. This is how the personal dimension impacts the institutional dimension of a human rights culture (or potentially counteracts the development of such a culture). For example, Australian researchers Ward and Birgden have reported that some correctional officers hold the belief that because of the crime committed, offenders have ‘forfeited’ their human rights.<sup>242</sup>

Secondly, public perceptions of the goals of the closed environment impact on the way staff perceive their role. If the community perceives that a prison, for example, should primarily be punitive, this may influence prison officers’ attitudes towards imprisoned people. A comparison of prison officer attitudes in

238 Alison Liebling, ‘Moral Performance, Inhuman and Degrading Treatment and Prison Pain’ (2011) 13 *Punishment & Society* 530, 533.

239 *Working Paper 1*, above n 143, 10.

240 Kevin M Dunn, ‘Do Australians Care about Human Rights? Awareness, Hierarchies of Sympathy and Universality’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 515, 519.

241 *Ibid* 521–2.

242 Tony Ward and Astrid Birgden, ‘Human Rights and Correctional Clinical Practice’ (2007) 12 *Aggression and Violent Behaviour* 628, 635.

California, which can be characterised as a punitive jurisdiction, and Minnesota, which is less punitive,<sup>243</sup> found that 67 per cent of prison officers in Minnesota were supportive of rehabilitation as a goal of imprisonment as compared to 47 per cent in California; and 61 per cent of prison officers in California considered that prison should be ‘totally punishment’ as compared to 46 per cent in Minnesota.<sup>244</sup> The authors conclude that:

Without seriously altering prevailing sentiments about prisoners within and beyond the penal field, it will be extremely difficult to get buy-in from front-line officers for making contemporary prisons less punitive and austere and more ‘correctional’ and humane.<sup>245</sup>

The best way to promote an understanding of human rights in society more broadly is through education.<sup>246</sup> In recognition of this, treaty-monitoring bodies require the Australian government to disseminate the findings from their visits as one method of promoting awareness.<sup>247</sup> The need for education was also recognised in the federal *Human Rights Framework* (2010),<sup>248</sup> with education being one of five key principles for protecting and promoting human rights in Australia.<sup>249</sup> Human rights are considered in the development of a national education curriculum.<sup>250</sup> However, the effectiveness of such educational initiatives has been questioned given the absence of a human rights legislative framework at the national level.<sup>251</sup> Gerber and Pettitt emphasise that *both* legislation and education are needed to create a human rights culture.<sup>252</sup>

### 3 Achieving Change from Within

Without the support of an external human rights culture, closed environments are left to pursue a human rights culture from within. Three of the most effective

243 ‘Punitiveness’ was measured by a variety of indicators, such as imprisonment rates, parole policies and expenditure on corrections: Amy E Lerman and Joshua Page, ‘The State of the Job: An Embedded Work Role Perspective on Prison Officer Attitudes’ (2012) 14 *Punishment & Society* 503, 507.

244 Ibid 516.

245 Ibid 524.

246 Dunn, above n 240, 519, 529.

247 See, eg, Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Australia*, 40<sup>th</sup> sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [38]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [28].

248 Attorney-General’s Department (Cth), *Australia’s Human Rights Framework* (April 2010).

249 Ibid 3, 5–6. The other four were: a reaffirmed commitment to Australia’s human rights obligations, enhanced domestic and international engagement on human rights issues, improved human rights protections, and greater respect for human rights principles in the community: at 3.

250 See Paula Gerber and Annie Pettitt, ‘Human Rights Education in the Australian Curriculum’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 531.

251 Philip Lynch, ‘Australia’s Human Rights Framework: Can There Be Action Without Accountability?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 17, 35.

252 Gerber and Pettitt, above n 250, 537.

strategies for internal change are leadership, change agents and in-house education and training.

