

A BREATH OF FRESH AIR? RIGHTS OVERSIGHT BY THE OMBUDSMAN DURING THE PANDEMIC

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This article examines the distinct role played by Australia's Ombudsman offices in monitoring and protecting rights during the pandemic. We argue that the Ombudsman was uniquely able to respond both reactively and proactively to rights concerns at general and systemic levels. Nonetheless, despite the strengths of the Ombudsman's responses, the pandemic highlighted the fragmented and often ad hoc nature of rights protection and complaints handling during an emergency. This article offers two case studies. The first focuses on how various Ombudsman offices performed their main role of complaints handling, in particular their handling of complaints regarding access to fresh air in hotel quarantine. The second case study focuses on the new detention monitoring role that various Australian Ombudsman offices are developing, which represents a significant shift for these offices, transforming them more squarely into human rights institutions.

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I INTRODUCTION

Responding to emergencies is no easy task for lawmakers. During the COVID-19 pandemic, Australian governments and their agencies acted rapidly and strongly through laws and administrative action to protect public health. But in doing so, Australian governments regularly sidelined human rights by imposing measures such as lockdowns, mandatory hotel quarantine, and state and international border restrictions. These rights-restricting pandemic measures had an ‘unprecedented, broad and deep impact across the community’;¹ they were on a scale that most Australians had not previously experienced. Rights intrusions were imposed at both a general level (such as the imposition of quarantine requirements through delegated legislation) and in relation to individuals (such as decisions about whether to exempt an individual from travel restrictions).

For some, this level of rights intrusion was particularly high — for example, those returning to Australia, communities living on or near state borders and those living in public housing. It is widely recognised that during times of emergency there is a heightened risk of ill-treatment of vulnerable sections of society, especially when people are being deprived of their liberty.²

¹ Queensland Ombudsman, *Annual Report 2020–21* (Report, 2021) 4 (‘*Queensland Ombudsman 2020–21 Annual Report*’).

² See, eg, NSW Ombudsman, *2020 Hindsight: The First 12 Months of the COVID-19 Pandemic* (Report, 22 March 2021) 1 (‘*NSW Ombudsman 2020 Hindsight*’); Jamie Paterson, Mostafa Mahmud Naser and Haydn Rigby, ‘COVID-19 Emergency Measures and Their Implications for Disadvantaged and Vulnerable Groups in Australia: A Human Rights Perspective’ (2022) 50(1) *University of Western Australia Law Review* 419, 434–45; ‘What Human Rights Are at Particular Risk of Being Restricted during a Pandemic?’, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/about/covid19-and-human-rights/what-hum>

While much of the scholarship on responses to the pandemic has examined the work of lawmakers³ and the courts,⁴ this article offers a different perspective. We focus on the work of an institution that has received less scholarly attention: the Ombudsman.

While the sidelining of human rights can be anticipated during a state of emergency, it can also be anticipated that the public will need some assurance by independent oversight bodies, like Ombudsman offices, that lawmakers are imposing rights restrictions after having considered whether the restrictions are reasonable, necessary, proportionate and lawful, and how the restrictions might impact particular communities. The Melbourne public housing lockdown in July 2020 was one example where — as the Victorian Ombudsman’s investigation later revealed — lawmakers did not consider all less restrictive options before imposing these extraordinary measures.⁵ Many residents were inadequately informed regarding their initial and continuing phases of detention.⁶

This article analyses how one independent oversight institution — the Ombudsman — operated during the emergency in providing rights scrutiny of pandemic measures. For this purpose, we adopt a methodology of using publicly available sources produced by Ombudsman offices to gain insight

an-rights-are-particular-risk-being-restricted-during-pandemic>, archived at <<https://perma.cc/3KAH-UJD8>>; ‘Embedding Human Rights during COVID-19’, *Victorian Equal Opportunity & Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/embedding-human-rights-during-covid-19/>>, archived at <<https://perma.cc/87M6-ZE3N>>.

³ See, eg, Kay Wilson and Christopher Rudge, ‘COVID-19 Vaccine Mandates: A Coercive but Justified Public Health Necessity’ (2023) 46(2) *University of New South Wales Law Journal* 381, 387–402; Bruce Chen, ‘The COVID-19 Border Closure to India: Would an Australian Human Rights Act Have Made a Difference?’ (2021) 46(4) *Alternative Law Journal* 320, 320–2.

⁴ See, eg, Michael Legg, ‘The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality’ (2021) 49(2) *Federal Law Review* 161, 166–83; Tania Sourdin, Bin Li and Donna Marie McNamara, ‘Court Innovations and Access to Justice in Times of Crisis’ (2020) 9(4) *Health Policy and Technology* 447, 448–52; Bruce Chen, ‘COVID-19 Stay at Home Restrictions and the Interpretation of Emergency Powers: A Comparative Analysis’ (2022) 44(1) *Statute Law Review* 1, 3–22 (‘Stay at Home Restrictions’).

⁵ Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 ‘Hard Lockdown’ in July 2020* (Report, December 2020) 14 [26]–[28] (‘*Victorian Ombudsman Public Housing Investigation*’).

⁶ *Ibid* 171 [868]–[876].

into the work those offices performed during the pandemic.⁷ We analyse reports relating to specific issues,⁸ reports relating more generally to the Ombudsman's caseload during the pandemic,⁹ and annual reports for 2020–21¹⁰ and 2021–22.¹¹

⁷ We note that a somewhat similar methodology — combing through publicly available reports to shed light on the Ombudsman's role — was employed in Axel Pohn-Weidinger and Julia Dahlvik, 'Enacting the Ombud's Roles: A Study Based on Text Mining' (2023) 43(1) *Zeitschrift für Rechtssoziologie* 14, 17–18.

⁸ *Victorian Ombudsman Public Housing Investigation* (n 5); Victorian Ombudsman, *Ombudsman's Recommendations: Fourth Report* (Report, September 2022) ('*Victorian Ombudsman Fourth Report*'); Penny McKay, Commonwealth Ombudsman, *Monitoring Immigration Detention: The Ombudsman's Oversight of Immigration Detention* (Report No 01/2022, 2022) ('*Commonwealth Ombudsman Monitoring Immigration Detention 2022*'); Michael Manthorpe, Commonwealth Ombudsman, *Monitoring Immigration Detention: Review of the Ombudsman's Activities in Overseeing Immigration Detention* (Report No 06/2020, 2020) ('*Commonwealth Ombudsman Monitoring Immigration Detention 2020*'); Commonwealth Ombudsman, *Monitoring Commonwealth Places of Detention: Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT)* (Report, 2023) ('*Commonwealth Ombudsman Monitoring Commonwealth Places of Detention*'); Commonwealth National Preventive Mechanism and ACT Ombudsman, *Post Visit Summaries: ACT Policing Watch House and ACT Police Stations* (Report, 25 June 2024); Peter Boshier, Office of the Ombudsman (NZ), *OPCAT Report: Report on an Unannounced Follow up Inspection of Te Toki Maurere Unit, Whakatāne Hospital, under the Crimes of Torture Act 1989* (Report, April 2022) ('*NZ Ombudsman Whakatāne Hospital*'); Peter Boshier, Office of the Ombudsman (NZ), *OPCAT COVID-19 Report: Report on Inspections of Prisons under the Crimes of Torture Act 1989* (Report, June 2020) ('*NZ Ombudsman Report on Inspections of Prisons*'); Peter Boshier, Office of the Ombudsman (NZ), *OPCAT COVID-19 Report: Report on Inspections of Mental Health Facilities under the Crimes of Torture Act 1989* (Report, 15 June 2020) ('*NZ Ombudsman Report on Inspections of Mental Health Facilities*'); Peter Boshier, Office of the Ombudsman (NZ), *OPCAT COVID-19 Report: Report on Inspections of Aged Care Facilities under the Crimes of Torture Act 1989* (Report, August 2020) ('*NZ Ombudsman Report on Inspections of Aged Care Facilities*').

⁹ *NSW Ombudsman 2020 Hindsight* (n 2); NSW Ombudsman, *The COVID-19 Pandemic: Second Report* (Report, 7 September 2022) ('*NSW Ombudsman Second Pandemic Report*'); Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (Report, August 2021) ('*Victorian Ombudsman Human Rights Casebook*').

¹⁰ Commonwealth Ombudsman, *Annual Report 2020–21* (Report, October 2021) ('*Commonwealth Ombudsman 2020–21 Annual Report*'); ACT Ombudsman, *ACT Ombudsman Annual Report 2020–21* (Report); NSW Ombudsman, *Annual Report 2020–2021* (Report, 26 October 2021) ('*NSW Ombudsman 2020–21 Annual Report*'); Ombudsman NT, *Annual Report 2020/21* (Report) ('*NT Ombudsman 2020–21 Annual Report*'); Queensland Ombudsman 2020–21 *Annual Report* (n 1); Ombudsman SA, *Annual Report 2020–21* (Report) ('*SA Ombudsman 2020–21 Annual Report*'); Ombudsman Tasmania, *Annual Report 2020–2021* (Report) ('*Tasmanian Ombudsman 2020–21 Annual Report*'); Victorian Ombudsman,

We use these sources to identify the kinds of work Ombudsman offices were performing and to draw out common themes: strengths, challenges and distinctive features that set the role of the Ombudsman apart from that of other institutions providing rights scrutiny and holding governments to account. This article analyses these general themes, using examples to illustrate our points. The examples do not, of course, purport to represent every case; in some cases, as we explain, an example is chosen *because* it is atypical. Nor do we claim to have compiled a comprehensive account of Ombudsman activity during the pandemic. That is not the purpose of this article. Instead, we aim to show what the Ombudsman *can* do and to reflect on how the institution of the Ombudsman fits into a broader system of rights protection during an emergency. In doing so, we draw on Ellen Rock's insight that the efficacy of any single accountability mechanism should be evaluated not in isolation, but as 'part of a patchwork of interacting and overlapping mechanisms'.¹²

This article begins in Part II by identifying key institutional characteristics of Australian Ombudsman offices, with a focus on the capacity of the Ombudsman to monitor government interference with human rights. Part III considers how the Ombudsman operated within the context of some distinct aspects of pandemic lawmaking — reduced parliamentary scrutiny of lawmaking, the use of soft law, and the hasty setting up of legal frameworks and taking of administrative actions — many of which involved significant inroads into rights and liberties.

Annual Report 2021 (Report) ('Victorian Ombudsman 2021 Annual Report'); Ombudsman Western Australia, *Annual Report 2020–21* (Report) ('WA Ombudsman 2020–21 Annual Report').

¹¹ Commonwealth Ombudsman, *Annual Report 2021–22* (Report, October 2022) ('Commonwealth Ombudsman 2021–22 Annual Report'); ACT Ombudsman, *2021–22 ACT Ombudsman Annual Report* (Report) ('ACT Ombudsman 2021–22 Annual Report'); NSW Ombudsman, *Annual Report 2021–2022* (Report, 25 October 2022) ('NSW Ombudsman 2021–22 Annual Report'); Ombudsman NT, *Annual Report 2021/22* (Report) ('NT Ombudsman 2021–22 Annual Report'); Queensland Ombudsman, *Annual Report 2021–22* (Report, 2022) ('Queensland Ombudsman 2021–22 Annual Report'); Ombudsman SA, *2021–22 Annual Report* (Report) ('SA Ombudsman 2021–22 Annual Report'); Ombudsman Tasmania, *Annual Report 2021–2022* (Report); Victorian Ombudsman, *2022 Annual Report* (Report) ('Victorian Ombudsman 2022 Annual Report'); Ombudsman Western Australia, *Annual Report 2021–22* (Report) ('WA Ombudsman 2021–22 Annual Report').

¹² Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) 217.

Parts IV and V offer two case studies illustrating the integral role played by the Ombudsman in oversight of human rights during the pandemic. Part IV focuses on how various Ombudsman offices managed their *reactive* role in dealing with pandemic related complaints about a lack of access to fresh air, made by those deprived of their liberty. It compares the responses of Ombudsman offices with how courts address similar complaints. Part V offers a second case study focusing on how the pandemic affected the ability of some Ombudsman offices in undertaking one of their *proactive* roles: that of monitoring places of detention to prevent the risk of inhuman treatment. This article compares how this monitoring was undertaken in New Zealand ('NZ'), where a detention monitoring scheme involving the Ombudsman was already well-established.

Overall, this article argues that when persons are deprived of their liberty during an emergency, Australian jurisdictions need to strengthen their systems of complaints handling and detention monitoring so that avenues of making complaints are made more visible and accessible, and to give the public greater 'assurance of independent oversight'.¹³ In the context of detention monitoring, it further argues that Ombudsman offices have proven their independence and capacity for rights protection in relation to a wide range of persons detained, but this monitoring requires adequate resourcing.

II THE OMBUDSMAN AND HUMAN RIGHTS

Among Australia's horizontal accountability mechanisms, the Ombudsman is considered a leading independent oversight institution for public accountability.¹⁴ This can be attested by the Ombudsman's longevity (many Ombudsman offices in Australia are now nearing half a century of operation)¹⁵ and perceived capacity (successive governments have bestowed on the

¹³ *NSW Ombudsman 2020 Hindsight* (n 2) 50.

¹⁴ See Rick Snell, 'Australian Ombudsman: A Continual Work in Progress' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 100, 100. According to Stuhmcke, by the end of the 1980s, the Commonwealth Ombudsman was 'established as a primary means of dispute resolution in terms of the new administrative law': Anita Stuhmcke, 'Privatisation and Corporatisation: What Now for the Commonwealth Ombudsman?' (2004) 11(2) *Australian Journal of Administrative Law* 101, 109.

¹⁵ The first Australian Ombudsman was the Western Australian Ombudsman (also known as the Parliamentary Commissioner for Administrative Investigations), which was established

Ombudsman responsibility for an ever-growing number of functions).¹⁶ To describe these varying functions of the Ombudsman, Carol Harlow and Richard Rawlings have deployed the typology of ‘fire-fighting’ (complaints handling) and ‘fire-watching’ (systemic investigations).¹⁷ Rick Snell has suggested the addition of ‘fire prevention’ to this typology, referring to Ombudsman activities that are ‘not based solely or primarily on intelligence gained from previous complaints’.¹⁸ This would encompass preventive work such as detention monitoring, which has been recently added to the Ombudsman’s role in many jurisdictions.¹⁹

The Ombudsman is generally understood to be part of the integrity branch of Australian governments.²⁰ As such, the Ombudsman is one of

in 1971: *Parliamentary Commissioner Act 1971* (WA) s 5 (*‘Parliamentary Commissioner Act WA’*). The second and third were the South Australian Ombudsman and Victorian Ombudsman, established in 1972 and 1973 respectively: *Ombudsman Act 1972* (SA) s 5A (*‘Ombudsman Act SA’*); *Ombudsman Act 1973* (Vic) s 3 (*‘Ombudsman Act Vic’*). The New South Wales (*‘NSW’*) Ombudsman and Queensland Ombudsman (also known as the Parliamentary Commissioner for Administrative Investigations) were established in 1974: *Ombudsman Act 1974* (NSW) s 6 (*‘Ombudsman Act NSW’*); *Parliamentary Commissioner Act 1974* (Qld) s 5, as repealed by *Ombudsman Act 2001* (Qld) s 95 (*‘Ombudsman Act Qld’*). The Commonwealth Ombudsman began operation in 1977: *Ombudsman Act 1976* (Cth) s 4 (*‘Ombudsman Act Cth’*); Australian Government, *Making a Difference: 40 Years of the Commonwealth Ombudsman* (Report, 2017) 7. The Tasmanian Ombudsman and Northern Territory Ombudsman were established in 1978: *Ombudsman Act 1978* (Tas) s 5 (*‘Ombudsman Act Tas’*); *Ombudsman (Northern Territory) Ordinance 1978* (NT) s 4, as repealed by *Ombudsman Act 2009* (NT) s 163 (*‘Ombudsman Act NT’*). The Australian Capital Territory (*‘ACT’*) Ombudsman was established in 1989: *Ombudsman Act 1989* (ACT) s 4 (*‘Ombudsman Act ACT’*).

¹⁶ The Tasmanian Ombudsman has over 130 separate statutory functions under 17 different Acts of Parliament, representing a ‘somewhat extreme example’: see Chris Wheeler, ‘Bringing the Ombudsman Role and Powers into the Twenty-First Century’ in Matthew Groves and Anita Stuhmcke (eds), *The Ombudsman in the Modern State* (Hart Publishing, 2022) 113, 116 n 7.

¹⁷ Carol Harlow and Richard Rawlings, *Law and Administration* (Butterworths, 2nd ed, 1997) 427–32.

¹⁸ Snell (n 14) 104, citing *ibid* 399, 427, 431.

¹⁹ See below nn 217–23 and accompanying text.

²⁰ See generally JJ Spigelman, ‘The Integrity Branch of Government’ (2004) 78(11) *Australian Law Journal* 724. Alternatively, within Mark Tushnet’s taxonomy, the Ombudsman may be understood as a fourth branch institution — an institution protecting democracy: Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021) 21–2. Cf Stephen Gageler, ‘Three Is Plenty’ in Greg Weeks and Matthew Groves (eds), *Administrative Redress in and out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 12, 15.

several institutions that exists to ensure that governments exercise their powers ‘in the manner in which [they are] expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose’.²¹ While formally part of the executive, the Ombudsman is given robust statutory independence from other parts of government and generally enjoys high levels of public trust. The Ombudsman has extensive powers of investigation²² but its outcomes are generally limited to non-binding recommendations.²³ One aspect that distinguishes the Ombudsman from many of the other administrative law mechanisms is that its investigations are usually conducted informally and in private.²⁴

The jurisdiction of the Ombudsman is conferred — and, it follows, limited — by statute. The Ombudsman generally has power to commence an investigation either on their own motion or in response to a complaint.²⁵ The matters to which these investigations relate are restricted. In most jurisdictions, the Ombudsman has limited or no power²⁶ to investigate the actions of Members of Parliament,²⁷ judges,²⁸ Ministers²⁹ or police.³⁰ Where the

²¹ Spigelman, ‘The Integrity Branch of Government’ (n 20) 726.

²² *Ombudsman Act Cth* (n 15) ss 9, 13–14; *Ombudsman Act ACT* (n 15) ss 11, 16–17; *Ombudsman Act NSW* (n 15) ss 18, 20; *Ombudsman Act NT* (n 15) ss 11, 52–5; *Ombudsman Act Qld* (n 15) ss 28–9, 34; *Ombudsman Act SA* (n 15) ss 19, 23; *Ombudsman Act Tas* (n 15) ss 24–5; *Ombudsman Act Vic* (n 15) ss 18, 21; *Parliamentary Commissioner Act WA* (n 15) ss 20–1.

²³ *Ombudsman Act Cth* (n 15) s 15(3)(b); *Ombudsman Act ACT* (n 15) ss 17K(3)(b), 18(3)(b); *Ombudsman Act NSW* (n 15) s 25A(3)(c); *Ombudsman Act NT* (n 15) s 62; *Ombudsman Act Qld* (n 15) ss 50(2)(a)(ii), (3)(a)(ii); *Ombudsman Act SA* (n 15) s 25(2); *Ombudsman Act Tas* (n 15) s 28(2); *Ombudsman Act Vic* (n 15) ss 13D(2)(b), 23(2), (2A)(b); *Parliamentary Commissioner Act WA* (n 15) ss 19S(3), 19ZD(3)(b), 19ZE(b), 25(2).

²⁴ Snell (n 14) 105.

²⁵ *Ombudsman Act Cth* (n 15) ss 5(1)(a)–(b); *Ombudsman Act ACT* (n 15) ss 5(1), 17K(1); *Ombudsman Act NSW* (n 15) s 13(1); *Ombudsman Act NT* (n 15) s 14(1); *Ombudsman Act Qld* (n 15) ss 12(a), 18(1); *Ombudsman Act SA* (n 15) s 13(2); *Ombudsman Act Tas* (n 15) s 13; *Ombudsman Act Vic* (n 15) ss 15B, 16; *Parliamentary Commissioner Act WA* (n 15) s 14(1).

²⁶ In some jurisdictions, this is subject to an important exception: the power of Parliament to refer matters to the Ombudsman. *Ombudsman Act NT* (n 15) s 17; *Ombudsman Act Qld* (n 15) s 19; *Ombudsman Act SA* (n 15) s 14; *Ombudsman Act Tas* (n 15) s 16; *Ombudsman Act Vic* (n 15) ss 15B, 16A(1); *Parliamentary Commissioner Act WA* (n 15) s 15.

²⁷ *Ombudsman Act NSW* (n 15) sch 1 item 1(g); *Parliamentary Commissioner Act WA* (n 15) s 13(2)(a). See also *Ombudsman Act Cth* (n 15) s 5(2)(aa); *Ombudsman Act ACT* (n 15) s 5(1); *Ombudsman Act NT* (n 15) s 5 (definition of ‘public authority’); *Ombudsman Act Qld*

Ombudsman of one jurisdiction is investigating an issue that involves the government of another jurisdiction, there will be jurisdictional complexities.³¹ As we will see, these jurisdictional limits hampered the ability of the Ombudsman to respond to some issues during the pandemic, especially in relation to complex schemes spanning multiple agencies and jurisdictions.

While the role of the Ombudsman is constantly evolving, it is useful to distinguish between *reactive* ('fire-fighting') and *proactive* ('fire-watching' and 'fire prevention') functions. The main function of the Ombudsman institution in Australia continues to be reactive, namely, handling complaints from members of the public about government action. The right to make a complaint to an independent body continues to be one of the key rights that all Australians can exercise.³² But the Ombudsman also has a range of proactive functions that do not rely on a complaint being made. The most obvious is the ability to commence an own motion investigation which may then lead to recommendations for law reform to 'prevent recurring indignity

(n 15) s 9(1); *Ombudsman Act Tas* (n 15) s 4(1); *Ombudsman Act Vic* (n 15) s 2 (definition of 'authority').

²⁸ *Ombudsman Act Cth* (n 15) s 5(2)(b); *Ombudsman Act ACT* (n 15) s 5(2)(b)(i); *Ombudsman Act NSW* (n 15) sch 1 item 2; *Ombudsman Act NT* (n 15) s 16(1)(a); *Ombudsman Act Tas* (n 15) ss 4(2)(i)–(l), 12(5)(b); *Ombudsman Act Vic* (n 15) sch 2 items 7–8; *Parliamentary Commissioner Act WA* (n 15) ss 13(2)(d)–(ka). See also *Ombudsman Act SA* (n 15) ss 3(1) (definitions of 'administrative act' and 'agency to which this Act applies'), 5(3).

²⁹ *Ombudsman Act Cth* (n 15) s 5(2)(a); *Ombudsman Act ACT* (n 15) s 5(2)(a); *Ombudsman Act NSW* (n 15) sch 1 item 1(b); *Ombudsman Act NT* (n 15) s 15; *Ombudsman Act Qld* (n 15) s 16(1); *Ombudsman Act Tas* (n 15) s 12(5)(a); *Parliamentary Commissioner Act WA* (n 15) s 14(3). See also *Ombudsman Act SA* (n 15) s 3(1) (definitions of 'administrative act' and 'agency to which this Act applies'). In *A-G (Vic) v Glass* (2016) 51 VR 381, the Victorian Court of Appeal held that the Parliament of Victoria's power under s 16 of the *Ombudsman Act Vic* (n 15) to refer 'any matter' to the Ombudsman extended to referring acts of a Minister for investigation: at 405 [56]–[57] (Warren CJ, Beach and Ferguson JJA).

³⁰ *Ombudsman Act NSW* (n 15) sch 1 item 13; *Ombudsman Act Qld* (n 15) ss 7(2), 16(2)(c)–(d); *Ombudsman Act SA* (n 15) s 5(2); *Ombudsman Act Vic* (n 15) s 15(1), sch 2 item 1; *Parliamentary Commissioner Act WA* (n 15) s 4A(1)(b). But see *Ombudsman Act Cth* (n 15) s 3(9); *Ombudsman Act NT* (n 15) s 10(1)(d); *Ombudsman Act Tas* (n 15) s 4(1)(b).

³¹ For example, the Commonwealth Ombudsman may make an arrangement for a state Ombudsman to investigate activity by certain Commonwealth agencies: *Ombudsman Act Cth* (n 15) s 8A(1). See also *Ombudsman Act ACT* (n 15) s 10(1); *Ombudsman Act NSW* (n 15) s 10A(1); *Ombudsman Act NT* (n 15) s 148(1); *Ombudsman Act Vic* (n 15) s 20A.

³² John McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 (January) *Australian Institute of Administrative Law Forum* 1, 3.

and unfairness'.³³ In Part V of this article, we examine another proactive function: monitoring of detention.

At the international level, Ombudsman institutions are considered important mechanisms 'for the promotion and protection of human rights and the promotion of good governance and respect for the rule of law',³⁴ and they are encouraged to actively draw on international human rights standards.³⁵ Dame Beverley Wakem and Peter Kostelka write that '[t]here is no doubt that the institution of Ombudsman contributes to good governance and the enhancement of trust in government'.³⁶ The Ombudsman's work promotes the rule of law through reminding governments that laws must be made clear and knowable, and actions must be subject to appropriate

³³ Anita Stuhmcke, 'The Role of Australian Ombudsmen in the Protection and Promotion of Human Rights' (2010) 16(1) *Australian Journal of Human Rights* 37, 49 ('The Role of Australian Ombudsmen'). See also Anita Stuhmcke, 'Australian Ombudsmen and Human Rights' (2011) 66 (July) *Australian Institute of Administrative Law Forum* 43, 44, 47.

³⁴ *The Role of Ombudsman and Mediator Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law*, GA Res 75/186, UN GAOR, 75th sess, 46th plen mtg, Agenda Item 72(b), UN Doc A/RES/75/186 (28 December 2020, adopted 16 December 2020) para 2(b). At Preamble para 5, this resolution endorses European Commission for Democracy through Law, *Principles on the Protection and Promotion of the Ombudsman Institution*, 118th plen sess, Opinion 896/2017 (3 May 2019) ('*Venice Principles*'). The *Venice Principles* (n 34) are a set of standards for the Ombudsman institution adopted in 2019 by the Venice Commission — the Council of Europe's Commission for Democracy through Law. See also Navanethem Pillay, 'Statement by the United Nations High Commissioner for Human Rights, HE Ms Navanethem Pillay to the Ninth International Ombudsman Institute World Conference', *Office of the High Commissioner of Human Rights* (Statement, 16 June 2009) <<https://www.ohchr.org/en/statements/2009/10/statement- united-nations-high-commissioner-human-rights-he-ms-navanethem-pillay>>:

Many human rights abuses are indeed connected with maladministration, administrative malfeasance, or a lack of government accountability. The essential notion of procedural fairness, which underpins the administrative law that ombudsman institutions are mandated to uphold, is thus key to protecting the rights of individuals in their interactions with public authorities.

³⁵ Pillay (n 34):

I also encourage all ombudsman institutions, even those without an explicit human rights mandate, to actively draw on the standards enumerated in international instruments and consolidate their mandates in order to accommodate human rights responsibilities.

³⁶ Dame Beverley Wakem, International Ombudsman Institute and Peter Kostelka, International Ombudsman Institute, 'Preface from the Editor' in Michael Frahm, *Australasia and Pacific Ombudsman Institutions: Mandates, Competences and Good Practice*, ed International Ombudsman Institute (Springer, 2013) v, v.

review.³⁷ While the rule of law, good governance and human rights are clearly interwoven, this article focuses on the Ombudsman as a mechanism for monitoring and protecting human rights.

Anita Stuhmcke notes that ‘human rights have always implicitly formed part of the mandate of federal, state and territory ombudsmen’ in Australia, and she argues that ‘Australian ombudsmen do and should continue to address human rights violations.’³⁸ Admittedly, human rights are not an explicit part of the *legislative* mandate of Australian Ombudsman offices apart from the Victorian Ombudsman.³⁹ Stuhmcke explains that a lack of an explicit human rights mandate ‘does not predetermine the significance of the role [that the Ombudsman] played in human rights promotion and protection’.⁴⁰ A survey of Ombudsman reports across Australia indicates that, to differing degrees, most Ombudsman offices use human rights standards when performing various functions,⁴¹ with the Victorian Ombudsman having a greater scope to do so when exercising her explicit human rights mandate.⁴² For some Australian Ombudsman offices, human rights may be considered when deciding whether it is in the public interest to investigate administrative conduct and when making determinations under general legislative criteria such as whether administrative conduct is ‘unreasonable, unjust, oppressive or improperly discriminatory’.⁴³

³⁷ See *NSW Ombudsman Second Pandemic Report* (n 9) 58.

³⁸ Stuhmcke, ‘The Role of Australian Ombudsmen’ (n 33) 56. This aligns with the view expressed in Linda C Reif, *Ombuds Institutions, Good Governance, and the International Human Rights System* (Brill Nijhoff, 2nd rev ed, 2020) 224.

³⁹ See *Ombudsman Act Vic* (n 15) s 13(2).

⁴⁰ Stuhmcke, ‘The Role of Australian Ombudsmen’ (n 33) 56.

⁴¹ Reif (n 38) 225–6, 257–8, 272–4, 282–4. See also *ibid* 45–6. In the ACT, s 30 of the *Human Rights Act 2004* (ACT) (‘ACT HRA’) provides that laws must be interpreted in a way that is compatible with human rights, and s 40B(1)(a) provides that it is unlawful for a public authority to act in a way that is incompatible with a human right. Similar provisions exist under the *Human Rights Act 2019* (Qld) (‘Qld HRA’): ss 48(1), 58(1)(a).

⁴² Under s 13(2) of the *Ombudsman Act Vic* (n 15), when the Ombudsman receives a complaint about an administrative action, they can investigate whether it is compatible with, and gives proper consideration to, human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Victorian Charter’): see *Victorian Ombudsman Human Rights Casebook* (n 9) 10–11. See also Stuhmcke, ‘The Role of Australian Ombudsmen’ (n 33) 45–6.

⁴³ *Ombudsman Act Cth* (n 15) s 15(1)(a)(ii); *Ombudsman Act ACT* (n 15) s 18(1)(a)(ii); *Ombudsman Act NSW* (n 15) s 26(1)(b); *Ombudsman Act NT* (n 15) s 59(1)(a)(ii); *Ombudsman*

In the 21st century, Australian Ombudsman offices have adopted an approach which embraces international human rights treaties and standards as interpretive rules when determining whether a government action is ‘unreasonable, unjust, oppressive or improperly discriminatory’. Linda C Reif explains that this use of international human rights by Australian Ombudsman offices extends to unimplemented treaty obligations (such as parts of the *International Covenant on Civil and Political Rights* (‘ICCPR’)) and also to non-binding soft international law⁴⁴ which offers detailed standards, such as the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (‘Mandela Rules’).⁴⁵ In large part, these are ‘standards quite distinct from those used by courts and tribunals’⁴⁶ in Australia, which distinguishes the Ombudsman from these bodies.

In Stuhmcke’s view, the Ombudsman is well-suited to human rights protection because it is an institution which ‘straddles both legal and moral concepts, and takes into account wider values, rights and questions of law and administrative practice which render the institution much more than simply a complaints office’.⁴⁷ Nevertheless, Stuhmcke articulates some need for caution: she repeatedly argues that should the Ombudsman’s role in promoting human rights be extended, resourcing will be critical, otherwise the efficacy of the Ombudsman’s ‘fire-fighting’ role of handling complaints and addressing maladministration would risk being undermined.⁴⁸ Her work

Act Qld (n 15) s 49(2)(b); *Ombudsman Act Tas* (n 15) s 28(1)(b); *Ombudsman Act Vic* (n 15) s 23(1)(b); *Parliamentary Commissioner Act WA* (n 15) s 25(1)(b). Ombudsman scholars such as Reif categorise those Ombudsman offices with an explicit mandate as (national) human rights institutions, while those without are ‘classic-based ombud institutions’: Reif (n 38) 221. According to Reif, ‘classic-based ombuds institutions ... play a supporting role in domestic human rights protection’: at 226.

⁴⁴ Reif (n 38) 248–50, 262–74, 282–4. Reif explains that this is increasingly the case in dualist states where, unlike in monist states, ratified human rights treaties do not automatically become part of domestic law: at 257–8.