(a) *Leadership*

Organisational change literature recognises that strong leadership is crucial to changing culture.<sup>253</sup> Leaders have the challenging task of convincing staff that human rights compliance will not complicate their jobs, and that the changes will benefit everyone in the closed environment.<sup>254</sup>

In forensic psychiatric institutions, staff must balance therapeutic goals with the restrictive nature of the environment, and manage the human rights risks inherent to the environment. Sullivan and Mullen recognise that ‘there are subtle and not so subtle pressures to suborn mental health professionals to play a role in the custodial constructions of control and containment’.<sup>255</sup> Whilst recognising that the forensic psychiatric institution involves some denial of rights, they argue that incursions on patients’ human rights can be minimised by creating a ‘therapeutic culture’, rather than a custodial one.<sup>256</sup> This reorientation requires strong leadership to change the methods used in the setting. Sullivan and Mullen emphasised the distinction:

The custodial relies on cameras, direct observations, routine searches, and the various technologies that track, monitor, and observe the prisoner. The therapeutic relies on the presence of staff being with and interacting with their patients ... The technologies of observation cannot be an addendum to the therapeutic because their use creates the identity of the observed and the observer, destroying the very possibility of prior or subsequent interactions premised on any humanistic commonalities.<sup>257</sup>

The current Chief Executive Officer of Forensicare has observed that a human rights based approach is consistent with the emphasis on finding the least restrictive form of intervention that was introduced by the *Mental Health Act 1986* (Vic).<sup>258</sup> Assessing whether this vision has been achieved in practice is beyond the scope of this article. However, it is clear that a leader can play a major role in defining and directing a human rights compliant culture for a particular closed environment.

253 See, eg, Schein, above n 227; Roger Gill, ‘Change Management — or Change Leadership?’ (2002) 3 *Journal of Change Management* 307; Rosabeth Moss Kanter, ‘Leadership and the Psychology of Turnarounds’ (2003) 81(6) *Harvard Business Review* 58.

254 Gill notes the importance of ‘linking the message with the benefits for everybody involved’: Gill, above n 253, 316.

255 Danny H Sullivan and Paul E Mullen ‘Mental Health and Human Rights in Secure Settings’ in Michael Dudley, Derrick Silove and Fran Gale (eds), *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford University Press, 2012) 283, 292.

256 Ibid 294–5.

257 Ibid.

258 Tom Dalton, ‘The Human Rights Lens: A Forensic Psychiatric Perspective’ in Bronwyn Naylor et al (eds), *Monitoring and Oversight in Closed Environments: Proceedings of a Roundtable, 29 November 2010* (Monash University Law Faculty, 2012) 105, 107.

### (b) *Change Agents*

In large organisations, where staff do not have direct contact with senior leaders, it is widely recognised that culture change inspired by leadership will be more likely to succeed if ‘change agents’ are also identified and utilised. A change agent is at a lower level of an organisation than senior managers, but may still be in a management role.<sup>259</sup> They are supportive of the change being sought, and are more accessible to lower level staff than are senior management.

Change agents have been used in the policing context to support human rights culture change. Toch argues that this is because police officers will resist changes that they see as ‘top down’, and because police officers exercise a high degree of discretion in their daily work that is outside direct supervision of their superiors.<sup>260</sup>

The Toronto Police Service explicitly used change agents in a three-year project to address human rights concerns in the organisation. The change agents were from different areas of the organisation — the Diversity Management Unit, police officers and administrative staff. The project was discussed in an Ontario Human Rights Commission guide, which made the following recommendations about change agents:

Staff selected as lead change agents often come from equity-seeking groups, because of their social experiences, identified concerns, and generally stronger awareness of human rights aims. However, individuals with such backgrounds are not the only possible lead change agents. It is also important that lead change agents not be seen as representing ‘special interest’ groups, but be seen as representing the will and interests of the entire organization.<sup>261</sup>

### (c) *In-House Education and Training*

The limited understanding of human rights amongst the broader Australian community has already been noted. This must be accounted for when the management of a closed environment seeks to establish a human rights culture. That is, education and training will need to target both the personal and institutional dimensions of a human rights culture.

As noted, Australia has an obligation to educate all persons involved in any form of arrest, detention or imprisonment about the prohibition against torture under art 10 of the *CAT*. Providing education to staff working in closed environments would go some way towards meeting this obligation.

Victoria Police conducted an extensive human rights education program upon the introduction of the *Charter*. This program involved a three-level education

259 For discussion about categories of change agents see Raymond Caldwell, ‘Models of Change Agency: A Fourfold Classification’ (2003) 14 *British Journal of Management* 131.