⁴⁵ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70th sess, 80th plen mtg, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) annex (‘Mandela Rules’). See below nn 164–6 and accompanying text for an explanation of the origins and application of these rules.

⁴⁶ Matthew Groves and Anita Stuhmcke, ‘The Evolution and Future of the Ombuds’ in Matthew Groves and Anita Stuhmcke (eds), *The Ombudsman in the Modern State* (Hart Publishing, 2022) 1, 3.

⁴⁷ Stuhmcke, ‘The Role of Australian Ombudsmen’ (n 33) 54.

⁴⁸ *Ibid* 54–5; Stuhmcke, ‘Australian Ombudsmen and Human Rights’ (n 33) 47–8.

also highlights the findings of a demographic study that Ombudsman ‘clients’ tend to be both middle class and advantaged,⁴⁹ a finding which challenges the notion that the Ombudsman assists the most disadvantaged. In the context of the pandemic, this article takes up Stuhmcke’s urging that this institution ‘deserves much closer scrutiny with respect to the role it does and may play in the protection and promotion of human rights’, and it considers Stuhmcke’s call for caution.⁵⁰

III PANDEMIC LAWMAKING

During the first 12 months of the pandemic, Australian governments believed urgent responses were required⁵¹ in order to prevent the spread of infections in the community and ‘to protect the public health system from being completely overwhelmed’.⁵² While this urgency may often have been necessary, there was the risk that ordinary processes for monitoring the effect of new laws and administrative frameworks on individual rights would be sidelined.⁵³ This Part identifies characteristics of lawmaking during the pandemic that heightened this risk and explains how the Ombudsman responded in these conditions.

A Reduced Pre-Enactment (Parliamentary) Scrutiny of Lawmaking

A distinctive feature of pandemic lawmaking was the use of delegated legislation to implement major policy decisions with significant rights

⁴⁹ Stuhmcke, ‘Australian Ombudsmen and Human Rights’ (n 33) 48, citing Steven Van Roosbroek and Steven Van de Walle, ‘The Relationship between Ombudsman, Government, and Citizens: A Survey Analysis’ (2008) 24(3) *Negotiation Journal* 287. This view is not strongly supported in the documents reviewed for the purposes of this article. The NSW Ombudsman, for example, reported dealing with a large number of COVID-19 related complaints from people in custody: *NSW Ombudsman 2021–22 Annual Report* (n 11) 6.

⁵⁰ Stuhmcke, ‘The Role of Australian Ombudsmen’ (n 33) 47.

⁵¹ Senate Select Committee on COVID-19, Parliament of Australia, *First Interim Report* (Report, December 2020) xvii, xix. The perception of the urgency of executive action at the state level is observed by the NSW Ombudsman: *NSW Ombudsman 2020 Hindsight* (n 2) 40.

⁵² Senate Select Committee on COVID-19, Parliament of Australia, *Final Report* (Report, April 2022) 1 [1.2] (*‘Senate Select Committee Final Report’*).

⁵³ *Ibid* 87–8 [5.4]–[5.5].

consequences.⁵⁴ Delegated legislation, whether in the form of regulations, declarations or public health orders, was used to: prohibit people from leaving Australia⁵⁵ or their local area,⁵⁶ exclude unvaccinated people from workplaces;⁵⁷ isolate people with COVID-19 and close contacts;⁵⁸ and mandate quarantine.⁵⁹ There are, of course, good reasons for Australian parliaments' heavy reliance on delegated legislation. In the circumstances of the first 12 months of the pandemic, the New South Wales ('NSW') Ombudsman believed there were times when there was a need for governments to take rapid and decisive action, and to change the law frequently.⁶⁰

While the executive made laws with a deep impact on rights through these delegated legislative instruments, many of these instruments were made exempt from disallowance by Parliament.⁶¹ For example, under the *Biosecurity Act 2015* (Cth), after a declaration of a human biosecurity emergency has been made by the Governor-General,⁶² the federal Health Minister can make determinations or directions dealing with biosecurity for a period of up to three months.⁶³ These biosecurity directions and determinations can override laws,⁶⁴ they are not subject to disallowance by

⁵⁴ See Tamara Tulich and Sarah Murray, 'Executive Accountability and Oversight in Australia during the COVID-19 Pandemic' (2022) 30(2) *Michigan State International Law Review* 103, 126–7; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Interim Report, 2 December 2020) ch 2.

⁵⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) s 5.

⁵⁶ See, eg, *Public Health (COVID-19 Greater Sydney) Order (No 2) 2021* (NSW) cl 6.

⁵⁷ See, eg, *Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2021 (No 1)* (Vic) cl 7.

⁵⁸ See, eg, *Management of Diagnosed Cases of COVID-19 and Close Contacts Direction (No 2)* (Qld) paras 5, 18–21.

⁵⁹ See, eg, *Public Health (COVID-19 Air Transportation Quarantine) Order (No 1) 2021* (NSW) cl 5.

⁶⁰ *NSW Ombudsman 2020 Hindsight* (n 2) 50.

⁶¹ Senate Standing Committee for the Scrutiny of Delegated Legislation (n 54) 12–13 [2.7], 14–15 [2.11], 16 [2.15], 17–8 [2.19]–[2.20], 20 [2.27].

⁶² *Biosecurity Act 2015* (Cth) s 61(1)(h) ('*Biosecurity Act Cth*').

⁶³ *Ibid* s 443(1).

⁶⁴ *Ibid* ss 477(5), 478(4).

Parliament,⁶⁵ and non-compliance with the directions is punishable by up to five years' imprisonment.⁶⁶

In normal circumstances, Parliament is the institution primarily responsible for scrutinising legislation before it has passed.⁶⁷ By deeming some delegated legislation not subject to disallowance, this meant that some Australian governments imposed extraordinary restrictions on liberty with no pre-enactment parliamentary scrutiny. One such extraordinary restriction was the ban on incoming travellers from India, which was introduced in late April 2021.⁶⁸ Noncompliance carried a fine of up to \$63,000 or five years' imprisonment.⁶⁹

At the state level, reduced scrutiny of lawmaking also marked pandemic law. For example in NSW, pandemic lawmaking took place predominantly via public health orders made by the Health Minister under s 7 of the *Public Health Act 2010* (NSW).⁷⁰ These orders are a special set of subordinate legislation that are not disallowable and need not be laid before Parliament.⁷¹ No declaration of emergency needs to precede their making,⁷² which means they are not subject to time limits. Such ministerial orders also do not fall within the jurisdiction of the NSW Ombudsman,⁷³ although they can be reviewed by the NSW Civil and Administrative Tribunal⁷⁴ and are subject to judicial review.⁷⁵ Some of these orders gave broad discretion to the executive — for example, persons in mandatory hotel quarantine were

⁶⁵ Ibid s 477(2); Senate Standing Committee for the Scrutiny of Delegated Legislation (n 54) 20 [2.27].

⁶⁶ *Biosecurity Act Cth* (n 62) s 479.

⁶⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation (n 54) 1 [1.1]–[1.2].

⁶⁸ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (Cth) s 6.

⁶⁹ *Biosecurity Act Cth* (n 62) s 479; *Crimes Act 1914* (Cth) s 4AA(1), as at 31 August 2021.

⁷⁰ *NSW Ombudsman Second Pandemic Report* (n 9) 58.

⁷¹ See 'Scrutiny of COVID-19 Public Health Orders', *Parliament of New South Wales* (Web Page) <<https://www.parliament.nsw.gov.au/news/Pages/COVID-public-health-orders.aspx>>, archived at <<https://perma.cc/6KKA-XQFZ>>.

⁷² See *Public Health Act 2010* (NSW) s 7(1) ('*Public Health Act NSW*').

⁷³ *Ombudsman Act NSW* (n 15) sch 1 item 1(b).

⁷⁴ *Davis v Minister for Health* [2022] NSWCATAP 115, [110] (Armstrong J and Deputy President Britton).

⁷⁵ See *Supreme Court Act 1970* (NSW) s 69.

required to comply with any ‘direction’ of the NSW Police Commissioner.⁷⁶ Breaching an order made under s 7 of the *Public Health Act 2010* (NSW) can lead to fines of up to \$11,000 with a further fine of \$5,500 for each day the offence continues, or imprisonment of up to six months.⁷⁷

In Victoria, under the *Public Health and Wellbeing Act 2008* (Vic) (*‘Public Health Act Vic’*), directions made by the Chief Health Officer (‘CHO’) or their delegates could similarly avoid parliamentary scrutiny, specifically by the Scrutiny of Acts and Regulations Committee, if the government failed to gazette or table them.⁷⁸ Critically, however, the Victorian Ombudsman could investigate the actions of the Victorian CHO and their directives between 2020 and 2021 as these directives were not issued by a Minister.⁷⁹ Since amendments were made to the *Public Health Act Vic* in December 2021,⁸⁰ these orders may only be made by the Minister.⁸¹ However, the legislation ensures: that the Ombudsman continues to have jurisdiction over detention even when the detention is pursuant to a pandemic order made by the Minister; and that those detained must be informed of the right to Ombudsman review.⁸²

In this situation of reduced scrutiny of lawmaking, where the Ombudsman has jurisdiction, the Ombudsman’s ability to investigate (sometimes in private) the operation of laws and directives post-enactment is important. Investigations such as the Victorian Ombudsman’s report into the hard and immediate lockdown of Melbourne’s public housing towers in July 2020 can provide public, high profile feedback on law and policy, including vivid accounts of the impact of these directions and policies on individuals.⁸³ This report was the result of an own motion investigation:⁸⁴ an example of the Ombudsman’s proactive role. The report revealed that the Deputy CHO

⁷⁶ See, eg, *Public Health (COVID-19 Air Transportation Quarantine) Order 2020* (NSW) cl 6(2).

⁷⁷ *Public Health Act NSW* (n 72) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁷⁸ See *Subordinate Legislation Act 1994* (Vic) s 21(1).

⁷⁹ See *Victorian Ombudsman 2022 Annual Report* (n 11) 20.

⁸⁰ See especially *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) s 12, inserting *Public Health and Wellbeing Act 2008* (Vic) pt 8A.

⁸¹ *Public Health and Wellbeing Act 2008* (Vic) ss 165AI–165AK.

⁸² *Ibid* ss 165BF(2A)(a), 165BJ(2A)(a), 200A(1A)(a).

⁸³ See, eg, *Victorian Ombudsman Public Housing Investigation* (n 5) 120 [602], [604].

⁸⁴ *Ibid* 12 [8].

had 15 minutes to consider the human rights implications of a hard and immediate lockdown that in its initial phase would effectively deprive around 3,000 residents of their liberty.⁸⁵ For 400 or so residents, this period of being deprived of their liberty continued for two weeks and it was a week before these residents were given access to fresh air.⁸⁶ By the final day of the initial lockdown phase, in this group, almost half of the households had not been telephoned by the relevant government department and some households alleged they did not receive a copy of the detention directions.⁸⁷ In addition, the Ombudsman noted that the ‘overwhelming police presence’ employed in the lockdown was ‘particularly traumatic’ for residents who ‘had endured civil wars and dictatorships before settling in Australia, some even surviving torture at the hands of their former State’.⁸⁸ The report concluded that, despite the *Charter of Rights and Responsibilities Act 2006* (Vic), inadequate consideration was given to human rights in the making of this decision and, in particular, in the immediacy of its implementation.⁸⁹ The Victorian Ombudsman found that the residents were in part treated inhumanely and unlawfully.⁹⁰ The report was critical of the police-heavy approach deployed in the public housing lockdown.⁹¹

In this equation, the soft, non-binding nature of the Ombudsman’s recommendations is a strength. It means that an Ombudsman can make strong public findings and recommendations for change without any danger of jeopardising the efficacy of the government’s pandemic response or delaying necessary government action. This can be understood as the power of persuasion. Greg Weeks argues that ‘ombudsmen’s success derives from their effective exercise of *influence* rather than merely from wielding *power*’.⁹²

⁸⁵ Ibid 12 [8], 178 [957].

⁸⁶ Ibid 22 [91]–[92], 100–3 [490]–[524].

⁸⁷ Ibid 22 [92], 89 [441], [447].

⁸⁸ Ibid 5.

⁸⁹ Ibid 179 [1], discussing *Victorian Charter* (n 42) s 38(1).

⁹⁰ *Victorian Ombudsman Public Housing Investigation* (n 5) 179 [1]–[4].

⁹¹ See ibid 173–4 [899]–[909].

⁹² Greg Weeks, ‘Maladministration: The Particular Jurisdiction of the Ombudsman’ in Matthew Groves and Anita Stuhmcke (eds), *The Ombudsman in the Modern State* (Hart Publishing, 2022) 21, 22 (emphasis in original) (‘Maladministration’).

Several Ombudsman offices reported the executive accepted recommendations made during the pandemic at high rates of 80–100%.⁹³

The Ombudsman's independence means they can make findings without fear of party discipline or electoral backlash. In this sense, the Victorian Ombudsman's report was proactive — not simply reacting to a past event but making sure those making and enforcing decisions understood that human rights cannot be unreasonably sidelined. Despite the government's refusal to apologise to the public housing residents, the findings of the Victorian Ombudsman were likely to have been cathartic and a form of validation for those impacted. Furthermore, when the same tower was locked down 12 months later, it was managed as a public health operation without a heavy police and security presence.⁹⁴

Proactive reports such as this can shed light on the ways in which government action has affected the rights of individuals. The Victorian Ombudsman's report identified specific shortcomings that should not be repeated: hasty decision-making, over-policing and insufficient communication.⁹⁵ Somewhat similarly, the NSW Ombudsman's 2022 special report on the government response to the pandemic drew attention to systemic problems including the disproportionate enforcement of public health orders against

⁹³ Between 2020–21, the Commonwealth Ombudsman reported an acceptance rate of 89% of recommendations in public reports, the Victorian Ombudsman reported a 92% acceptance rate and the Western Australian Ombudsman reported a 100% acceptance rate: *Commonwealth Ombudsman 2020–21 Annual Report* (n 10) 29; *Victorian Ombudsman 2021 Annual Report* (n 10) 4; *WA Ombudsman 2020–21 Annual Report* (n 10) 12. Between 2021–22, the Commonwealth Ombudsman reported an acceptance rate of 83% of recommendations in public reports, the NSW Ombudsman reported a 90% acceptance rate, the Queensland Ombudsman reported a 99% acceptance rate and the Western Australian Ombudsman reported a 100% acceptance rate: *Commonwealth Ombudsman 2021–22 Annual Report* (n 11) 29; *NSW Ombudsman 2021–22 Annual Report* (n 11) 32; *Queensland Ombudsman 2021–22 Annual Report* (n 11) 11; *WA Ombudsman 2021–22 Annual Report* (n 11) 12. On the recommendatory powers of Ombudsman offices, see Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 256–7 [8.4.1].

⁹⁴ *Victorian Ombudsman Fourth Report* (n 8) 53. In May 2023, the Victorian government agreed to settle a class action brought on behalf of the 3,000 public housing residents for \$5 million: David Estcourt, 'Tower Tenants Win \$5m in Pandemic Lockdown Settlement, but No Apology', *The Age* (online, 9 May 2023) <<https://www.theage.com.au/national/victoria/tower-tenants-win-5m-in-pandemic-lockdown-settlement-but-no-apology-20230505-p5d64v.html#>>, archived at <<https://perma.cc/W777-9KE8>>.

⁹⁵ *Victorian Ombudsman Public Housing Investigation* (n 5) 169–70 [845]–[861], 171 [868]–[876], 173–4 [899]–[909].

marginalised groups⁹⁶ and the difficulty of ascertaining what the law was at any given time.⁹⁷ Feedback such as this is valuable at any time, but priceless when ordinary scrutiny mechanisms are compromised.

Ombudsman offices were not the only institutions scrutinising the operation of pandemic laws. Parliaments in several jurisdictions established committees to monitor the operation of these new laws and schemes.⁹⁸ These committees have done important work in this area, for example, in calling for a clearer delineation of federal and state responsibility, and articulating the need for national principles for managing quarantine.⁹⁹ Sarah Moulds described these new committees as ‘struggl[ing] to [their] feet’:¹⁰⁰ a description which recognises that these accountability mechanisms had to find their feet in the midst of the pandemic when many parliaments paused sittings.¹⁰¹ The efficacy of parliamentary committees has varied across jurisdictions: based on political calculation, at times, they have hesitated to use the full scope of their powers to compel the production of information or have diverted their energy to partisanship.¹⁰² After two years of the pandemic, in March 2022, the NSW parliamentary inquiry into the government’s management of the pandemic tabled its report without making any formal recommendations to government.¹⁰³ In contrast, Ombudsman offices were already well-established institutions that could hit the ground running.

We can see how the Ombudsman’s institutional features — long established independence, existing capacity and machinery for own motion

⁹⁶ *NSW Ombudsman Second Pandemic Report* (n 9) 70–1.

⁹⁷ *Ibid* 62–7.

⁹⁸ Sarah Moulds, ‘Keeping Watch on COVID-19 Laws: Are Parliamentary Committees up to the Job?’, *AUSPUBLAW* (Blog Post, 1 May 2020) <<https://www.auspublaw.org/blog/2020/05/keeping-watch-on-covid-19-laws-are-parliamentary-committees-up-to-the-job>>, archived at <<https://perma.cc/D8V5-EAC7>>.

⁹⁹ See *Senate Select Committee Final Report* (n 52) ix [1.31], x [3.3].

¹⁰⁰ Sarah Moulds, ‘Scrutinising COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees’ (2020) 45(3) *Alternative Law Journal* 180, 181.

¹⁰¹ See generally Harry Hobbs and George Williams, ‘Australian Parliaments and the Pandemic’ (2023) 46(4) *University of New South Wales Law Journal* 1314, 1326–32.

¹⁰² For example, the Senate arguably did not use its full powers to compel the attendance of seven government Ministers who claimed public interest immunity and refused to attend hearings: *Senate Select Committee Final Report* (n 52) 5 [1.25], 90–4 [5.20]–[5.36].

¹⁰³ Legislative Council Public Accountability Committee, Parliament of New South Wales, *NSW Government’s Management of the COVID-19 Pandemic* (Report No 12, March 2022).

investigations conducted in private, and the ability to make findings public when appropriate — meant that the Ombudsman was well-positioned to perform valuable scrutiny during the pandemic. The Ombudsman’s scrutiny of pandemic measures was not unfettered though: jurisdictional limits and — as we will explain later — limited resources and conditions of uncertainty restricted the impact of the Ombudsman’s scrutiny. Furthermore, during the pandemic, governments may have felt more emboldened to push back on the Ombudsman’s non-binding recommendations, in the belief that an emergency like the pandemic required them to take bold action.

B *Soft Law*

A second distinct feature of pandemic lawmaking was the heavy reliance of Australian governments on soft law.¹⁰⁴ ‘Soft law’ describes ‘a rule which has no legally binding force but which is intended to influence conduct’.¹⁰⁵ Examples from the pandemic include information disseminated through: government websites, press conferences, published guidelines, social media content and advice given in written or verbal communications by government officials to individuals.¹⁰⁶

There are obvious benefits in communicating information about COVID-19 related restrictions to the public in an easily accessible and understandable form. Soft law serves a ‘communicative function’.¹⁰⁷ This was especially important during the pandemic, as the law regulating people’s daily activity changed almost daily. At the height of the pandemic, most Australians did not engage with the ‘complex, voluminous, obscure and everchanging’ legal instruments that controlled their activity.¹⁰⁸ Instead, they

¹⁰⁴ Matthew McLeod, ‘Distancing from Accountability? Governments’ Use of Soft Law in the COVID-19 Pandemic’ (2022) 50(1) *Federal Law Review* 3, 3.

¹⁰⁵ Robin Creyke, ‘“Soft Law” and Administrative Law: A New Challenge’ (2010) 61 (January) *Australian Institute of Administrative Law Forum* 15, 15. For an exploration of definitions of ‘soft law’, see generally Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) ch 2 (‘*Soft Law and Public Authorities*’).

¹⁰⁶ McLeod (n 104) 3, 6–7.

¹⁰⁷ Lisa Burton Crawford, ‘Between a Rock and a Hard Place: Executive Guidance in the Administrative State’ in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 7, 14.

¹⁰⁸ McLeod (n 104) 3.

relied on ‘government interpretations of the law distributed in “soft law” instruments such as guidelines, websites, advices and press releases’.¹⁰⁹

Soft law largely escapes scrutiny through established accountability mechanisms.¹¹⁰ It is not subject to the parliamentary process and is generally not reviewable in judicial review or merits review proceedings (although decisions applying the underlying hard law will be reviewable).

However, soft law can go awry, such as when there is a discrepancy between the hard law and the soft law that is being communicated to the public. There have been many instances of soft law failing to reflect the hard law.¹¹¹ Soft law might be inaccurate: for example, by specifying some, but not all, exceptions to a rule.¹¹² In one instance, the pronouncement of soft law simplified the hard law by stating a limit on the number of people who could attend a private gathering, but omitting reference to some exceptions to that rule.¹¹³ Soft law might fail to distinguish between legally binding rules and mere guidelines,¹¹⁴ such as when the soft law indicated that mask wearing was compulsory, while the relevant hard law merely recommended wearing a mask.¹¹⁵

Confusion caused by soft law has obvious ramifications for the rule of law and human rights. People might refrain from lawful activities because they are under the false impression that those activities are *unlawful*. Or they might risk a penalty by engaging in unlawful behaviour because the soft law did not clearly communicate the unlawfulness of this course of action.

Ombudsman offices are well-positioned to identify these discrepancies associated with soft law and to make recommendations for improvement.¹¹⁶ The NSW Ombudsman’s second special report into the COVID-19 pandemic explained how the use of soft law contributed to widespread confusion about

¹⁰⁹ Ibid.

¹¹⁰ Ibid 12–13; Weeks, *Soft Law and Public Authorities* (n 105) 30.

¹¹¹ McLeod (n 104) 8, 10.

¹¹² *NSW Ombudsman Second Pandemic Report* (n 9) 64.

¹¹³ McLeod (n 104) 8, discussing ‘Coronavirus (COVID-19) Daily Update’, *Department of Health (Vic)* (Web Page, 3 March 2021) <<https://web.archive.org/web/20210303185829/https://www.dhhs.vic.gov.au/coronavirus-covid-19-daily-update>>, and *Stay Safe Directions (Victoria) (No 16) 2020* (Vic) cl 7(2)(h), as at 15 March 2021.

¹¹⁴ *NSW Ombudsman Second Pandemic Report* (n 9) 64.

¹¹⁵ McLeod (n 104) 10.

¹¹⁶ Ibid 14–15.

what the law was on any given day.¹¹⁷ The Northern Territory ('NT') Ombudsman has highlighted the potential confusion arising from rapidly changing laws that are not always communicated consistently, stating that, '[f]or the future, it would be enormously helpful to have a single and settled official source of authority that is accurate and updated as often as necessary and as quickly as possible'.¹¹⁸

In some cases, the Ombudsman may be able to work constructively with government to correct discrepancies between soft law and the actual law. For example, the South Australian Ombudsman's *Annual Report 2020–21* notes:

At various times throughout the year, my office has contacted the Department for Health and Wellbeing to request changes to their website information about the exemption process when it has been incorrect or required updating due to changes in directions or circumstances. The department has generally acted promptly to comply with such requests.¹¹⁹

Not all jurisdictions reported such sanguine experiences. The NT Ombudsman reported that communications by the NT Department of Health imposing quarantine fees suggested the fees were non-discretionary and did not clearly advise of review or waiver options.¹²⁰ The Ombudsman raised this with the Department, recommending a more flexible, individualised approach and a stronger system of internal review.¹²¹ The Department's response did not embrace these recommendations, citing the need for a consistent approach and the responsibility of individuals to inform themselves of current quarantine requirements.¹²²

C *Hasty Administrative Actions and Frameworks*

A third feature of pandemic lawmaking was the speed at which governments took administrative actions and set up legal frameworks. In NSW, for

¹¹⁷ *NSW Ombudsman Second Pandemic Report* (n 9) 64–5.

¹¹⁸ *NT Ombudsman 2021–22 Annual Report* (n 11) 11.

¹¹⁹ *SA Ombudsman 2020–21 Annual Report* (n 10) 28.

¹²⁰ *NT Ombudsman 2020–21 Annual Report* (n 10) 9–10.

¹²¹ *Ibid.*

¹²² *Ibid* 10–11.

example, in a single year of the pandemic, the Health Minister made 155 principal and amending public health orders.¹²³

One such hastily established framework was for mandatory hotel quarantine, which was implemented at the state and territory level following a decision of the National Cabinet on 27 March 2020.¹²⁴ The framework was developed at short notice in a context in which ‘[t]here was no best practice quarantine handbook and arrangements were developed on a state-by-state basis’.¹²⁵ The process for applying for an exemption varied ‘significantly’ from state to state.¹²⁶

Haste inevitably creates the possibility that things will go wrong, especially when the hasty measures impose significant restrictions on liberty. It is therefore more important than ever that individuals affected have access to effective mechanisms for reviewing restrictions on their liberty. This has not always been the case in relation to Australia’s systems of hotel quarantine.

In South Australia (‘SA’) for example, the system of hotel quarantine was initially established without any appeal process for exemption applications.¹²⁷ A national review of the framework found that ‘[i]nformation about criteria, the application process including evidentiary requirements, timeframes and appeal mechanisms were often unclear and/or hard to find’.¹²⁸ In NSW, two agencies were tasked with administering the hotel quarantine system: NSW Health and NSW Police.¹²⁹ For the NSW Ombudsman, this posed a significant challenge given his jurisdiction covered only one of the two agencies, namely NSW Health.¹³⁰ The responsibilities of each of these two agencies for various aspects of the hotel quarantine system was not made

¹²³ These orders were made between 1 February 2021 and 31 January 2022: *NSW Ombudsman Second Pandemic Report* (n 9) 62.

¹²⁴ *Senate Select Committee Final Report* (n 52) 13 [2.22].

¹²⁵ Jane Halton, *National Review of Quarantine* (Report, 15 November 2021) 5. See also Jennifer Coate, Board of Inquiry into the COVID-19 Hotel Quarantine Program, Parliament of Victoria, *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations* (Parliamentary Paper No 191, December 2020) vol 1, 15.

¹²⁶ Department of Health and Aged Care (Cth), *National Review of Hotel Quarantine* (Report) 16.

¹²⁷ See *Emergency Management (Cross-Border Travel No 15) (COVID-19) Direction 2020* (SA).

¹²⁸ *National Review of Hotel Quarantine* (n 126) 16.

¹²⁹ *NSW Ombudsman Second Pandemic Report* (n 9) 25.

¹³⁰ *Ombudsman Act NSW* (n 15) ss 5(1) (definition of ‘public authority’), 12–13, sch 1 item 13.

clear by the NSW government, thus hampering the efforts of the NSW Ombudsman to assist those making hotel quarantine complaints.¹³¹

People in hotel quarantine or subject to other government actions affecting liberty were able to challenge government action in judicial review proceedings.¹³² However, during the pandemic, the shortcomings of judicial review and the comparative advantages of taking a complaint to an Ombudsman office were magnified. Perusal of the COVID-19 related contacts received by Ombudsman offices (especially regarding hotel quarantine)¹³³ shows that many of these were:

- highly time sensitive: relating, for example, to a short but ongoing period of quarantine or an urgent need to travel interstate, and unlikely to be resolved by a court in time to put matters right;¹³⁴
- not necessarily complaints about the legality of government action, and therefore not susceptible to correction in judicial review proceedings;¹³⁵
- possibly made by people for whom the costs of judicial review proceedings would be prohibitive;
- complaints that required further investigation:¹³⁶ not something an Australian court can do;
- complaints that revealed systemic problems;¹³⁷ and
- best remedied by nonlegal means such as apologies or policy changes, or by amendments to the law.¹³⁸

¹³¹ NSW Ombudsman 2020 Hindsight (n 2) 3, 52.

¹³² Note that, according to the NSW Ombudsman, as at 7 September 2022, none of the judicial review challenges to NSW public health orders were successful: NSW Ombudsman Second Pandemic Report (n 9) 59.

¹³³ For example, the NSW Ombudsman's first report refers to complaints about bed bugs in hotel quarantine and failures to grant exemptions from quarantine: NSW Ombudsman 2020 Hindsight (n 2) 18–20, 23.

¹³⁴ As our discussion of *Davidson v Director-General, Justice and Community Safety Directorate* (2022) 18 ACTLR 1 ('*Davidson*') demonstrates (albeit in relation to a human rights complaint rather than judicial review), court proceedings can take years to resolve: see below nn 143–7 and accompanying text.

¹³⁵ See, eg, SA Ombudsman 2020–21 Annual Report (n 10) 28.

¹³⁶ See, eg, NSW Ombudsman Second Pandemic Report (n 9) 15.

¹³⁷ See, eg, NSW Ombudsman 2020 Hindsight (n 2) 23.

¹³⁸ See, eg, Victorian Ombudsman Public Housing Investigation (n 5) 5, 180.

To take one example, the NT Ombudsman received a complaint from a person in a government-run quarantine facility. The person complained that the occupants of a neighbouring room were noisy and disruptive.¹³⁹ The Ombudsman liaised with the facility's operators, arranging for the complainant to be moved to another room and for increased monitoring of the disruptive neighbours.¹⁴⁰ The complaint was resolved to the complainant's satisfaction on the day after the complainant's first contact with the Ombudsman.¹⁴¹ Since this situation did not appear to involve any breach of a legal duty, judicial review could never have addressed the problem and certainly not in a timely way.

The speed with which the Ombudsman addressed issues relating to lockdown and quarantine is noteworthy. For example, the Victorian Ombudsman's complex and careful investigation report into the lockdown of the Melbourne housing estates took no more than five months, and this relatively short timeframe factors in the scale of the investigation and the requirement to provide the relevant departments with an opportunity to respond, as part of procedural fairness.¹⁴² This timeframe is important to mention because the pandemic was far from over at the time the report was published. Those making and enforcing decisions were effectively put on notice that independent oversight mechanisms were intent on monitoring whether rights were being unreasonably sidelined during the pandemic.

In terms of gauging speed, we can consider by way of comparison the Supreme Court of the Australian Capital Territory's ('ACT') recent judgment of *Davidson v Director-General, Justice and Community Safety Directorate* ('*Davidson*'), relating to a complaint made by a prisoner in early 2019.¹⁴³ The prisoner's complaint was that while in solitary confinement in 2018–19, he was not given proper access to a daily hour of fresh air and exercise contrary to s 40B(1)(a) of the *Human Rights Act 2004* (ACT) ('*ACT HRA*').¹⁴⁴ The matter was heard in mid 2021 and the 90-page judgment was handed down

¹³⁹ *NT Ombudsman 2021–22 Annual Report* (n 11) 7.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² See *Ombudsman Act Vic* (n 15) s 25A(2). See also *Ombudsman Act Cth* (n 15) s 8(5); *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163, 170 (Einfeld J).

¹⁴³ *Davidson* (n 134) 16 [49] (Loukas-Karlsson J).

¹⁴⁴ *Ibid* 15 [44].

in mid 2022.¹⁴⁵ In his Honour's reasons, Loukas-Karlsson J declared cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) — which provided an open cell door constitutes access to fresh air and exercise — invalid.¹⁴⁶ Seven months later, in December 2022, the ACT government announced a policy change to confirm prisoners' right to fresh air,¹⁴⁷ which means that the resolution of this complaint took close to four years.

We are not arguing here that judicial review should become faster. There are good reasons why court proceedings take time. The adversarial process is designed to provide 'Rolls Royce' levels of legal argument and procedural fairness. Inevitably, this method takes time and costs money.¹⁴⁸ In some circumstances, judicial review will be the most appropriate option for a person affected by executive action. Our point is not to denigrate the value of judicial review but, instead, to highlight the strengths of the Ombudsman's faster, more flexible processes.

In making any comparisons, it should be noted that during the pandemic, a number of judicial review actions were heard relatively swiftly by Australian state courts. These actions mainly related to the legality of the pandemic orders themselves and not the conditions (such as a lack of ventilation) imposed by the pandemic frameworks established under these orders.¹⁴⁹ At the same time, the likely cost and complexity of taking such matters to the courts need to be factored into this assessment of dispute resolution mechanisms, as well as the fact that not every Australian jurisdiction has a bill of rights. In those jurisdictions, rights issues must be argued within other

¹⁴⁵ Ibid 5–6 [2].