260 Hans Toch, ‘Police Officers as Change Agents in Police Reform’ (2008) 18 *Policing & Society* 60, 61–2.

261 Ontario Human Rights Commission, *Human Rights and Policing: Creating and Sustaining Organizational Change* (2011) 24.

scheme, lunchtime seminars, and development of a ‘community of practice’.<sup>262</sup> In terms of the education scheme, all staff were required to undertake a four-hour seminar as the first level of the education scheme. The Victoria Police Annual Report noted that:

The seminars are made relevant and meaningful by using case studies relevant to participants’ work area/functions ... Case studies are used to highlight human rights implications in day-to-day policing activities, both operational and non-operational.<sup>263</sup>

The second level of education focused on human rights compliant investigation and complaints management, and was aimed at members who worked in certain areas, such as investigations. The third level involved an applied element — that is, undertaking a human rights assessment that had ‘force-wide implications’ — and was run in partnership with Curtin University.<sup>264</sup>

Lunchtime seminars are regularly conducted on topical matters, or due to changes in policy or legislation. For example, staff were given training on the *OPCAT* and how it relates to police custody.<sup>265</sup> Recordings of the seminars are placed on an intranet site so those unable to attend can access them.

Finally, staff who have undertaken the third level of education form the ‘community of practice’. This is a network of colleagues with applied knowledge, who assist other officers with human rights issues. This is effective because officers are likely to feel more comfortable approaching their peers, rather than someone in central administration.<sup>266</sup> Moreover, the ‘community of practice’ method ensures that human rights education is ongoing and connected to daily operations, not ‘one-off’ and disconnected. In particular, it allows officers to get assistance with the day-to-day application of the human rights issues explored during the formal education scheme.

### **C Concluding Remarks on Culture Change**

Organisational culture change with a human rights focus can be achieved in closed environments by engaging detainee perspectives and developing strategies based on leadership, change agents, and in-house education. However, a human rights

262 For a more detailed account of Victoria Police’s education initiatives see Anita Mackay, ‘Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison and Transforming the Culture of Victoria Police’ in Naylor, Debeljak and Mackay, above n 36, 261.

263 Victoria Police, *Annual Report 2010–11* (2011) 46.

264 *Ibid* 47.

265 *Ibid*.

266 For further information about the use of the ‘community of practice’ concept in police organisations see Maarten de Laat and Wim Broer ‘CoPs for Cops: Managing and Creating Knowledge through Networked Expertise’ in Paul Hildreth and Chris Kimble (eds), *Knowledge Networks: Innovation Through Communities of Practice* (Idea Group Publishing, 2004) 58; Frances Rock, “‘I’ve Picked Some Up from a Colleague’”: Language, Sharing and Communities of Practice in an Institutional Setting’ in David Barton and Karin Tusting (eds), *Beyond Communities of Practice: Language, Power and Social Context* (Cambridge University Press, 2005) 77.

organisational culture will be difficult to achieve without broader social change. This is because both the personal and institutional dimensions of a human rights culture must be addressed, and the personal dimension is influenced by broader social perceptions.

Despite the difficulties, human rights focused cultural change is crucial. Without effective cultural change, the first regulatory pillar of legislation and the second implementation pillar of preventive monitoring will be ineffective in securing the ongoing protection and promotion of human rights of people in closed environments.

## VI CONCLUSION

The power of the State to detain people is highly circumscribed, given its impact on numerous rights, including the rights to liberty, to be treated with humanity and dignity, and to freedom of movement.<sup>267</sup> The State must ensure that conditions of detention and the treatment of detainees meet strict standards, including the absence of torture, and CIDTP, respect for the humanity and inherent dignity of the detainee, and protection of detainees' rights to privacy, culture, and family. These restrictions are imposed in difficult settings ('total institutions'), characterised by the vulnerability of the detainees, a power imbalance between those detained and those detaining, and the 'closed' nature of detention facilities. The question of how to protect and promote human rights when the fundamental right to liberty is lawfully restricted is the challenge.

We have argued that human rights in closed environments are best protected by a strategic framework comprising three pillars: first, a regulatory framework embedding human rights obligations in closed environments; secondly, external preventive monitoring of the operations of closed environments; and thirdly, the establishment of a human rights organisational culture. All three pillars are equally necessary to the strategic framework; none is sufficient on its own.

A regulatory framework alone is insufficient to create real and sustained cultural change within closed environments. Adherence to regulation alone may produce a 'tick-a-box' style of technical compliance, aimed at avoiding litigation, which

267 A deprivation of liberty that is imposed for *lawful* punishment does not violate ICCPR art 9. The crucial component of this definition is 'lawful'. At international law, treaty-monitoring bodies go behind the formality of a law and assess its substance, such that a deprivation will not be considered 'lawful' if it was arbitrary, excessive or unreasonable: see, eg, *A v Australia*, UN Doc CCRP/C/59/D/560/1993. Similar considerations would apply in the context of psychiatric and disability settings in relation to 'approved' medical treatments. Specific legislation, policy and guidelines drafted in compliance with human rights obligations would ensure that reasonableness, arbitrariness and excess are central to deprivation decisions. Moreover, this may help to justify deprivations of liberty to those who experience them.

falls short of an enduring commitment to substantive rights compliance.<sup>268</sup> Shifting organisational culture towards a rights-respecting culture requires attitudinal change, concerted efforts to address the power imbalance between staff and detainees, and positive engagement with the processes for implementing the regulatory framework. Conversely, culture change is unlikely to occur without a regulatory framework that delivers comprehensive human rights guarantees that are linked to Australia's long-standing international obligations and enforceable in the domestic jurisdiction, and operationalises those into coherent sector-specific regulation. The experience of Victoria has demonstrated the impetus for change presented by the *Charter*.

At the same time, preventive monitoring in closed environments is meaningless without an agreed set of minimum monitoring standards. Human rights standards developed from the regulatory framework not only provide the check when things go wrong (that is, reactive usage); the standards provide very detailed guidance to staff in closed environments about how human rights translate to day-to-day practices in order to avoid violations of the regulatory framework (that is, preventive usage). Independent monitoring ought to provide the incentive to comply with the human rights standards, with its suite of 'carrot' and 'stick' motivations. In terms of 'carrots', monitoring can drive culture change because the monitoring organisation plays an important educational role within a closed environment. Monitoring organisations will work with staff on rights compliance on a day-to-day, decision-by-decision basis, and help to craft solutions that balance competing interests.

However, preventive monitoring may take years to have any impact within a resistant organisation without cultural change. For example, the 'naming and shaming' 'stick' is only effective if there is broad community support for human rights, which is part of achieving human rights culture change. If people in the community are committed to human rights, they will be outraged at non-compliance in closed environments. 'Naming and shaming' can also generate change within an organisation, ideally driven by a commitment to substantive rights compliance rather than technical compliance.

Victoria is currently deficient with respect to all three pillars of the strategic framework for implementing human rights in closed environments. Although Victoria has incorporated international human rights obligations into domestic law, its enforcement mechanisms are weak,<sup>269</sup> and the existing sector-specific legislation and regulation provide patchy protections. Moreover, the existing preventive monitoring mechanisms do not satisfy the four requirements for effective external monitoring based on human rights standards, with many

268 The concept of 'Charter-proofing' decisions is hotly debated in Canada: see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, 2001), 283; Hiebert, *Charter Conflicts*, above n 79, 53–5, 218–28; Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, 1996) 123; Hiebert, 'A Relational Approach to Constitutional Interpretation', above n 79, 178.

269 See Debeljak, 'Parliamentary Sovereignty and Dialogue', above n 66; Debeljak, 'Who Is Sovereign Now?', above n 94; Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations', above n 94.

problematic gaps and overlaps in jurisdictions. Finally, a genuine human rights culture will be difficult to achieve in closed environments, especially given the lack of human rights understanding in the broader Victorian (indeed, Australian) community.

Urgent attention to these matters is required if the domestic human rights obligations in the *Charter*, and international human rights obligations, are to be met. People in closed environments are especially vulnerable to human rights abuses, whether they are held in prisons, in police cells, in immigration detention, or in facilities for the mentally ill or intellectually impaired. We owe it to them to ensure that a framework is in place to protect their rights as fellow human beings.