¹⁴⁶ Ibid 87 [439], discussing *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) cl 4.3.

¹⁴⁷ See 'Commissioner Welcomes Secure Access to Fresh Air and Exercise for Prisoners', *ACT Human Rights Commission* (Web Page, 2 December 2022) <<https://web.archive.org/web/20230322103716/https://hrc.act.gov.au/commissioner-welcomes-secure-access-to-fresh-air-and-exercise-for-prisoners/>>.

¹⁴⁸ See JJ Spigelman, 'Economic Rationalism and the Law' (2001) 24(1) *University of New South Wales Law Journal* 200, 203; Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019) 15–16.

¹⁴⁹ See, eg, *Loiello v Giles* (2020) 63 VR 1, 6 [5] (Ginnane J). See above n 132. On judicial review during the pandemic, see generally Chen, 'Stay at Home Restrictions' (n 4).

(often ill-fitting) legal issues, such as jurisdictional error or breach of a constitutional limit.¹⁵⁰

To sum up, the Ombudsman was in many ways well-adapted to monitoring and remedying rights violations during the pandemic. In most cases, the Ombudsman provided a responsive and accessible complaints mechanism. Through its complaints handling and proactive reports, the Ombudsman was able to engage in constructive dialogue with government about individual and systemic issues, even if the government's ultimate position did not always align with that of the Ombudsman.

But there were limits on the Ombudsman's efficacy. Like many organisations, Ombudsman offices battled limited information in a constantly changing environment. As we have seen, the Ombudsman's jurisdiction is limited and responses from government were variable. Resourcing was also an issue for some Ombudsman offices. The NSW Ombudsman, for example, reflected in 2021 that the shift to remote work and service delivery during the pandemic 'exposed the extent to which this office has in some respects been left behind, with chronic under-funding leading to a long-term under-investment in legacy technologies, service-delivery modes, and processes'.¹⁵¹ While the NSW government increased the Ombudsman's funding in 2022–23,¹⁵² the fact remains that limited resources affected the Ombudsman's operations throughout much of the pandemic. Inevitably, the pandemic affected the staff of some Ombudsman offices.¹⁵³ The ACT Ombudsman adopted a 'limited-service complaint handling model' to manage employee availability and welfare, noting that while this model enabled complaints handling to continue, it did reduce the Ombudsman office's 'ability to investigate and manage complaints as efficiently as [it] otherwise would'.¹⁵⁴

In the next two Parts, we examine more closely the work of the Ombudsman in two case studies involving human rights and the deprivation of liberty under pandemic measures.

¹⁵⁰ See, eg, *Kassam v Hazzard* (2021) 393 ALR 664, 669 [4] (Beech-Jones CJ at CL).

¹⁵¹ *NSW Ombudsman 2020–21 Annual Report* (n 10) vii.

¹⁵² *NSW Ombudsman 2021–22 Annual Report* (n 11) 17.

¹⁵³ The extent of the impact on staff varied across jurisdictions. The Tasmanian Ombudsman reported that, while there were changes to working practice, '[t]he activities of the Office were not greatly affected': *Tasmanian Ombudsman 2020–21 Annual Report* (n 10) 2.

¹⁵⁴ *ACT Ombudsman 2021–22 Annual Report* (n 11) 18.

IV THE OMBUDSMAN'S REACTIVE ROLE IN RESOLVING COMPLAINTS REGARDING ACCESS TO FRESH AIR

This case study examines how the Ombudsman, in its *reactive* complaints handling role, responded to concerns about a lack of fresh air in hotel quarantine and lockdown. We start by setting out the international standard of daily access to fresh air and explaining that quarantine is a form of detention to which such standards apply. We analyse how Australian Ombudsman offices applied these standards and how governments responded. We conclude with a reflection on the difficulty that those in hotel quarantine experienced in complaining about this problem, given the multiple agencies often involved in this quarantine scheme, and the fragmented nature of complaints handling and oversight across Australia.

Lack of fresh air was a common issue raised in complaints about hotel quarantine across jurisdictions, and about the hard and immediate lockdown of the Melbourne public housing towers.¹⁵⁵ Concerns regarding access to fresh air in hotel quarantine were articulated in the media within the first month of the scheme, with a story by journalist Jack Gramenz on 23 April 2020 titled 'Coronavirus: Hotel Quarantine Has No Access to Fresh Air, Unlike "Prison"'.¹⁵⁶ The headline implied that while hotel quarantine and prison share some commonalities, those detained in prison were better off. This comparison was also articulated in a complaint made to the NSW Ombudsman by a person detained in hotel quarantine: 'even criminals are given outside time in prisons'.¹⁵⁷ In June 2020, a submission to a Queensland parliamentary inquiry explained the problem to lawmakers: 'Many people

¹⁵⁵ Poor ventilation in residential aged care facilities has also been raised as a concern: see Geoff Hanmer and Bruce Milthorpe, 'Poor Ventilation May Be Adding to Nursing Homes' COVID-19 Risks', *The Conversation* (online, 20 August 2020) <<https://theconversation.com/poor-ventilation-may-be-adding-to-nursing-homes-covid-19-risks-144725>>, archived at <<https://perma.cc/8D54-GBRBhttps>>. Residents with limited mobility and those persons living in locked units with secured windows are less likely to be able to access fresh air. Aged care legislation such as the *Aged Care Act 1997* (Cth) does not regulate indoor air quality in these settings.

¹⁵⁶ Jack Gramenz, 'Coronavirus: Hotel Quarantine Has No Access to Fresh Air, Unlike "Prison"', *News.com.au* (online, 23 April 2020) <<https://www.news.com.au/lifestyle/health/health-problems/coronavirus-hotel-quarantine-has-no-access-to-fresh-air-unlike-prison/news-story/555a364cc72cc52e25370f498346660e>>, archived at <<https://perma.cc/M2QX-M4VX>>.

¹⁵⁷ *NSW Ombudsman 2020 Hindsight* (n 2) 17.

quarantining in hotels report being confined to rooms with no opening windows or balconies, and that time allowed out of the room is at the discretion of the supervising police unit.¹⁵⁸

While there is no standalone or direct right to daily access to fresh air in international human rights law, it is connected to the right to be treated humanely when deprived of liberty as articulated by art 10(1) of the *ICCPR*,¹⁵⁹ which was ratified by Australia in 1980.¹⁶⁰ According to the advice of the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT') — a body of international experts which monitors all forms of detention under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT') — quarantine (such as hotel quarantine) is a form of detention.¹⁶¹ The SPT released further advice that '[s]ince quarantine facilities are a de facto form of deprivation of liberty, all those so held should be able to benefit from the fundamental

¹⁵⁸ Queensland Human Rights Commission, Submission No 44 to Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Queensland Government's Health Response to COVID-19* (6 July 2020) 11–12 [37].

¹⁵⁹ Laura Grenfell, Anita Mackay and Meribah Rose, 'A Human Right to Daily Access to Fresh Air beyond Prisons in Australia?' (2023) 29(2) *Australian Journal of Human Rights* 259, 261–2.

¹⁶⁰ 'Chapter IV: Human Rights: International Covenant on Civil and Political Rights', *United Nations Treaty Collection* (Web Page, 19 June 2024) <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind>, archived at <<https://perma.cc/XK34-DHFF>>. Article 10(1) has not been implemented into federal legislation, but the right to be treated humanely when deprived of liberty has been articulated in legislative bills of rights in the ACT, Queensland and Victoria: *ACT HRA* (n 41) s 19; *Qld HRA* (n 41) s 30; *Victorian Charter* (n 42) s 22.

¹⁶¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice Provided by the Subcommittee to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland regarding Compulsory Quarantine for Coronavirus (COVID-19 Virus)*, 40th sess, UN Doc CAT/OP/9 (31 March 2020) 1 [2]–[3]. The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('OPCAT') applies to all 'places of detention' and all persons 'deprived of their liberty': at art 4(1). It is designed to 'prevent torture and other cruel, inhuman or degrading treatment or punishment' in such settings: at art 1 (emphasis added).

safeguards against ill-treatment.¹⁶² Both pieces of advice, published in March and April 2020 respectively, meant that states parties to *OPCAT* such as Australia were aware that many of the principles providing fundamental safeguards for those in detention would be applicable. These safeguards include the right to daily access to fresh air, which is articulated by r 23(1) of the *Mandela Rules*.¹⁶³

The *Mandela Rules* were first devised in 1955 in the context of the treatment of those persons held in prisons and were subsequently revised in 2015.¹⁶⁴ They are regularly referred to as relevant standards in reports published by Australian Ombudsman offices.¹⁶⁵ Over time, Australian Ombudsman offices and other independent oversight bodies have applied these non-binding standards more broadly to all detention settings.¹⁶⁶

¹⁶² Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice of the Subcommittee to States Parties and National Preventive Mechanisms Relating to the Coronavirus Disease (COVID-19) Pandemic*, UN Doc CAT/OP/10 (7 April 2020) 4 [10] (emphasis added) ('*SPT Pandemic Advice*').

¹⁶³ See also *Mandela Rules* (n 45) rr 14, 42.

¹⁶⁴ Katrin Tiroch, 'Modernizing the Standard Minimum Rules for the Treatment of Prisoners: A Human Rights Perspective' (2016) 19(1) *Max Planck Yearbook of United Nations Law* 278, 280, 285.

¹⁶⁵ See, eg, *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 11 n 4; *Victorian Ombudsman Public Housing Investigation* (n 5) 102; *NSW Ombudsman 2020 Hindsight* (n 2) 16 n 9; Wayne Lines, Ombudsman SA, *Full Investigation: Ombudsman Act 1972* (Redacted Final Report 2017/01854, 20 September 2017) 2, 13 [55]–[57], 29 [173].

¹⁶⁶ On 20 March 2020, the regional counterpart of the SPT, the well-resourced European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'), took the useful approach of explaining to states parties that the right of daily access to open air of at least one hour extends to 'newly established facilities/zones where persons are placed in quarantine': European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Statement of Principles Relating to the Treatment of Persons Deprived of Their Liberty in the Context of the Coronavirus Disease (Covid-19) Pandemic* (CPT/Inf(2020)13, 20 March 2020) ('*CPT Statement of Principles*'). In Australia, the broader application of the *Mandela Rules* (n 45) is evidenced by *Victorian Ombudsman Public Housing Investigation* (n 5) 102; Queensland Human Rights Commission, *Hotel Quarantine: Unresolved Complaint Report under Section 88 Human Rights Act 2019* (Report, 15 October 2020) 8 [35] n 16 ('*QHRC Hotel Quarantine Report*'). Similarly, the NSW Ombudsman explains that daily access to fresh air has long been seen as a minimum standard of treatment for people in facilities where liberty has been restricted: *NSW Ombudsman 2020 Hindsight* (n 2) 16. See also at 16 nn 9–11, citing *Mandela Rules* (n 45) rr 14(a), 23(1), 42, *SPT Pandemic Advice* (n 162) 3 [9], and *CPT Statement of Principles* (n 166).

In NZ, the Chief Ombudsman, in his *OPCAT* role, published a set of principles in April 2020 which are aligned with the *Mandela Rules*. These principles are designed to guide detention facilities and their staff in treating those deprived of their liberty in a humane manner.¹⁶⁷ The sixth principle in this statement spells out rights: ‘The fundamental rights of detained people during the pandemic ... includ[e] ... the right of daily access to the open air (of at least one hour)’.¹⁶⁸ These rights-based principles are to be applied to *all* places of detention in NZ.¹⁶⁹

A Scope for a Rights-Based Approach

In Australia, it appears that complaints about a lack of fresh air in hotel quarantine were made in most jurisdictions and to a range of oversight bodies.¹⁷⁰ For example, of the more than 500 hotel quarantine complaints received by the NSW Ombudsman between March 2020 and January 2021, 73 complaints mentioned a lack of access to fresh air and exercise.¹⁷¹

The Ombudsman was not always able to respond effectively (or at all) to these complaints. This was the case in NSW where the selection of hotels for hotel quarantine was made by NSW Police, a body not subject to the Ombudsman’s jurisdiction.¹⁷² The Ombudsman’s first pandemic report explains that without a state-based rights framework,¹⁷³ NSW Police priori-

¹⁶⁷ ‘OPCAT Inspections during COVID-19 Pandemic’, *Ombudsman (NZ)* (Update and Statement of Principles, 15 April 2020) <<https://www.ombudsman.parliament.nz/sites/default/files/2021-11/OPCAT%20inspections%20during%20COVID-19%20pandemic%20-%20update%20and%20Statement%20of%20Principles%20-%20poster.pdf>>, archived at <<https://perma.cc/Z7XL-YC7N>>.

¹⁶⁸ *Ibid.* This is closely aligned with the seventh principle of the *CPT Statement of Principles* (n 166).

¹⁶⁹ See ‘Monitoring Places of Detention’, *Ombudsman (NZ)* (Web Page) <<https://www.ombudsman.parliament.nz/what-ombudsman-can-help/monitoring-places-detention>>, archived at <<https://perma.cc/53Y2-DVJM>>.

¹⁷⁰ See *National Review of Hotel Quarantine* (n 126) 17. The Department of Health and Aged Care (Cth) noted that ‘[a]ccess to fresh air and exercise varies across jurisdictions reviewed’: at 12.

¹⁷¹ *NSW Ombudsman 2020 Hindsight* (n 2) 16. The NSW Ombudsman received an average of 40 contacts in relation to hotel quarantine per month in 2020, and 29 per month between 1 February 2021 and 30 April 2022: *NSW Ombudsman Second Pandemic Report* (n 9) 15–16.

¹⁷² *Ombudsman Act NSW* (n 15) sch 1 item 13.

¹⁷³ See *NSW Ombudsman 2020 Hindsight* (n 2) 2.

tised safety and efficiency, rather than rights: '[NSW Police] determined that high-rise buildings would be easier and less resource intensive to keep secure'¹⁷⁴ and they considered the option of escorting guests to access fresh air but decided against it on the bases that it was 'logistically too difficult and resource-intensive to manage, and ... represented a transmission risk'.¹⁷⁵ The NSW Ombudsman's jurisdictional limit and, as earlier explained, the initial lack of information regarding the splitting of responsibility between NSW Health and NSW Police, thwarted the Ombudsman's ability to respond to complaints.

In some jurisdictions, complaints made to the Ombudsman regarding access to fresh air in hotel quarantine were addressed in a rights framework, regardless of whether the jurisdiction in which the complaint was made had a legislative rights framework or whether the Ombudsman had an explicit rights mandate. For example, the *Annual Report 2020–21* of the South Australian Ombudsman stated that multiple complaints were made about a lack of fresh air in hotel quarantine.¹⁷⁶ The Ombudsman subsequently gave advice to the Department for Health and Wellbeing (SA) that 'access to fresh air is a basic human right and that all people in hotel quarantine should have access to fresh air'.¹⁷⁷ The report indicates the Department's response in February 2021, namely that it had adopted the South Australian Ombudsman's position that access to fresh air was a human right and that it had adopted a policy of only using 80% of the capacity of a hotel for quarantine so as to ensure those in hotel quarantine had provision of a balcony or an opening window.¹⁷⁸ This rights-based approach to the problem and its acceptance by the Department are noteworthy given that SA has no legislative rights framework.

¹⁷⁴ Ibid 17.

¹⁷⁵ Ibid 18.

¹⁷⁶ *SA Ombudsman 2020–21 Annual Report* (n 10) 30.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid 30–1. The issue re-emerged in October 2021, with the South Australian Ombudsman receiving several complaints of a lack of fresh air in hotel quarantine. After conversations with the Department for Health and Wellbeing (SA), the Ombudsman was satisfied that this was a short-term problem resulting from an influx of travellers, and that appropriate arrangements were made for people with a particular need for fresh air: *SA Ombudsman 2021–22 Annual Report* (n 11) 48.

The South Australian response was no doubt bolstered by the work of other rights-monitoring institutions at a similar time. The Victorian Ombudsman investigated the issue in the context of the Melbourne public housing lockdown.¹⁷⁹ In mid October 2020, the Queensland Human Rights Commission ruled that humane treatment in hotel quarantine requires rooms to have either balconies or opening windows and that it was reasonable that the government be called on to source hotels with such rooms.¹⁸⁰ In both Victoria and Queensland, government departments and agencies pushed back.¹⁸¹ While the approach taken by both the Victorian and Queensland oversight bodies occurred under legislative bills of rights, this approach clearly had a positive flow-on effect for those jurisdictions like SA without a bill of rights and where the Ombudsman does not have an explicit human rights mandate. This experience demonstrates the potential value of the Ombudsman as a rights protective institution.

B *The Ombudsman's Dialogue with Government*

In jurisdictions with a legislative rights framework, one of the touted strengths of using the courts as a forum for rights issues is their potential to engage the Parliament and the executive in a 'rights dialogue'.¹⁸² In the ACT's human rights framework, a court can do this by making a declaration of incompatibility under s 32 of the *ACT HRA*, which is what the Supreme Court of the ACT did in *Davidson*,¹⁸³ thus triggering a process whereby the Attorney-General must present the declaration to Parliament and present a

¹⁷⁹ *Victorian Ombudsman Public Housing Investigation* (n 5) 100–14 [491]–[573].

¹⁸⁰ *QHRC Hotel Quarantine Report* (n 166) 11 [44]. See also Queensland Human Rights Commission, *Prisoner Isolation: Unresolved Complaint under Section 88 Human Rights Act 2019* (Report, 2 February 2021) 25–6 [98].

¹⁸¹ *QHRC Hotel Quarantine Report* (n 166) 10 [43]; Lily Nothling, 'Advocates Slam Queensland Government's "Unacceptable" Ban on Fresh Air Breaks in Hotel Quarantine for Returning Travellers', *ABC News* (online, 8 December 2020) <<https://www.abc.net.au/news/2020-12-08/coronavirus-queensland-fresh-air-breaks-banned-hotel-quarantine/12960484>>, archived at <<https://perma.cc/67RF-FMHT>>; *Victorian Ombudsman Public Housing Investigation* (n 5) 222–3 [125]–[129].

¹⁸² On rights dialogue, see Julie Debeljak, 'Rights Dialogue where There Is Disagreement under the Victorian Charter' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020) 267.

¹⁸³ *Davidson* (n 134) 88 [439] (Loukas-Karlsson J).

formal government response within six months.¹⁸⁴ Even in a jurisdiction without a human rights framework, however, the Ombudsman can perform a similar function in an informal manner.

As the previously mentioned South Australian example illustrates, informal interaction between the Ombudsman, and government departments and agencies, is key to much of the reactive, complaints handling work of Ombudsman offices. This takes place behind closed doors. However, a form of formal interaction, similar to that between the courts and Parliament, is required when an Ombudsman makes findings. To satisfy the requirements of procedural fairness, Ombudsman offices give government departments and agencies an opportunity to formally respond to their preliminary findings.¹⁸⁵ The Victorian Ombudsman's report on the public housing lockdown offers a strong illustration of such rights dialogue thanks to the lengthy 44-page government response which can be found in appendix A of the report.¹⁸⁶

The Victorian government response to the Ombudsman made the point that the right to access fresh air 'is not mandated ... by any human rights instrument'¹⁸⁷ or any legislation and that 'the primary human rights guidance ... has been developed in the context of imprisonment for criminal activity'.¹⁸⁸ This indicates that the Victorian government chose to take a highly adversarial and legalistic approach in responding to the Victorian Ombudsman, a response which did not recognise that the Ombudsman's recommendations are soft, non-binding and focused on good practice.¹⁸⁹ The Victorian government's approach was narrow, not taking into account that since 2019, the Commonwealth Ombudsman has been using the

¹⁸⁴ *ACT HRA* (n 41) s 33.

¹⁸⁵ *Ombudsman Act Cth* (n 15) ss 8(5)–(6); *Ombudsman Act ACT* (n 15) ss 9(6), 18(5); *Ombudsman Act NSW* (n 15) ss 24(1)–(2); *Ombudsman Act NT* (n 15) ss 61(2), 100(2); *Ombudsman Act Qld* (n 15) ss 26(3), 55(2); *Ombudsman Act SA* (n 15) s 18(4); *Ombudsman Act Tas* (n 15) ss 23A(5)–(6); *Ombudsman Act Vic* (n 15) s 17(4); *Parliamentary Commissioner Act WA* (n 15) ss 19(4), 26(7).

¹⁸⁶ *Victorian Ombudsman Public Housing Investigation* (n 5) 182–225.

¹⁸⁷ *Ibid* 223 [127].

¹⁸⁸ *Ibid* 223 [129]. Although not explicitly stated, the primary human rights guidance is likely *Mandela Rules* (n 45) r 23(1).

¹⁸⁹ According to Ombudsman scholars, 'relations between ombuds and an agency can become quite adversarial': Groves and Stuhmcke (n 46) 3 n 9.

Mandela Rules in the monitoring of immigration detention,¹⁹⁰ and that the media was publishing articles decrying that prison had higher standards than those required in hotel quarantine.¹⁹¹ Here it is worth recalling that, as Weeks explains, the Ombudsman ‘stands apart from other administrative law bodies’ in that it is ‘not concerned primarily with law but with justice’.¹⁹²

Furthermore, the Victorian government did not implement the Ombudsman’s later recommendation that the *Public Health Act Vic* be amended to include a right to regular and meaningful access to fresh air.¹⁹³ This shows that while the Ombudsman can engage in public dialogue with government, the success of this intervention is never guaranteed.

¹⁹⁰ Manthorpe, *Commonwealth Ombudsman Monitoring Immigration Detention 2020* (n 8) 25 [6.45]; McKay, *Commonwealth Ombudsman Monitoring Immigration Detention 2022* (n 8) 46 [2.254] n 21.

¹⁹¹ See, eg, Gramenz (n 156); Nick Bond, ‘Five-Star Hotel Quarantine “Worse than Jail”, Say Travellers’, *News.com.au* (online, 5 April 2020) <<https://www.news.com.au/entertainment/tv/current-affairs/fivestar-hotel-quarantine-worse-than-jail-say-travellers/news-story/f00fc990823c09f8194fe70bda4dbe45>>, archived at <<https://perma.cc/KT5A-UQEB>>; Chanel Zagon, ‘Melbourne Couple inside Hotel Quarantine Leave Scathing Review’, *9News* (online, 14 April 2020) <<https://www.9news.com.au/national/melbourne-couple-inside-coro-navirus-hotel-quarantine-travelodge-leave-scathing-review/84f1928c-b1aa-4bff-b41a-215e53c6fa6d>>, archived at <<https://perma.cc/2UBU-QXEX>>.

¹⁹² Weeks, ‘Maladministration’ (n 92) 28. See also Deborah Glass, ‘Common Sense and Clean Hands: An Ombudsman’s View of Justice’ (2019) 43(1) *Melbourne University Law Review* 369, 383.

¹⁹³ *Victorian Ombudsman Fourth Report* (n 8) 56. It is worth noting that in November 2020, an independent review of Victoria’s hotel quarantine scheme undertook a ‘human-rights-based analysis’ based on the *Victorian Charter* (n 42) of what facilities were appropriate for quarantine use: Jennifer Coate, Board of Inquiry into the COVID-19 Hotel Quarantine Program, Parliament of Victoria, *COVID-19 Hotel Quarantine Inquiry: Interim Report and Recommendations* (Parliamentary Paper No 169, November 2020) 49 [138] (*‘Hotel Quarantine Interim Report’*). The report directly referred to the *Mandela Rules* (n 45) in recommending that daily access to fresh air be factored into Victoria’s hotel quarantine program: Coate, *Hotel Quarantine Interim Report* (n 193) 59 [45]. The Victorian government did not implement this particular recommendation but instead publicly announced that it would take it to National Cabinet so as to achieve a nationally consistent approach: ‘COVID-19 Hotel Quarantine Inquiry: Government Response to the Final Report’, *Victorian Government* (Web Document, 27 October 2023) 4 <https://content.vic.gov.au/sites/default/files/2021-03/Victorian-Government-Response-to-the-Hotel-Quarantine-Inquiry_0.pdf>, archived at <<https://perma.cc/8YT8-U8Y6>> (*‘Government Response to Hotel Quarantine Final Report’*). Such a national approach never materialised, despite the view of the Department of Health and Aged Care (Cth) that ‘[h]otel infrastructure [for quarantine] should enable access to open spaces and fresh air independently (that is, without escort)’: *National Review of Hotel Quarantine* (n 126) 59.

C A Fragmented System of Complaints Handling

While the complaints regarding access to fresh air during the pandemic indicate a level of engagement and cross fertilisation between Australian Ombudsman offices and other oversight bodies, they also highlight Australia's fragmented system of oversight and complaints handling, a point made by the NSW Ombudsman in March 2021.¹⁹⁴ This fragmentation at the jurisdiction, agency and activity level is illustrated by mandatory hotel quarantine, which was intended to be a national scheme, albeit legislated and implemented by each jurisdiction.¹⁹⁵ A fragmented approach is not surprising in a federal system, especially where state and territory frameworks are hastily established; but it is concerning where there is little scrutiny and transparency as to how decisions are made, and little clarity as to how they can be appealed or reviewed.

A 2020 review of the national hotel quarantine system, commissioned by National Cabinet, indicates that the bulk of complaints were made to state, territory and Commonwealth Ombudsman offices, while some complaints were made to the Australian Human Rights Commission ('AHRC').¹⁹⁶ The 2020 review explains that it did not canvass all the complaints made directly to state agencies such as the police.¹⁹⁷ As the NSW Ombudsman observes, it was difficult for those affected by pandemic laws to know who to complain to.¹⁹⁸

¹⁹⁴ *NSW Ombudsman 2020 Hindsight* (n 2) 45.

¹⁹⁵ *Senate Select Committee Final Report* (n 52) 13 [2.22].

¹⁹⁶ *National Review of Hotel Quarantine* (n 126) 17.

¹⁹⁷ *Ibid.*

¹⁹⁸ The NSW Ombudsman's first pandemic report articulates that at times it was difficult even for his office to know which state or federal entity was in charge of administering these webs of emergency laws and directives: *NSW Ombudsman 2020 Hindsight* (n 2) 52. In August 2022, the NSW Parliament sought to address the NSW specific problems by empowering the NSW Ombudsman to proactively review and report on the complaints handling systems of all state public authorities, regardless of whether the Ombudsman has jurisdiction to receive and investigate complaints about that authority: *Ombudsman Legislation Amendment Act 2022* (NSW) sch 1 items 5, 11, inserting *Ombudsman Act NSW* (n 15) ss 15A, 25A. Unfortunately, this is only a partial fix as the NSW Ombudsman will be able to refer complaints for investigation only to those public authorities under his jurisdiction — and only those public authorities will then be required to report to the Ombudsman as to the outcome of their investigation: *Ombudsman Act NSW* (n 15) ss 12A(1)–(2). This also does not address similar problems in other Australian jurisdictions.

The NSW Ombudsman concludes his first special report on complaints handling during the pandemic by observing that Australia's current oversight and complaints handling system is not necessarily 'suited to a crisis of this nature and magnitude'.¹⁹⁹ The Ombudsman argues that where there is a national scheme or system, arrangements need to be made 'to ensure that (whether on a state-by-state or national basis) there is at least one oversight body that has full visibility of [that scheme] and an ability to receive complaints about all aspects of it'.²⁰⁰ For example, given that hotel quarantine was a national scheme, the Commonwealth Ombudsman could have been authorised to handle all hotel quarantine complaints at first instance.²⁰¹ This first special report of the NSW Ombudsman was published soon after the Victorian government announced that it would take to National Cabinet the recommendation made by its independent Board of Inquiry into the COVID-19 Hotel Quarantine Program in late 2020 that daily fresh air breaks be made part of hotel quarantine.²⁰² Despite the consensus among complaints handlers and independent reviews that a national position on such quarantine and detention conditions (such as daily access to fresh air) would be helpful, National Cabinet has not taken a position on this issue, and it has not addressed the compelling argument for an integrated and visible system of complaints — a 'front door' — where a national scheme is in operation.

This case study on complaints regarding access to fresh air during the pandemic illustrates three things. First, that Australian Ombudsman offices are robustly considering human rights in undertaking their reactive role of handling complaints, regardless of whether their jurisdiction has dedicated human rights legislation. Second, it illustrates that not all governments and their agencies are receptive of these rights-based Ombudsman recommendations, even where there is a legislative bill of rights. Third, it highlights the observation of the NSW Ombudsman that Australia's 'fragmented' system of complaints handling, largely undertaken by various Ombudsman offices, needs some serious attention.

¹⁹⁹ *NSW Ombudsman 2020 Hindsight* (n 2) 2. See also *NSW Ombudsman Second Pandemic Report* (n 9) 77–8.

²⁰⁰ *NSW Ombudsman 2020 Hindsight* (n 2) 3.

²⁰¹ *Ibid* 53.

²⁰² 'Government Response to Hotel Quarantine Final Report' (n 193) 4. See also Coate, *Hotel Quarantine Interim Report* (n 193) 59 [45].

V THE OMBUDSMAN'S PROACTIVE ROLE IN MONITORING
PLACES OF DETENTION UNDER *OPCAT*

Since Australia ratified *OPCAT* in late 2017,²⁰³ it has gradually implemented the detention monitoring scheme required by this human rights treaty. This has meant that at least five Australian Ombudsman offices have been given a central role in the *OPCAT* monitoring scheme of their jurisdiction. This is a new and important *proactive* role in preventing ill-treatment of persons deprived of their liberty through the systematic and independent monitoring of all places of detention. This proactive, preventive role complements the Ombudsman's more traditional, reactive role of complaints handling. In common, both roles seek to hold government to account for actions affecting individual human rights.

Ombudsman offices are a good fit for this novel role given that issues relating to the deprivation of liberty have long taken up a significant portion of complaints handling and investigation work for Australian Ombudsman offices,²⁰⁴ and as demonstrated in the first case study, these offices have much experience in applying human rights standards to the detention context.²⁰⁵ Over time, this proactive role is likely to become more prominent for various Australian Ombudsman offices as they commence and develop their roles under *OPCAT*, with the implementation deadline of 20 January 2023 having now passed.²⁰⁶

²⁰³ 'Chapter IV: Human Rights: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', *United Nations Treaty Series* (Web Page, 20 June 2024) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9-b&chapter=4&clang=_en>, archived at <<https://perma.cc/QX5J-6A25>> ('*OPCAT* Ratification').

²⁰⁴ See, eg, *Victorian Ombudsman 2022 Annual Report* (n 11) 5, 28–9; *SA Ombudsman 2020–21 Annual Report* (n 10) 7, 40–1. At the international level, Glušac explains that '[p]rotecting the rights of persons deprived of liberty is among the traditional tasks of the Ombudsman': Luka Glušac, 'A Critical Appraisal of the Venice Principles on the Protection and Promotion of the Ombudsman: An Equivalent to the Paris Principles?' (2021) 21(1) *Human Rights Law Review* 22, 42.

²⁰⁵ Former Victorian Ombudsman Deborah Glass OBE explains that while the monitoring of the treatment of detainees has long been a role of her office, *OPCAT* (n 161) 'introduces more rigorous standards for local inspections of places of detention ... [and] demands much closer attention to international standards': Glass (n 192) 380.

²⁰⁶ Australian National Preventive Mechanism, *Monitoring Places of Detention under the Optional Protocol to the Convention against Torture: Annual Report of the Australian National Preventive Mechanism* (Report, 10 July 2024) 2.

This case study explains this new role for various Australian Ombudsman offices and how the slow implementation of this scheme affected the ability of these offices (in particular the Commonwealth Ombudsman) to conduct effective monitoring of places of detention during the pandemic. It offers a comparison with NZ, where the Chief Ombudsman has been undertaking this proactive role as one of five integrity institutions under the *Crimes of Torture Act 1989* (NZ),²⁰⁷ following NZ's ratification of *OPCAT* in 2007.²⁰⁸ It concludes by reflecting on how this new role might transform various Ombudsman offices.

A The Ombudsman's OPCAT Monitoring Role

According to Reif, in half of the states parties to *OPCAT*, Ombudsman offices have been designated a role as a National Preventive Mechanism ('NPM').²⁰⁹ Under *OPCAT*, at the domestic level, NPMs perform independent monitoring of all places of detention in order to proactively prevent the risk of torture and other cruel, inhuman or degrading treatment,²¹⁰ otherwise referred to as ill-treatment. Under art 4 of *OPCAT*, 'places of detention' is to be broadly construed to refer to 'any place under [states parties'] jurisdiction and control where persons are or may be deprived of their liberty'. This would include not just prisons, youth detention and locked psychiatric units, but also non-traditional places of detention such as locked units of residential aged care. In a federal system, these places of detention are often under the control of different jurisdictions.

NPMs conduct monitoring by undertaking regular inspection visits — announced or unannounced — to places of detention where they have unrestricted access to all databases and facilities, and interview staff and detainees in private.²¹¹ NPMs undertake these visits with a diverse team including medical, health, legal and cultural experts.²¹² In undertaking this

²⁰⁷ *Crimes of Torture Act 1989* (NZ) s 16 (definition of 'National Preventive Mechanism') (*Crimes of Torture Act NZ*).

²⁰⁸ 'OPCAT Ratification' (n 203).

²⁰⁹ Reif (n 38) 341–2.

²¹⁰ *OPCAT* (n 161) art 3.

²¹¹ *Ibid* arts 19–20.

²¹² See, eg, Australian National Preventive Mechanism (n 206) 49; Boshier, *NZ Ombudsman Whakatāne Hospital* (n 8) 8 n 7; ACT Inspector of Correctional Services, *Isolation of Chil-*

inspection and monitoring role, NPM teams have regard to human rights principles and best practice.²¹³ They are guided by the SPT, which issues advice and visits places of detention within states parties' jurisdiction.²¹⁴ Subsequently, NPMs make system-level recommendations to Parliament for law reform and institutional change, which are aimed at preventing the risk of torture and ill-treatment.²¹⁵

Ombudsman offices are well-equipped for this role due to the non-binding nature of NPMs' recommendations, the Ombudsman's existing proactive own motion investigation power, and the high level of independence and public regard required of the NPMs to successfully exert persuasive power. However, NPMs must take a strictly *proactive* role which means that they cannot mix this with their reactive, complaints handling role. On this front, the SPT has explained that where a body has functions in addition to its NPM role, the roles must be separated and ring-fenced both functionally and financially: they cannot be an 'add on'.²¹⁶

In 2018, the Commonwealth government designated the Commonwealth Ombudsman the NPM for monitoring places of detention under Commonwealth control such as immigration detention.²¹⁷ Additionally, the Commonwealth Ombudsman has been designated as the national coordinator of the network of NPMs.²¹⁸ In 2022, Tasmania designated its Ombudsman as its

dren and Young People at Bimberi Youth Justice Centre (Report, November 2023) 45. See also United Nations Office of the High Commissioner for Human Rights, *Preventing Torture: The Role of National Preventive Mechanisms* (Guide, Professional Training Series No 21, 2018) 17.

²¹³ See, eg, Commonwealth National Preventive Mechanism and ACT Ombudsman (n 8) 20–1; *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 11; Scottish Human Rights Commission and National Preventive Mechanism, *Review... Recommend... Repeat...: An Assessment of where Human Rights Have Stalled in Places of Detention* (Report, July 2024) 17–37.

²¹⁴ *OPCAT* (n 161) arts 11–12.

²¹⁵ *Ibid* arts 19(b), 22.

²¹⁶ See Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 12th sess, UN Doc CAT/OP/12/5 (9 December 2010) 5 [32]. This means that co-assigning staff is contrary to SPT advice.

²¹⁷ *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 40. Other places of detention include Australian Defence Force military detention facilities and Australian Federal Police custodial detention facilities: at 9.

²¹⁸ *Ibid* 38.

NPM for all forms of detention,²¹⁹ while in Western Australia ('WA'), the Ombudsman is the NPM in relation to monitoring mental health facilities where persons are deprived of their liberty.²²⁰ The ACT has given the Commonwealth Ombudsman a shared role as NPM,²²¹ while the NT has given its Ombudsman NPM status on an interim basis.²²² In late 2022, the Queensland Ombudsman was given the role of Inspector of Detention Services.²²³ Presently, SA is the only jurisdiction where the Ombudsman has not been given any role in *OPCAT* detention monitoring, despite the South Australian Ombudsman's strong record in inspecting state prisons.²²⁴ At the time of writing, NSW, Queensland and Victoria have yet to officially designate their NPMs.²²⁵ These states have demanded that the Commonwealth provide ongoing funding for these new detention monitoring schemes required in each jurisdiction under *OPCAT*.²²⁶ The protracted

²¹⁹ Ibid; 'About the Tasmanian NPM', *Tasmanian Government* (Web Page, 25 January 2023) <<https://npm.tas.gov.au/about>>, archived at <<https://perma.cc/A2D9-7YWR>>.

²²⁰ 'Monitoring Places of Detention: OPCAT', *Commonwealth Ombudsman* (Web Page) <<https://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat>>, archived at <<https://perma.cc/26EM-DYJE>>.

²²¹ The ACT has a multi-body NPM. This role is shared by the Commonwealth Ombudsman, the ACT Human Rights Commission and the ACT Inspector of Correctional Services: 'ACT National Preventive Mechanism (NPM)', *ACT NPM* (Web Page, 2023) <<https://www.npm.act.gov.au/>>, archived at <<https://perma.cc/D2AP-HT3K>>.

²²² 'Monitoring Places of Detention: OPCAT' (n 220).

²²³ *Inspector of Detention Services Act 2022* (Qld) s 33. This legislation does not designate any NPM body or bodies or reference *OPCAT* (n 161). Debate in the Parliament of Queensland indicates that the legislation was drafted with *OPCAT* (n 161) in mind: see Queensland, *Parliamentary Debates*, Legislative Assembly, 30 August 2022, 2254 (Shannon M Fentiman, Attorney-General).

²²⁴ Anita Mackay, *Towards Human Rights Compliance in Australian Prisons* (Australian National University Press, 2020) 120. Mackay observes that '[t]he South Australian Ombudsman is probably the most active prison inspector in Australia'. She refers specifically to his numerous prison inspection reports between 2010 and 2019: at 121 n 231 (citations omitted).

²²⁵ Australian National Preventive Mechanism (n 206) 13–14.

²²⁶ See Australian Human Rights Commission, *Road Map to OPCAT Compliance* (Report, 17 October 2022) 12, 25–9. One difficulty is that there is a (mis)perception among Australian subnational governments that they are not directly bound by international treaties such as *OPCAT* (n 161). This was demonstrated during the SPT's 2022 visit to Australia when the body was obstructed from visiting various places of detention in subnational jurisdictions: see 'UN Torture Prevention Body Suspends Visit to Australia Citing Lack of Co-Operation', *Office of the United Nations High Commissioner for Human Rights* (Press

nature of this funding dispute leads to questions as to how genuine the Commonwealth and Australia's subnational governments are in meeting Australia's OPCAT obligations.

B *Australia's Missed Opportunity for Robust Oversight and Monitoring of Places of Detention during the Pandemic*

As noted earlier, Australia was given until January 2023 to implement OPCAT. This unusually lengthy deadline meant Australia missed the opportunity to benefit from OPCAT's rights protection through the height of the pandemic.

The relevance of OPCAT was noted by the Victorian Ombudsman in her public housing lockdown report²²⁷ and by the NSW Ombudsman in his two pandemic reports.²²⁸ Both noted that OPCAT had not yet been implemented and established in Australia.²²⁹ The NSW Ombudsman insightfully raised how Australia could have benefited from an established OPCAT monitoring system during the pandemic, pointing to the experience in NZ and the United Kingdom ('UK'). The NZ Chief Ombudsman has performed an NPM role under the *Crimes of Torture Act 1989* (NZ) since 2007,²³⁰ while the UK NPM was established in 2009.²³¹

The NSW Ombudsman noted that the well-established OPCAT monitoring schemes in NZ and the UK meant that formalised channels of communication between oversight and detention monitoring bodies were already in place.²³² Consequently, inter-agency cooperation and deliberation

Release, 23 October 2022) <<https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation>>.

²²⁷ *Victorian Ombudsman Public Housing Investigation* (n 5) 28–9 [128]–[136].

²²⁸ *NSW Ombudsman 2020 Hindsight* (n 2) 56; *NSW Ombudsman Second Pandemic Report* (n 9) 78, 80.

²²⁹ Australia arranged an implementation deadline of 20 January 2022 which was subsequently extended by 12 months: 'Monitoring Places of Detention: OPCAT' (n 220).

²³⁰ *Crimes of Torture Act NZ* (n 207) s 16 (definition of 'National Preventive Mechanism'); Te Kāhui Tika Tangata Human Rights Commission, *2021/22 Monitoring Places of Detention: Annual Report of Activities under the Optional Protocol to the Convention against Torture (OPCAT)* (Report, November 2023) 2.

²³¹ 'About', *National Preventive Mechanism (UK)* (Web Page) <<https://nationalpreventivemechanism.org.uk/about/>>, archived at <<https://perma.cc/X644-QEHR>>.

²³² *NSW Ombudsman 2020 Hindsight* (n 2) 56.

could more easily consider the best ways forward in relation to detention issues.²³³ In the Australian context, we can speculate that in circumstances where a decision needs to be made quickly, such as in the case of the Melbourne public housing lockdown, the relevant experts could have been more easily engaged and drawn into the decision-making process if an *OPCAT* scheme had already been established. These experts could have proactively identified the possible risks of inhuman treatment and made recommendations as to how human rights-compliant systems could be put in place. For example, the fact that those deprived of their liberty would need daily access to fresh air could have been pre-empted, particularly in relation to those quarantine hotels and Melbourne public housing towers built without balconies.

On this point it is worth recalling that the NZ Ombudsman's statement of principles was published in mid April 2020²³⁴ — two and a half months before the Melbourne public housing lockdown. The lack of an established *OPCAT* detention monitoring scheme in Australia meant that there was no equivalent set of guiding principles.²³⁵

The lack of an established *OPCAT* detention monitoring scheme in Australia also meant that there was no assurance of ongoing onsite monitoring visits by an *independent* body where people were being deprived of their liberty. There is a higher risk of ill-treatment when people are 'out of sight', which means that preventive monitoring visits are critical. On the issue of independent inspection visits continuing during the pandemic, the SPT stated in March 2020 that it '*considers that [NPMs] should continue to undertake visits of a preventive nature, respecting necessary limitations on the manner in which their visits are undertaken*'.²³⁶ According to the SPT, NPMs

²³³ Ibid 55.

²³⁴ 'OPCAT Inspections during COVID-19 Pandemic' (n 167).

²³⁵ Note that in October 2022, the AHRC and the Commonwealth Ombudsman (both responsible for inspecting immigration detention facilities) issued a joint statement calling on the federal government to ensure that those held in hotels as alternative places of detention have access to at least one hour of open air exercise per day: Iain Anderson, Commonwealth Ombudsman and Lorraine Finlay, Australian Human Rights Commission, 'Joint Statement on the Use of Hotels as Alternative Places of Detention' (Joint Statement, 7 October 2022) 1 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/115280/Joint-Statement-on-hotel-APODs.pdf>, archived at <<https://perma.cc/H3MK-FAKL>>. See also *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 23–5.

²³⁶ *SPT Pandemic Advice* (n 162) 2 [7] (emphasis added).

‘cannot be completely denied access to official places of detention, including places of quarantine, even if temporary restrictions are permissible in accordance with article 14(2) of the Optional Protocol’.²³⁷

The well-established scheme in NZ meant that the NPMs suspended their onsite inspection visits for only a month; they were able to continue visiting places of detention, albeit through shorter visits. For example, in citing the advice of the SPT, the NZ Chief Ombudsman recommenced onsite visits in late April 2020 (after a month of suspension, when the NZ alert level was lowered),²³⁸ and published two inspection reports in June 2020²³⁹ and one in August 2020.²⁴⁰

In some Australian jurisdictions, onsite visits to places of detention were suspended for a longer period of up to four months. In many cases, inspection visits were suspended by the inspection teams themselves.²⁴¹ In some cases, state and territory legislative frameworks gave government agencies the power to suspend visits by independent prison inspectors and the Ombudsman.²⁴²

²³⁷ Ibid 4 [11] (emphasis added).

²³⁸ Boshier, *NZ Ombudsman Report on Inspections of Aged Care Facilities* (n 8) 2–3. NZ moved to its highest alert level, alert level 4, on 25 March 2020: ‘History of the COVID-19 Alert System’, *Unite against COVID-19 (NZ)* (Web Page, 29 June 2022) <<https://covid19.govt.nz/about-our-covid-19-response/history-of-the-covid-19-alert-system>>, archived at <<https://perma.cc/SBR8-CYJX>>.

²³⁹ Boshier, *NZ Ombudsman Report on Inspections of Prisons* (n 8); Boshier, *NZ Ombudsman Report on Inspections of Mental Health Facilities* (n 8).

²⁴⁰ Boshier, *NZ Ombudsman Report on Inspections of Aged Care Facilities* (n 8).

²⁴¹ Thalia Anthony et al, ‘Australia’ in Frieder Dünkel, Stefan Harrendorf and Dirk van Zyl Smit (eds), *The Impact of COVID-19 on Prison Conditions and Penal Policy* (Routledge, 2022) 7, 17–19. Tasmania’s Custodial Inspector (also known as the Tasmanian Ombudsman) and the NSW Inspector of Custodial Services (not the NSW Ombudsman) postponed all scheduled inspection visits from March to June 2020. This was also the case for the Western Australian Inspector of Custodial Services (not the Western Australian Ombudsman), who used a remote, virtual monitoring approach until October 2020. In contrast, in SA, the Training Centre Visitor’s staff continued to undertake regular face-to-face meetings with youth detainees.

²⁴² For example, in Victoria, emergency measures legislation initially granted the Secretary to the Department of Justice and Community Safety (Vic) or the Governor of a prison the ability to prevent any ‘visitor’, including an independent prison visitor or an Ombudsman visitor, from entering a prison: *Corrections Act 1986* (Vic) ss 3(1) (definitions of ‘Governor’ and ‘Secretary’), 33 (definition of ‘visitor’), 112G(1)–(2), as at 25 April 2022. Section 112G of the Act was subsequently repealed in 2022: *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 112V, as amended by *COVID-19 Omnibus (Emergency Measures) and Other*

Meanwhile, throughout much of 2020 and in mid 2021, the Commonwealth Ombudsman suspended his inspection teams' onsite visits to immigration detention facilities,²⁴³ in part due to state lockdowns and movement restrictions.²⁴⁴ The Office of the Commonwealth Ombudsman's 2022 report sets out that it used a remote monitoring approach. It explains that it 'elected not to pursue site visits where [its] attendance would be inconsistent with or contrary to risk mitigation strategies in place at detention facilities',²⁴⁵ especially given that these were state-based strategies. This decision arguably sits in tension with the March 2020 advice of the SPT that '[t]he overriding criterion' for whether to proceed with an onsite visit during the pandemic 'must be that of effectiveness in securing the prevention of ill-treatment of those subject to detaining measures'.²⁴⁶ In contrast, this advice was more closely adhered to by the NZ Chief Ombudsman in his proactive, detention monitoring role.

C *The NZ Ombudsman's OPCAT Monitoring during the Pandemic*

We can gain an understanding of how the Office of the Commonwealth Ombudsman could have performed its NPM role by looking at NZ, where the Chief Ombudsman made ongoing 'short and targeted' inspection visits.²⁴⁷

Acts Amendment Act 2020 (Vic) s 20. In NSW, legislation made the NSW Ombudsman (and the NSW Inspector of Custodial Services) exempt from any visitor restrictions: see *Crimes (Administration of Sentences) Act 1999* (NSW) s 275(3), as at 3 March 2022; *ibid* 17. In Queensland, the Ombudsman conducted his annual prison visit program 'in a virtual way' in 2020 and 2021, but conducted physical inspections of three youth detention centres in late 2020 and early 2021: *Queensland Ombudsman 2020–21 Annual Report* (n 1) 11.

²⁴³ McKay, *Commonwealth Ombudsman Monitoring Immigration Detention 2022* (n 8). This report shows that no onsite visits took place from early 2020 until November 2020 and that an onsite visit in November 2020 did not include engagement with detainees in person: at 25 [2.87], [2.91]. Remote visits were again used from mid 2021 to late 2021 due to restrictions imposed by the governments of NSW and Victoria: at 25 [2.89]; *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 13. See also Rebecca Vonthehoff, Office of the Commonwealth Ombudsman, 'Developments in OPCAT Implementation in Australia, and the Importance of the Preventive Mandate' (Speech, Future Justice and Corrections Summit, 29 March 2022) 7.

²⁴⁴ McKay, *Commonwealth Ombudsman Monitoring Immigration Detention 2022* (n 8) 15 [2.25], 16 [2.29], 25 [2.89].

²⁴⁵ *Ibid* 16 [2.32].

²⁴⁶ *SPT Pandemic Advice* (n 162) 5 [14].

²⁴⁷ Boshier, *NZ Ombudsman Report on Inspections of Mental Health Facilities* (n 8) 2.

These were made possible through the NZ Chief Ombudsman arranging to be designated ‘essential services’ during alert level 4.²⁴⁸ This gave the NZ Chief Ombudsman a ‘foot in the door’. This pandemic arrangement showed that NZ authorities recognised the importance and legitimacy of NPMs and their monitoring work.

The NZ Chief Ombudsman’s June 2020 inspection report on prisons indicates some initial pushback to his inspection visits from the Chief Executive of the Department of Corrections (NZ).²⁴⁹ The introductory paragraphs of the NZ Chief Ombudsman reports pithily explain his rationale on insisting on onsite visits despite transmission risks:

I was acutely aware of the specific risks peoples in places of detention faced, both from the virus itself but also from the measures taken to prevent the spread of COIVD-19 in places of detention and the impact these may have on people’s human rights. *I decided that ... physical on-site inspections must continue* in order for me to provide effective independent oversight.

...

*I firmly believe that independent monitoring is essential during these unprecedented times. Extraordinary measures imposed by the Government must not have an unnecessary or disproportionate impact on people’s rights.*²⁵⁰

One factor that distinguishes the Australian experience from that in NZ is that the various Australian Ombudsman offices and other inspectors did not have the same level of NPM mandate to carry out inspections because the *OPCAT* implementation period was still in train in Australia. Australia initially extended its *OPCAT* implementation deadline until January 2022 and further extended it until January 2023,²⁵¹ making it a lengthy implementation period. While the Commonwealth Ombudsman was designated as an NPM in 2018, the subnational jurisdictions have lagged further behind, with WA being the first of this group to comprehensively arrange its NPMs in 2019 and Tasmania being the second in late 2021. Furthermore,

²⁴⁸ Boshier, *NZ Ombudsman Report on Inspections of Prisons* (n 8) 6.

²⁴⁹ *Ibid* 6–7.

²⁵⁰ *Ibid* (emphasis added). This position was reiterated in the NZ Chief Ombudsman’s report on the inspection of mental health facilities: Boshier, *NZ Ombudsman Report on Inspections of Mental Health Facilities* (n 8) 2.

²⁵¹ See Australian National Preventive Mechanism (n 206) 2.

Australian Ombudsman offices' NPM mandates are not set out in primary legislation,²⁵² unlike in NZ where NPM powers and functions are clearly set out in legislation.²⁵³

The onsite visits of the NZ Chief Ombudsman as NPM allowed him to reiterate to those managing places of detention the requirement to ensure access to at least one hour of fresh air on a daily basis for those persons deprived of their liberty.²⁵⁴ In one of the two inspection reports published in June 2020, the NZ Chief Ombudsman explained more broadly that 'future emergency response planning' needed to include maintaining the right 'to have adequate access to fresh air'.²⁵⁵

Admittedly, it is likely that not all NZ places of detention followed the principles set out by the Chief Ombudsman as NPM. However, the ability of the Chief Ombudsman to make short, targeted inspection visits for most of 2020 meant that the public could be reassured that, while they were not able to visit loved ones themselves, a team of independent experts were monitoring and also engaging with facilities that needed some reminding of their human rights obligations.

D The Australian Ad Hoc and Reactive Approach to Monitoring and Oversight

The establishment of National Cabinet early in the pandemic demonstrated that Australia's federal government was able to work efficiently and swiftly with the subnational governments of the states and territories.²⁵⁶ National

²⁵² The Commonwealth Ombudsman's NPM mandates are set out in secondary legislation: *Ombudsman Regulations 2017* (Cth) s 16. States and territories have not yet implemented primary or secondary legislation setting out their NPMs' mandates: *ibid* 12–14.

²⁵³ *Crimes of Torture Act NZ* (n 207) ss 16 (definition of 'National Preventive Mechanism'), 27–32.

²⁵⁴ Boshier, *NZ Ombudsman Report on Inspections of Prisons* (n 8) 7–8, 10–11; Boshier, *NZ Ombudsman Report on Inspections of Mental Health Facilities* (n 8) 6, 16.

²⁵⁵ Boshier, *NZ Ombudsman Report on Inspections of Mental Health Facilities* (n 8) 6.

²⁵⁶ For positive assessments of National Cabinet's work early in the pandemic, see Australian Associated Press, 'PM Weighs Permanent National Cabinet', *The Canberra Times* (online, 14 April 2020) <<https://www.canberratimes.com.au/story/6721545/pm-weighs-permanent-national-cabinet/?cs=14231>>; Mike Baird and Jay Weatherill, 'As Former Premiers, We Have Seen the Benefits of States Cooperating. Let's Extend National Cabinet', *The Guardian* (online, 27 May 2020) <<https://www.theguardian.com/commentisfree/2020/may/27/as-form>

Cabinet created the broad policy of the mandatory hotel quarantine scheme,²⁵⁷ but this level of cooperation did not extend to setting up a nationally coordinated system for detention monitoring with a set of exemption provisions to ensure the Commonwealth Ombudsman could continue onsite monitoring of Commonwealth administered detention facilities; nor did it extend to a nationally consistent approach to daily access to fresh air in hotel quarantine.

The designation of the Commonwealth Ombudsman as the NPM coordinator before the pandemic unfortunately did not lead to a national approach or a national set of principles for detention monitoring. Some of the blame here can be attributed to the Commonwealth government which arguably showed minimal genuine interest in meeting its obligations under *OPCAT* as evidenced by its lacklustre approach to resourcing the new *OPCAT* monitoring scheme across Australia.²⁵⁸ This problem of resourcing Ombudsman offices including the Commonwealth Ombudsman to perform this new

er-premiers-we-have-seen-the-benefits-of-states-cooperating-lets-extend-national-cabinet>, archived at <<https://perma.cc/3LZQ-NHWG>>.

²⁵⁷ *Senate Select Committee Final Report* (n 52) [2.22] 13.

²⁵⁸ To resource the Commonwealth Ombudsman for his new NPM role, including his NPM coordinator role, in 2018–19, the federal government allocated ongoing funding of approximately \$300,000 per year: *Road Map to OPCAT Compliance* (n 226) 16. This new role includes monitoring seven immigration detention facilities, 15 alternative places of immigration detention, 11 Australian Defence Force detention facilities, four ACT Police policing holding cells, three Australian Federal Police stations in external territories and one ACT Police watch house: *Commonwealth Ombudsman Monitoring Commonwealth Places of Detention* (n 8) 12. In 2021, the Commonwealth Ombudsman described this funding as a ‘modest amount’: Michael Manthorpe, Commonwealth Ombudsman, ‘The Implementation of OPCAT in Australia and Challenges for Detention Inspections in a COVID-19 World’ (Speech, 10th Annual Prisons Conference, 15 June 2021) 5. By contrast, in 2019, the Victorian Ombudsman estimated that *OPCAT* (n 161) monitoring would cost Victoria approximately \$2.5 million annually: Victorian Ombudsman, *OPCAT in Victoria: A Thematic Investigation of Practices Related to Solitary Confinement of Children and Young People* (Parliamentary Paper No 63, September 2019) 60 [304]. In 2021, Stuhmcke expressed concern that the Commonwealth Ombudsman continues to be underfunded: Anita Stuhmcke, ‘The Commonwealth Ombudsman: Still Fit for Purpose?’, *AUSPUBLAW* (Blog Post, 17 September 2021) <<https://www.auspublaw.org/blog/2021/09/the-commonwealth-ombudsman-still-fit-for-purpose>>, archived at <<https://perma.cc/3HVZ-G2V6>>. In March 2022, the federal government made further cuts to this funding: Christopher Knaus, ‘Federal Budget Cuts to Integrity Bodies Spark Calls for Independent Funding’, *The Guardian* (online, 31 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/31/federal-budget-cuts-to-integrity-bodies-spark-calls-for-independent-funding>>, archived at <<https://perma.cc/T6EC-NKH6>>.

human rights protection role continues to slow down the implementation of *OPCAT*, even after the official implementation deadline. In May 2023, the Commonwealth Ombudsman explained in a Senate estimates hearing that his office had been given ‘funding for approximately 3.8 people’ but that he had ‘more than 10 people working on the NPM functions ... The challenge is that it does involve taking resources away from other functions.’²⁵⁹ Thus we see that the role expansion of the Commonwealth Ombudsman is not reflected in sufficient funding since his office’s designation in 2018 as the federal NPM, ACT NPM and NPM coordinator for Australia.²⁶⁰

Given the continuing operation of National Cabinet, there is an opportunity for this national body to give serious consideration to the NSW Ombudsman’s finding that Australia lacks a national system of complaints handling and oversight where schemes (eg hotel quarantine and detention monitoring) are nationally agreed on.²⁶¹ There is scope for National Cabinet, as well as governments in each jurisdiction, to streamline and strengthen complaints mechanisms in anticipation of another complex emergency. For example, the existing network of Australian Ombudsman offices could be given the resources and capacity to work more closely together and with other oversight bodies, regardless of their various jurisdictional discrepancies, drawing on the principles of cooperative federalism that are instrumental in our nationally agreed schemes.

Drawing the two case studies together, we observe that had *OPCAT* been implemented *before* the pandemic and all NPMs been made operational, the Commonwealth Ombudsman as the NPM coordinator could have followed the lead of NZ to work together with other Australian NPMs to publish a set of national principles which could have set out rights and standards such as

²⁵⁹ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 25 May 2023, 96 (Iain Anderson, Commonwealth Ombudsman). On 10 May 2023, a network of NPMs including the Commonwealth Ombudsman released a joint statement expressing their disappointment that the 2023–24 federal budget ‘did not contain any additional funding to support the work of Australia’s NPM’: Commonwealth Ombudsman et al, ‘No Additional Funding to Implement Australia’s Obligations under *OPCAT*’ (Joint Statement, May 2023) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0038/298748/Joint-Statement-Federal-Budget-10-May-2023-Final-Clean.pdf>, archived at <<https://perma.cc/S2UG-U7KY>>. On the long-term funding of the Commonwealth Ombudsman, see Michael Kirby, ‘Australia’s Commonwealth Ombudsman 40 Years on: Achievements and Ten Challenges’ (2017) 45(3) *Federal Law Review* 495, 499–500, 505.

²⁶⁰ See ‘Monitoring Places of Detention: *OPCAT*’ (n 220).

²⁶¹ See above nn 232–3 and accompanying text.

that of access to fresh air. This would have largely averted the need for those in hotel quarantine or lockdown to make complaints and it is possible that the inconsistencies relating to hotel quarantine across Australia may have been better addressed. Giving the Ombudsman a proactive, preventive role (and resourcing it) can likely reduce the number of complaints being made and in particular, it can assure the public during a time of emergency when access to various sites including closed institutions is limited.

Overall, in comparison with NZ, the Australian approach to safeguarding the human rights of those deprived of their liberty during the pandemic was largely reactive and ad hoc. Pandemic arrangements often sidelined the human rights of those deprived of their liberty because there was no adequate system at play to identify the relevant principles and likely tension points before directives and orders were announced. This meant that complaints to Ombudsman offices were often necessary before action took place. Given that Australia has robust Ombudsman offices, governments need to equip these institutions with greater resources so as to play a more central role in safeguarding human rights.

VI CONCLUSION

The pandemic has done much to underline two things. First, it underlined the fact that Australian governments face few obstacles in introducing laws that sideline human rights.²⁶² Second, and more critically for this article, it underlined the importance of the work of the Ombudsman as a human rights oversight institution and the strengths of its modus operandi. In undertaking human rights protection, the Ombudsman takes a non-litigious approach based on persuasive power. The pandemic has highlighted the relative speed at which the Ombudsman can respond, the economy of the investigations, and the capacity of the Ombudsman to engage public authorities and legislatures in dialogue and change. As a soft mechanism which largely engages informally with government, the Ombudsman is uniquely positioned to swiftly scrutinise government actions and the operation of soft law, and to

²⁶² In March 2023, the AHRC launched a position paper recommending that the federal government enact a human rights act. The paper argues that Australia's pandemic experience has highlighted the inadequacies and lack of cohesion in Australia's protection of human rights: Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 7, 34, 36–9.

make recommendations based on human rights standards that departments generally (but not always) comply with. Thus, Ombudsman offices have contributed to developing a human rights-based understanding of justice which is not always limited to strict legal obligations.

The first case study on access to fresh air highlights that the vulnerability of individuals to human rights violations during the pandemic was in some situations compounded by the lack of a visible, coordinated and easily accessible mechanism for complaining about government action. It also illustrates that while jurisdictional issues impeded the complaints handling work of Ombudsman offices around Australia, these institutions are adept at applying human rights standards and undertaking dialogue with governments both formally and informally to safeguard human rights. This is evident in both their main reactive role of complaints handling, and their main proactive role of undertaking own motion investigations and issuing special reports. In this case study, we saw the Ombudsman seeking (with considerable success) to temper the rights-abrogating impact of laws and orders that were hastily introduced. While Ombudsman offices did not have success across the board, they did have some success in persuading governments to remedy both procedural and substantive aspects of hotel quarantine and lockdown.

The second case study focused on the detention monitoring role that various Australian Ombudsman offices are commencing and developing under *OPCAT*. This new proactive role opens opportunities for this institution to consolidate itself as a leading integrity body that safeguards human rights, regardless of whether the jurisdiction has a legislative rights framework. In Reif's view, where an Ombudsman is given an NPM mandate, it transforms from a classic Ombudsman institution into a human rights institution.²⁶³ Given at least five Ombudsman offices have this new mandate, Australian Ombudsman offices are undergoing a big shift. At the same time, the fact that the *OPCAT* mandate was given to these Ombudsman offices, rather than for example a human rights commission at the state or national level, indicates the success of these offices in overseeing detention issues.²⁶⁴

²⁶³ Reif (n 38) 709.

²⁶⁴ See John McMillan, 'The Ombudsman in Australia: Flourishing, Expanding, Diversifying, Innovating' in Marc Hertogh and Richard Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar, 2018) 436, 442–3. In McMillan's view, the mandate is 'another indicator of the Commonwealth Ombudsman's successful work on detention issues': at 442;

But this expanded role in human rights protection presents challenges for Ombudsman offices in terms of the resources and ring-fencing required for them to perform this role effectively.

To conclude, we can return to the two concerns identified by Stuhmcke in relation to the Ombudsman's role in promoting human rights in Australia. One concern is that Ombudsman offices will not be properly resourced when their functions are expanded into human rights protection and that this may undermine the efficacy of the Ombudsman's 'fire-fighting' role. As Part V(D) explained, on this front, there is good reason for concern.

In terms of the demographic of Ombudsman clients, Stuhmcke's concern on this front may be that only the middle class and the advantaged are positioned to benefit from the Ombudsman's work. In light of the Ombudsman's new *OPCAT* role which covers persons in places of detention, it is likely that the demographic of the Ombudsman's 'client' will shift. As we know, Australia's prison population is drawn from a small number of locations with high levels of economic and social disadvantage.²⁶⁵ The Victorian Ombudsman's investigation of the lockdown of the nine public housing towers, which impacted 3,000 residents, squarely addressed the experience of some of Victoria's most disadvantaged communities, many of whom have resettled in Australia as refugees from war-torn countries. This demonstrates that, in part due to the new *OPCAT* role, there is scope for the Ombudsman's non-litigious approach to human rights protection to benefit a wider demographic than was previously the case.

and he observes that this was despite a strong campaign by the AHRC to be the coordinating body.

²⁶⁵ Mackay (n 224) 21.